

Testimony of Dr. William Wilkins – Misskelley Trial Feb 1994

THE COURT: Ive previously sworn the witness?

CROW: I believe thats correct, your Honor.

THE COURT: All right.

CROW: Would you state your name sir?

WILKINS: William E. Wilkins

CROW: What is your occupation?

WILKINS: Im a psychologist.

CROW: Where is your practice primarily located?

WILKINS: In Jonesboro, Arkansas.

CROW: OK. What is your educational background?

WILKINS: I have a bachelors degree in psychology from State University of New York, a masters degree in research methods from Bucknell University and a PHD in Psychology from Cornell University.

CROW: Did you do any internships?

WILKINS: I did one in psychology in 1977 to 1979, and another one in neuropsychology in 1986.

CROW: Can you give me a public history of your professional practice?

WILKINS: At the present time Ive been in private practice in Jonesboro since 1989. Prior to that time I was Director of Clinical Services at George Jackson Mental Health Center--

CROW: If I could interrupt you for a second there, while you were at George W. Jackson, did you do any forensic testing for the state of Arkansas?

WILKINS: Yes I did.

CROW: OK. Did you do any foren-- what kind of case was that involved in?

WILKINS: I remember one, it was a competency of three young adolescents who had been accused of murder.

CROW: Was that in (unintelligible) County?

WILKINS: No, that was in Craighead County.

CROW: Oh, Craighead County? OK. That was a murder case?

WILKINS: Yes.

CROW: Go ahead, I didnt mean to interrupt you.

WILKINS: OK, Im sorry. Prior to my being at George W. Jackson, while I was at George W. Jackson I basically did a small practice practice. Mostly I was involved in supervision of the staff, of approximately thirty psychological examiners, interns. So my primary job at that point was supervising psychological examiners and interns plus I saw a few people, but not very many. Prior to that time I was Director of Mental Health Services for the Lion (?) County Mental Health Service in Lion (?) County, Nevada. Again, some administrative work, but in the large measure a wide range of patients ranging from child abuse cases to schizophrenics to chronic long term and so on. Prior to that time I was Head of Psychological Services for the Nevada Youth Training Center. That is the in quote Reform School for boys for the state of Arkansas. Im sorry, for the state of Nevada. In that position I did therapy with the young men, I put together psychological profiles for the purpose of parole and probation, I was a permanent member of the Parole Board, I did a review of treatment planning and all sorts of things. Prior to that time I was Director of Mental Health Services for the Phoenix Area Indian Health Service stationed in Owyhee, Nevada. That was a program to establish and develop mental health services for several tribes in the eastern half of Nevada and parts of Idaho and parts of Utah. Prior to that time I was Coordinator of the Ashley County Mental Health Center in Crossett, Arkansas. There I coordinated and supervised a multi-disciplinary staff of social workers, psychologists, substance abuse counselors, mental personnel and was involved in a wide variety of administrative as well as deputy processes. Prior to that time I was associated with Psychological Associates in (unintelligible) Missouri, doing a full case load of private practice. Prior to that time I was an Associate Professor at the University of Houston in Clear Lake, Texas. Clear Lake City, Texas, Im sorry. There I was responsible for teaching a wide variety of courses in human development, psychology, ethics, child development, abnormal psychology. I also shared the department for two years of approximately thirty people. I also supervised the doctoral dissertations and the masters dissertations. Prior to that time I was Assistant Professor at State University of New York at Brockport. At one time sharing one of the sub-divisions of approximately fifteen people. I taught graduate and under graduate courses in measurement theory, human development, those sorts of things. Prior to that time I was Principal Investigator for a large, US funded grant on self-fulfilling prophecies. Prior to that time I was Coordinator of the evaluation and development for the US Office of Education Project Center in Lockhaven, Pennsylvania.

CROW: Thank you, doctor. In the course of your practice over the last few years have you attended continuing education programs?

WILKINS: Yes I have.

CROW: OK, have some of those programs been in forensic psychology?

WILKINS: Yes they have.

CROW: Do you know how many of those were in forensic?

WILKINS: Uh, are you talking about continuing education?

CROW: Yes. Just a rough guess.

WILKINS: Probably ten, twenty, thirty, forty, fifty.

CROW: OK. Have you previously been qualified to testify as an expert in courts of law?

WILKINS: Yes I have.

CROW: As a psychologist?

WILKINS: Yes I have.

CROW: OK. Including the area of forensic psychology?

WILKINS: Yes I have.

CROW: OK. Do you know the number of times youve been qualified?

WILKINS: Uh, I would guess probably somewhere between seventy-five and a hundred in Arizona, Nevada, Idaho, Missouri, Texas, Arkansas.

CROW: OK. Have you, in the course of your practice while in Jonesboro, have you testified for the prosecutor, Mr. Davis?

WILKINS: Yes I have.

CROW: What kind of cases were those?

WILKINS: One were in filing PINS petitions--

CROW: Thats with a juvenile?

WILKINS: Yes.

CROW: OK. What would your duties be?

WILKINS: If the juvenile probation office or the parents or some other agency or some other person were concerned with an adolescent or a child needing psychiatric services or in need of

being supervision outside of the range of the parents, the process is that there is a court process for that where the Prosecuting Attorneys office, I gather, by law or Im not sure how, but anyway theyre the ones who present the argument for the PINS petition.

CROW: OK

WILKINS: Ive also been appointed guardian ad lidum by the court for an abused, for abused children.

CROW: OK. How many forensic evaluations have you performed?

WILKINS: In the past, uh, fifteen years, probably four thousand.

CROW: OK

WILKINS: I also did some for the US Department of-- for the Secret Service as part of an assassination attempt on President Reagan.

CROW: OK. That was when you were in Nevada?

WILKINS: Yes.

CROW: OK. Here in Arkansas, have you worked with some police departments to help certify their officers?

WILKINS: Yes. In the state of Arkansas, as in most states, police officers are required to have a psychological evaluation before they can be certified as police officers. I do a number of those for a large number of towns in the area.

CROW: OK. Have you been published?

WILKINS: Yes I have.

CROW: OK. And are you currently licensed?

WILKINS: Yes I am.

CROW: Where are you licensed?

WILKINS: Im currently licensed in Arkansas. I retired my licenses in Arizona and Missouri because I didnt want to pay dues there too.

CROW: OK. Now, are you currently having some kind of difficulty or dispute with your licensing board here in Arkansas?

WILKINS: Yes I am.

CROW: You want to tell us a little about that?

WILKINS: Um, the process began in 1991. At that time I had taken a critically ill patient to the hospital in Memphis. Charter Lakeside Hospital. While the patient was there she called me and then her husband also contacted me later on, their adolescent son was having some psychological difficulties. The concern of the parents was, and those are in the legal depositions, the parents comments, so theyre well founded, the concern was, was that a psychologist by the name of Doctor (phonetic) Anise Kozzie was telling the patient she could not go home until she agreed to bring her son over there and they would grab him and put him on the unit. When I was informed of this I became quite concerned that were looking at the potential for holding people against their will and those kinds of issues. I contacted Doctor Kozzie about those issues--

DAVIS: Your Honor, at this time if I may interrupt, we could go into a litany about this, but as I understand it the first thing he has to do with this witness is qualify him as an expert. And as far as what this has to do, the specifics of this event and his explanation have to do at this point with this case or his qualifications as an expert, uh, I dont know. It may come up and he may need to explain later but at this stage of the game its not relevant.

THE COURT: Im gonna sustain the objection. Thats not to say that at some point in this process that he will not be permitted to make his explanation.

CROW: All right, your Honor--

THE COURT: That was a double negative.

CROW: I underst--

THE COURT: What Im trying to say is that if its appropriate, hell be allowed to make any explanation necessary--

CROW: All right, your Honor. Any event, through the course of some hearings did you enter to some sort of stipulation?

WILKINS: Yes I did.

CROW: OK. Did you agree to not practice in the area of neuropsychology?

WILKINS: Yes I did.

CROW: OK. And you agreed to having a supervisor--

WILKINS: Yes I did.

CROW: For a period of six months?

WILKINS: Yes.

CROW: OK. And did you have any, was there any limitations placed on your ability to practice forensic psychology?

WILKINS: No there were not.

CROW: OK.

WILKINS: And in fact the supervision has not occurred because Im still waiting after two and a half years to get the board to decide what I have to be supervised for and by whom. And weve been--

CROW: Currently there is not a supervisor appointed?

WILKINS: No. I have chosen two and its up to the board now to decide what theyre going to do with it, so, and like I said its been two and a half years so I dont know what they are going to do with it.

CROW: Does anything in that stipulation affect your ability to do the type of evaluations you did on the defendant?

WILKINS: No.

CROW: OK. Your Honor, we present him as an expert.

DAVIS: Your Honor, wed like to voir dire the witness.

THE COURT: All right.

DAVIS: Doctor, what is the board that you have to get approval from in order to practice the profession of psychology in Arkansas?

WILKINS: Its called the Board of Examiners of Psychology, for Psychology, I dont know which one, of or for.

DAVIS: OK. And in fact that board brought disciplinary action against you, did they not?

WILKINS: Yes they did.

DAVIS: OK. And a result of that disciplinary action that was brought against you, youre under probationary status, is that not correct?

WILKINS: Im not sure of that.

DAVIS: OK. Well, they have placed restrictions on your ability to operate as a psychologist, correct?

WILKINS: Yes.

DAVIS: In fact, they have basically limited your practice to the most basic evaluations, is that correct?

WILKINS: No. It is not correct.

DAVIS: OK. Well, you cant deal at all with child sexual abuse cases, can you?

WILKINS: No.

DAVIS: And that is a result of that disciplinary action brought against you?

WILKINS: Yes.

DAVIS: OK. And because of that disciplinary action they restricted you in that area?

WILKINS: Yes.

DAVIS: OK. And also, you cant do any neuro psychology, is that correct?

WILKINS: Right.

DAVIS: And what is the field of neuro psychology?

WILKINS: The field of neuro psychology is through psychological assessment procedures to assess brain damage.

DAVIS: OK.

WILKINS: As a result of head trauma, auto accident, whatever.

DAVIS: OK. And so if in evaluations you make comment regarding any sort of indication regarding brain damage or any results from any neuro evaluations, then that would be beyond the area or scope that you are allowed to practice in. Is that correct?

WILKINS: Yes.

DAVIS: OK. And you mentioned that you had done some examinations or testimony in PINS cases?

WILKINS: Yes.

DAVIS: Those are brought by the Department of Human Services, right?

WILKINS: I, they're brought by, I don't know who they're brought by, I guess so, I don't know the details.

DAVIS: OK. And in those cases the Department of Human Services retains whoever it is that's gonna examine the children, correct?

WILKINS: I don't know how it happens.

DAVIS: OK. And in fact, in your hearings before the board you indicated that you only do forensic evaluations for the defense, correct?

WILKINS: I may well have said that. That's the vast majority of what I do, yes.

DAVIS: Well, the truth of the matter is the forensic evaluations that you've done in the past four or five years have all been for the defense, correct?

WILKINS: Yes.

DAVIS: OK. And you in fact told that board when they were questioning you about it, I don't work for the prosecution, I work for the defense.

WILKINS: I may well have, I don't remember.

DAVIS: OK. Have you had any training, in state training, in the state of Arkansas, in the area of forensic evaluations?

WILKINS: What do you mean by in state? You mean whether the training was done in, whether the training was in the state?

DAVIS: Yes sir.

WILKINS: No, I have not. Maybe I have. Let me look and see. I've done some.

DAVIS: In the state?

WILKINS: Yes, in the state.

DAVIS: Training in state? When was that?

WILKINS: Uh, (flipping through pages) one in 1987, one in 1988, one in 1988, one in 1989, one in 1990, one in 1991, one in 1991, one in 1991, I'm sorry, I'm sorry.

DAVIS: Now are those, wait a minute are those training sessions that you taught? Or that--

WILKINS: Yes.

DAVIS: OK. But I mean training sessions that youve been to.

WILKINS: No.

DAVIS: OK.

WILKINS: No.

DAVIS: And theres a big difference between being trained and presenting yourself as the one whos doing the training, correct?

WILKINS: Yes.

DAVIS: OK. And in fact when you were before the board at your last disciplinary action the chair person of that board, Miss Griffin, asked you Have you undergone any training for forensic evaluations conducted by the state? And could you read your response to that?

WILKINS: No, I have not

DAVIS: What else did you say?

WILKINS: I dont do them for the prosecution, I only do them for the defense. I called last week to find out about it again, I called the board about seven times the past three years trying to find out how to take the course. I just found out last week, I called over there and they gave it, they may give it again in June and maybe again in January.

DAVIS: OK. So what you told the chairperson was that you had been trying for three years to find out or to get scheduled for the course?

WILKINS: Yes.

DAVIS: On forensic psychology, correct?

WILKINS: Yes.

DAVIS: And as of the date that this statement was taken, you hadnt been able to figure out how to get in the course?

WILKINS: No.

DAVIS: And in fact you told them you hadnt had any training in the state of Arkansas, correct?

WILKINS: I, if thats in there, then I said that.

DAVIS: Now, as part of this order of probation, was it also ordered that you receive a psychological evaluation yourself?

WILKINS: Yes it was.

DAVIS: OK. And who performed that psychological evaluation?

WILKINS: A Doctor Michael Hazelwood.

DAVIS: OK. And--

STIDHAM: Your Honor, May counsel approach the bench?

BENCH CONFERENCE, WHISPERED:

STIDHAM: Your Honor, we vehemently object to him cross examining the witness (unintelligible)

THE COURT: Wait a minute.

STIDHAM: Can I move some of this stuff out of the way, sir?

THE COURT: Yea.

STIDHAM: Your Honor, we vehemently object to the prosecution cross examining this witness on the basis of a mental evaluation on him, I dont know what the date of it is, but thats obviously improper to impeach him on that. Also, we would submit that its improper to impeach him (unintelligible) evidence. Theyre trying to allege that he is not qualified because of prior bad acts, prior bad conduct?

THE COURT: No, Im not gonna allow that, prior bad acts, prior conduct. He opened it up himself, in fact you were about to go into areas on your introductory comments that the Court said I was not going to allow However, I also viewed channel eight TV last night where your witness was on TV telling the world about the things that I have restricted.

STIDHAM: Not the evaluation, your Honor.

THE COURT: Well, he talked all about this child and about the child being exposed and all that and I overruled that type of testimony. What I am going to allow the state to do, I dont want you to go into any specific findings of this man, I am going to allow you to go into any area that would test or challenge his competency to act as a forensic psychologist and it will be limited to those areas. Competency, not specific findings in the letter that refer to some specific conduct of the witness.

STIDHAM: Your Honor, Im gonna have to--

THE COURT: If that makes sense.

DAVIS: I think Im gonna stay within bounds.

THE COURT: OK.

STIDHAM: Well, if he doesnt Im gonna have to move for a mistrial.

THE COURT: Well, you can move for a mistrial any time you want. I mean, Ive made my ruling and thats all I can do. Im trying to limit it as best--

STIDHAM: (intelligible)

THE COURT: I understand that. Im trying to limit the cross examination within the bounds of decency and fair play. On the other hand, they have a right to cross examine a witness that you put up as an expert as to his professional competency. And thats what Im gonna allow. OK?

RETURN TO OPEN COURT:

DAVIS: Doctor Wilkins, before I get into the psychological evaluation that was performed on you as a result of this probationary order, the(whispering to self) lost my train of thoughtIt was also ordered that you be supervised, correct?

WILKINS: Yes.

DAVIS: And you arent supervised, are you?

WILKINS: No.

DAVIS: And you werent supervised when you did the evaluations in this case, correct?

WILKINS: As of this point, the board has not appointed a supervisor nor what I was supposed to be supervised for. As soon as they would do so, Id be glad to do so.

DAVIS: OK. Now would you answer my question? You were not--

WILKINS: No I was not--

DAVIS: --supervised at the time that you did this evaluation?

WILKINS: No.

DAVIS: And thats part of what the board that governor psychologists in the state of Arkansas required, that you be supervised in the practice of psychology, correct?

WILKINS: At some point, yes.

DAVIS: Now this evaluation by Doctor Hazelwood.

WILKINS: Yes.

DAVIS: OK, youre familiar with that?

WILKINS: I saw it for the first time about six months ago.

DAVIS: OK. Some eleven page report?

WILKINS: Yes.

DAVIS: Regarding his findings?

WILKINS: Yes.

DAVIS: OK, and he did perform a psychological evaluation on you?

WILKINS: No.

DAVIS: OK. What did he perform on you?

WILKINS: I dont know what it was, but it was not a psychological evaluation.

DAVIS: OK, well did you meet with him?

WILKINS: Yes I did.

DAVIS: OK. How long?

WILKINS: Approximately five hours.

DAVIS: OK. And as a result he made an eleven page report, correct?

WILKINS: Yes.

DAVIS: OK. Is the Weschsler Memory Scale, is that something that you use just in neuro psychology?

WILKINS: No its not.

DAVIS: OK. You use that in forensic psychology, dont you?

WILKINS: Sometimes.

DAVIS: OK. And in fact you used it in this case, didnt you?

WILKINS: Yes I did.

DAVIS: OK.

WILKINS: Yes I did. I used parts of it.

DAVIS: OK. The MMPI, is that something you just use in neuro psychology?

WILKINS: No its not.

DAVIS: OK. You use that in forensic evaluations, dont you?

WILKINS: Yes.

DAVIS: OK. And did you use that in this case?

WILKINS: Yes.

DAVIS: OK. And do you recall the concerns that were expressed by Doctor Hazelwood? Are you familiar with page eleven?

WILKINS: Yes.

DAVIS: Of his letter?

WILKINS: Yes.

DAVIS: OK. And did he not in there outline and express concerns by your lack of knowledge of the MMPI and the sub-test contained therein?

WILKINS: Yes.

DAVIS: OK. In fact, what does he say about that? Would you read that for us Doct--

WILKINS: Which place? You have nine places marked.

STIDHAM: Your Honor, may counsel approach the bench?

THE COURT: All right.

BENCH CONFERENCE, WHISPERED:

STIDHAM: Your Honor, again hes doing exactly what you told him not to do, and that is impeach him with this document. Im gonna ask for a mistrial.

THE COURT: I didnt say he couldnt impeach him with this document. I said that he could go into the areas that dealt on professional competency. And so far as I can tell, thats what hes doing. Now, specific incidents of bad conduct on the part of this person, I have said that you can not go into those. In fact, Mr. CROW opened it up until the state objected. But I am gonna allow him to cross examine him with regard to his professional competency.

STIDHAM: Thank you, your Honor.

THE COURT: And I feel real comfortable on this. Hed signed a consent order permitting this. Go ahead.

STIDHAM: Thank you, your Honor.

RETURN TO OPEN COURT:

DAVIS: Now Doctor, just to clarify, this examination or psychological evaluation of you, or, pardon me, examination was conducted pursuant to that order entered by your governing board, correct?

WILKINS: Yes.

DAVIS: And that order was entered with your consent, correct?

WILKINS: Yes.

DAVIS: In fact, you signed and agreed to all this?

WILKINS: Yes.

DAVIS: OK. And Doctor Hazelwood indicated in his letters that he found some fundamental deficits in your knowledge in certain areas, correct?

WILKINS: If thats whats in there, yes.

DAVIS: OK. And he put for example, Inability to provide the sub-test of the Wechsler Memory Scale, a test he reportedly utilizes. Is that correct?

WILKINS: Is it correct that he said that?

DAVIS: Yes sir.

WILKINS: Yes, its correct he said that, if its in there.

DAVIS: OK. And he also indicated that you misnamed, one of the areas of concern was that you misnamed MMPI clinical scales, An inability to spontaneously recite the clinical scales of the MMPI. Correct?

WILKINS: If he says that.

DAVIS: OK. And youve reviewed this letter, correct?

WILKINS: Yes. And that part is not true, but thats all right.

DAVIS: And in addition to that he said there was demonstrated failure to follow standardized procedures in the administration of the Finger Oscillation Test.

WILKINS: Yes.

DAVIS: And Failure to conduct comprehensive examinations of clients. Correct?

WILKINS: I dont remember that one, but if its in there then he said it then thats fine.

DAVIS: And did he also say that there was a Failure to appreciate the limitations of your professional competence?

WILKINS: I think he said that.

DAVIS: Now you used in your evaluation in this case, you used the Wechsler and the MMPI, correct?

WILKINS: Yes I did.

DAVIS: Now of the test you used on Mr. Misskelley, how many of those tests were objective in nature?

WILKINS: Uh, Id have to look and see, I (unintelligible)--

DAVIS: Let me ask you this, is the House Tree Person, is that a subjective or objective?

WILKINS: Its a projective technique. Subjective.

DAVIS: Subjective?

WILKINS: Yes.

DAVIS: And when you say subjective, that means that the testers viewpoints and orientation is included in the testers opinion?

WILKINS: No, I mean by that that there is a manual that describes what certain issues, what certain signs, what certain things mean.

DAVIS: Are you saying that in subjective tests that the viewpoints and the frame of mind and the perspective of the person giving the examination does not enter into the results drawn from that examination?

WILKINS: Its not supposed to.

DAVIS: But in any subjective test that happens?

WILKINS: It probably does.

DAVIS: And how many of these tests that were provided on him were subjective?

WILKINS: Again, I dont know without looking.

DAVIS: Well, the House Tree Person is, right?

WILKINS: Yes.

DAVIS: Bicycle Test?

WILKINS: Uh, no. Maybe half, OK? It has, it again has a scoring manual that goes with it.

DAVIS: The Clock Test?

WILKINS: That again has a scoring manual that goes with it.

DAVIS: But I mean its still subjective in how you evaluate it, correct?

WILKINS: There can be a subjective element.

DAVIS: OK. Well, you would agree that in any subjective test, your perceptions, your viewpoints, your mental make up contributes to the results you derive or determine from that test?

WILKINS: Yes.

DAVIS: When you do an evaluation for forensic, a forensic evaluation for a criminal defendant, what is it youre trying to determine?

WILKINS: In the very simplest form of forensic psychology, you deal with competency to stand trial.

DAVIS: So, once you get beyond the issues of competency to stand trial, youre getting into a more complex area of forensic evaluation?

WILKINS: Yes.

DAVIS: OK. And has there been question by the board as to whether or not youre qualified to practice in a complex area of forensic pathology, I mean forensic psychology?

WILKINS: No.

DAVIS: Do you have, have you filed a letter of intent with the board regarding that particular area of practice?

WILKINS: Yes.

DAVIS: When was that?

WILKINS: Last week (intelligible).

DAVIS: When?

WILKINS: Last week sometime. You are permitted to update your letter of intent.

DAVIS: So, as of last week you filed a letter of intent regarding that area of practice?

WILKINS: Yes. When I first came here in 1987 there was no area in that area in the state of Arkansas. So I, at that time it was not included on my original statement of intent.

DAVIS: But in order to practice in a certain area you are supposed to file a letter of intent, right?

WILKINS: When theres an area, yes.

DAVIS: Well, I assume since you put yourself out to be a forensic psychologist thats an area, correct?

WILKINS: Yes.

DAVIS: OK. And it wasnt till last week that you even filed your letter of intent with the Board of Psychology?

WILKINS: Yes.

DAVIS: No further questions, your Honor. Wait, one last question. When you file a letter of intent, say if Im, if Im gonna practice psychology and I want to practice forensic psychology, I dont just send a letter to the board and that qualifies me, does it?

WILKINS: No. Its like for example in my original intent I filed one that I was gonna practice neuro psychology and they certified that when I first came here and decided later on that they were not going to do that, on what grounds Im not sure of.

DAVIS: But there is a certification process--

WILKINS: There are no criteria anywhere in the state of Arkansas by the board or anywhere else which determines the criteria or qualifications of the practice of any part of psychology. None.

DAVIS: Then why did you file a letter of intent?

WILKINS: Because enough other, you mean recently? Or in the past?

DAVIS: Last week.

WILKINS: Last week because of some of the other cases Im dealing with it became an issue.

DAVIS: Whether youre qualified to practice in that area?

WILKINS: No. Whether or not I had taken the one day state course or not.

DAVIS: And you hadnt taken that one day state course?

WILKINS: No. I have not.

DAVIS: And up until last week you hadnt even filed a letter of intent?

WILKINS: No.

DAVIS: And yet youve been practicing it for, at least holding yourself out to practice it for how long?

WILKINS: Five years. Well, ten years, twelve years.

DAVIS: No further questions on voir dire, your Honor. Well have some later.

CROW: Doctor Wilkins, did the, did your board receive a copy of that evaluation that Mr. Davis was talking about?

WILKINS: Yes they did.

CROW: Do you know when?

WILKINS: Uh, they received it, I think it was done in June of 1992, is that the date on it?

CROW: OK, sometime in 1992?

WILKINS: Yea, and then I did not see it again, I never did see it until about a year and a half later. Despite repeated attempts by me and my attorneys to getting copies of it we never able to get copies of it. And my thought about it is that since the board let me practice for well over two years after that was completed they must not have been terribly concerned about what was in there.

CROW: Are you still, as of today, able to practice forensic psychology?

WILKINS: Yes I am.

CROW: Have you contacted the board as that issue?

WILKINS: Yes I have.

CROW: And while you cant tell what they say, or, uh, was it your impression that you were still able to practice--

WILKINS: At this time--

DAVIS: Your Honor--

CROW: He can a--

DAVIS: Whether he asked them what they say or whether he can ask whether its his impression hes asking for a hearsay response.

CROW: Your Honor, he can--

DAVIS: Well stipulate that hes obviously still practicing. We just question whether hes qualified to.

STIDHAM: Your Honor, may counsel approach the bench?

BENCH CONFERENCE

STIDHAM: (inintelligible) have a discussion.

THE COURT: About what?

STIDHAM: How the state is trying to say hes not qualified. If weve got a forensic evaluation

THE COURT: I want to know, he knows about the cases he made reference to because he had failed to take the one-day test. Has he ever been denied the right to testify in court as a forensic psychologist?

STIDHAM: The Attorney General said hes qualified.

THE COURT: Has he ever been denied that as a result of that?

STIDHAM: Your Honor, my concern is we got a competency of the defendant issue now cause

THE COURT: It goes to listen. All those things go to the weight of his testimony. Not, not, I mean the jury can sift through that.

CROW: Thank you, your Honor.

STIDHAM: Your Honor, but I dont think the Court is seeing my point.

THE COURT: What is your point?

STIDHAM: My point is at a previous hearing, Dr. Wilkins was qualified as an expert. He testified about a forensic evaluation that he did and said the defendant was competent to stand trial and he was aware of the difference between right and wrong and was able to appreciate the difference. Is the state questioning that now? I mean, do I need to move for a continuance that uh

THE COURT: Well, I dont know

STIDHAM: Im gonna have to retry this case based on the defendants competence. The

THE COURT: I dont think thats even an issue

FOGLEMEN: We never questioned the defendants competency.

STIDHAM: Judge, theyre saying hes not competent to

THE COURT: Theyre saying this man, theyre challenging his competency as an expert.

FOGLEMEN: Not your clients competency.

STIDHAM: Well how can you do one without doing the other? Thats my concern.

FOGLEMEN: Thatd be like saying if he had never been given a test then hes automatically incompetent to stand trial.

THE COURT: Well, theres a presumption of ones sanity in the first place and I dont know that thats even been put in the issue. Im gonna, what Im gonna do is Im gonna allow you to proceed

CROW: Thank you, your Honor

THE COURT: And that simply goes to the weight of his testimony.

STIDHAM: This witness (unintelligible) called as and expert

THE COURT: Im not gonna make that statement. I never make that statement. You submit him and I tell you to proceed. If I make the statement then it gives extra credence to the persons position, so my policys always been that youll never hear me say it.

STIDHAM: May I inquire as to the Courts, does the Court have any concerns about the defendants fitness to proceed?

THE COURT: Quite frankly?

STIDHAM: Yes.

THE COURT: Ive got some serious reservations based upon what Ive seen and heard but that doesnt mean Im not gonna let him testify because apparently the state has certified

STIDHAM/FOGLEMEN: (unintelligible)

FOGLEMEN: Hes talking about the defendants competency

THE COURT: Oh, the defendant?

STIDHAM: Yes, your Honor.

THE COURT: NO. None at all. None whatsoever.

STIDHAM: Is the state raising that issue?

THE COURT: Not that I know of.

DAVIS: (unintelligible) as I understood it (unintelligible) basic evaluation (unintelligible) complex area (unintelligible).

THE COURT: In forensics. Youre questioning the witness, not the defendant.

STIDHAM: Your Honor, but -- I don't think -- can we retire to chambers --

THE COURT: I'm not going to waste anymore time going back to chambers, what is it? What is your issue? What are you trying to --

STIDHAM: See Judge, it's not the witness, it's the defendant.

THE COURT: Well I -- nobody's raised that, as far as I know.

STIDHAM: That's what they're doing right now.

THE COURT: Are you trying to tell me you don't think your witness -- uh, your defendant is competent to stand trial, is that what you're saying?

STIDHAM: No, I'm saying does the Court have any question about that?

THE COURT: No, I don't have any. None at all. As to the competency of the defendant, none. Zero.

STIDHAM: The Court's satisfied with that?

THE COURT: Sure.

STIDHAM: [TO DAVIS] Is the State satisfied? To proceed? That he's competent to stand trial.

DAVIS: Oh. Yeah.

STIDHAM: [TURNS BACK TO BENCH] I just want to make sure, I mean those issues were kind of --

THE COURT: Well you're talking about two totally different things.

STIDHAM: But they were starting to intertwine, Your Honor, I wanted to --

THE COURT: No. OK, it's a matter of perception, I guess.

STIDHAM: Thank you, Your Honor.

CROW: Thank you, Your Honor. Now.

WILKINS: Uh, let me also note that I've had several psychological evaluations prior to that one by Dr. Hazelwood for various employment positions --

FOGLEMEN: Your Honor, I'm not, don't remember the question being asked. Dr. Wilkins just started talking. I object --

THE COURT: Doctor, please, let your responses be --

WILKINS: (INTERRUPTS) I --

CROW: Doctor, I'll, I'll ask you the question --

THE COURT: -- related to a question, that's --

WILKINS: I, I thought that we were in the middle of a question that Mr. Crow had just asked me before the ah, before the interruption.

CROW: Let me start again, please.

WILKINS: (NODS ASSENT)

CROW: Doctor, how -- I honestly don't remember what question I was asking, but Ill go ahead and ask you this question

WILKINS: I do.

THE COURT: Lets just start all over, ok?

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CROW: --the question I was asking, but Ill go ahead and ask you this question

WILKINS: I did.

CROW: Lets just start all over, ok?

WILKINS: OK.

CROW: Have you had previous psychological evaluations?

WILKINS: Yes I have.

CROW: OK. Um, any problems with those evaluations?

WILKINS: No.

CROW: All right

WILKINS: Let me, Im sorry. Go ahead.

CROW: Doctor, did you perform, no, lets see. We already covered that. Are there currently any outstanding offers to you for change of employment?

WILKINS: Yes sir.

CROW: In the teaching area?

WILKINS: Yes.

CROW: Ok, what would you be teaching if you took those jobs?

WILKINS: Forensic psychology.

CROW: Forensic psychology? Your Honor, at this moment we would ask that Doctor Wilkins be qualified.

DAVIS: Your Honor, Ive got one more question.

THE COURT: All right.

DAVIS: Do you plan to go ahead and take the course in the state of Arkansas to qualify you before you enter into that teaching field?

WILKINS: Uh, probably not because its not necessary in other states.

DAVIS: So it wouldnt be in the state of Arkansas?

WILKINS: No.

THE COURT: All right, you may proceed.

CROW: Thank you, your Honor. Now, if we could get down to the business. Did you perform any IQ, whats commonly known as IQ tests on the defendant?

WILKINS: Are we ready to--

CROW: Yes.

WILKINS: Ok, let me change things here.

CROW: All right.

WILKINS: Yes I did.

CROW: Ok, can you tell me a little bit about that, doctor?

WILKINS: I performed the standard one known as the Wechsler Adult Intelligence Scale-Revised. That is a fairly standard measure of intellectual ability. Do you want me to describe his results?

CROW: Yes, describe his results please.

WILKINS: Ok. The scale was designed with two broad sub-categories. One called verbal abilities and one called performance abilities. As the titles imply, verbal measures verbal ability, verbal reasoning, verbal thinking, verbal manipulation and things. Performance implies performance of physical manipulation of things, objects, ideas. On that scale, Jessie received a full scale IQ of 72 with a verbal IQ of 70, and performance IQ of 75.

CROW: What is considered average or normal?

WILKINS: Average is between 84 and 116.

CROW: Ok.

WILKINS: With the average average being 100. As the mean.

CROW: 100 is supposed to be the mean?

WILKINS: Yes, that's the mean score.

CROW: All right. Did you do, could you describe some of the tests, I believe there was some

WILKINS: I also did some, if we look at intelligence from a qualitative sense rather than from a quantitative sense and we begin to look at some other kinds of areas. By qualitative I mean in terms of the kind of thinking processes that go on. A lot of the work comes from the work of Jean Piaget before he died. A lot of it comes from the work of Doctor Jerome Bruner at Harvard. Piaget was in Switzerland. Basically, what we're looking at is not just what you know, that is the factual information that you know, but how you deal with thinking about the world, understanding the world. Piaget's primary concern was that at different ages we literally think about the world in different ways. And for him, then, intelligence at different ages means different things. So one of the things we did with Jessie was to look at some of those issues regarding his level of intellectual ability in a qualitative form. Those include things such as shall I demonstrate for you?

CROW: Certainly. Please, doctor.

WILKINS: One of the things that you do is have the person take play dough (Wilkins preparing play dough) and put it into round balls and then you ask the child to agree finding that the two are equal sizes. And they may or may not agree, they may move one pinch back over to here but eventually they'll decide that they're equal. They're the same size. Then you take one of the balls and flatten it down like this and ask them if they're now equal. And they'll say No. This one has more in it. And then if you do it this way and ask them Which one has more in it? They'll say This one. That is that kids are not bothered by the fact that they were blatantly inconsistent. Little children think in terms of one dimension; that is they think about height rather than height, weight being the same. Little children think about things in terms of a single dimensional thing. We do other things, make them into hot dogs, keep changing the sizes and they keep agreeing

that one is bigger, than the other ones bigger, than the other ones bigger, than the other ones bigger, and theyre not bothered by that in any form whatsoever. The other thing that we do sometimes is like

CROW: How did Mr. Misskelley respond?

WILKINS: Mr. Misskelley responded with the clay balls about what I would expect from a seven to eight year old child to do. That is, he tends to have real difficulty with whats called the conservation of matter. Thats what thats called. Another one is we take chips like this, (arranging chips) ask the child Which one has more in it? and theyll say This one. So then you have them count it One, two, three, four, five, six. One, two, three, four, five, six. Which one has more in it? This one. If I move them together this way again and spread these out and ask the child Which one has more in it? Theyll say This one. Have them count it again One, two, three, four, five, six. That is, again, were looking at length, and the number six is meaningless in terms of any kind of a criteria. Another thing we can do is we move into the work of what is known as moral judgment, based mostly on the work of Lawrence Kohlberg. Kohlberg talks about making moral decisions in the same way that we make these kinds of decisions: size differences. For example, if I say to a child, as I did with Jessie, Here is a child who is helping her father fill his fountain pen. He asked her to do that and shes doing that for him. She accidentally spills the ink and makes a spot this big. Theres another child who is playing with the ink bottle when hes not supposed to be and he spills it and makes a spot this big. Which child did the worse thing? And the response in children and the response in Jessie is This one, because the spot is bigger. That is we deal with the size, with the consequence of the system, not any kind of notion of what the intent is. If I ask Jessie questions like Suppose a man invented a cure for this particular type of cancer. This mans wife has that kind of cancer. He goes to the druggist and tries to buy it and the druggist is charging two thousand dollars for it. The man sells everything he has, all he can get is fifteen hundred dollars. And he goes to the druggist and says All I can get is fifteen hundred dollars. Can I buy a dose and pay you back the five hundred dollars at some point in time? and the pharmacist says No. So, then the man breaks into the pharmacy at night and steals a dose of medication and gives it to his wife. Now the question is, Did the man do a right or wrong thing? Now, as we begin dealing with morality, legality, we can get some very strange kinds of things happening to us. That is, whats legal, whats moral, and how we decide those issues become strange. In Jessies case, as in most childrens cases, most concrete thinking cases, is that the man did an absolute wrong. And Jessie is unable to entertain any kind of possible explanation, the possible intentional issues, that for Jessie it is blind obedience to authority. This is what the law is, this is what you do. We did some other kinds of memory scale kinds of things, do we want to deal with those now or as a separate issue?

CROW: Basically, after all this testing, did you come to a conclusion, doctor, as to what the mental reasoning

WILKINS: My conclusion was that Jessie reasons on the level of about a, between a six to eight year old. That is what is called a very concrete style of thinking. By concrete I mean is that is an inability to do abstracts, to envision the world in terms of things that I have had concrete experience with. So things are taken and dealt with very literally. Let me give you an example. Another example is that if you have a small child and you tell them, Dont eat any cookies before

supper. And you watch, and they go to the cookie jar and get cookies and eat them before supper. And you say to that child, I told you not to get any cookies before supper. And the kid says, I didnt do it. And youre baffled cause you saw them do it. If you question the child for awhile longer hell say to you, I was hungry and got something to eat. And for the child literally, literally, he did not get things when he should not have done so. He got something to eat because he was hungry. It is that very literal, absolute, direct definition of what the world is.

CROW: All right, doctor. Did you do any evaluations of Mr. Misskelley on his reading level?

WILKINS: Yes I did.

CROW: What were those results?

WILKINS: Uh, at the third grade level.

CROW: Ok, what about his writing level?

WILKINS: At about the point seven level, that means less than first grade.

CROW: Ok, what about his verbal comprehension?

WILKINS: Yes, Jessie has, one of the things we looked at was I read him a short story and asked him to give me details from that. Jessie was able to give one or two details out of a possible 12, 14, depending on the story: a very, very impaired ability to do those kinds of things. Jessie, basically, after a, after a seven or eight word sentence begins to lose whats happening. For example, on the first page of the second confession that he did, hes asked, All right, you told me earlier it was around seven or eight. Which time was it? Jessie responds, It was seven or eight. That is, he got the last half of the sentence.

CROW: Ok, doctor

WILKINS: And the first half was gone.

CROW: Did you do any testing on Jessie as personality patterns, or personality traits?

WILKINS: Yes I did. I did the MMPI-2, a House-Tree-Person, and a Rorschach.

CROW: Ok, can you tell me some about your results?

WILKINS: The findings on the Rorschach were, uh, of no value. The Rorschach is a ten card picturesI show you pictures and ask you to describe what you see here. The scoring is done, first of all a person has to give a response that is score able according to the manual. None of Jessies responses to the ten were score able, so, I just knowwhich is not necessarily unusual, particularly for someone who has moderate intellectual ability.

CROW: Ok.

WILKINS: The results on the MMPI found some moderate problems with being, uh, somewhat dependant, some anti-social characteristics, and some, what are called schizotypal characteristics. Basically, what were looking at in terms of Jessie, in terms of his basic personality structure, if were going to look in terms of a diagnostic category, is a young man who is pretty dependant upon others to make major decisions for him, who has some difficulty sometimes separating out fantasy from reality, and at times if put underneath a great deal of stress becomes almost unable to decide which is which. I also looked at, I guess its not in terms of other testing, but theres some other information in terms of the interview data but well let

CROW: Ok, did you do a, some kind of suggestibility test?

WILKINS: Yes I did.

CROW: Can you tell me about that?

WILKINS: The

DAVIS: Your Honor, at this point regarding the suggestibility test, my knowledge and Ive looked at the literature, Im not sure that theres any scientific test that qualifies as such and before we get into an area of speculation that is not based on any scientific research or data or any reliable foundation, I dont want to get that testimony in front of anybody (untelligible)

CROW: Let me back up a little bit your Honor? I have a textbook you pulled out by, Im gonna butcher this name, Gisli Gudjonsson?

WILKINS: Yes.

CROW: Ok.

DAVIS: Your Honor, we may need to have a hearing outside the presence of the Jury

THE COURT: All right, its time for a recess anyway. All right ladies and gentlemen, with the usual admonition not to discuss the case, you may stand in recess, I hope, for about ten or fifteen minutes. Well just tell you when to come back in were going to stay here.

(JURY RECESSES)

IN CAMERA HEARING

THE COURT: All right, gentlemen. Let the record reflect that this is a hearing out of the presence of the Jury. All right

CROW: Thank you, your Honor. May I proceed?

THE COURT: Yes.

CROW: Doctor, I have a textbook in front of me by, apparently written by an author by the name of Gisli Gudjonsson?

WILKINS: Yes.

CROW: Have you reviewed that textbook?

WILKINS: Yes I have.

CROW: Ok. Whats the nature of the textbook? Whats it about?

WILKINS: The textbook is titled The Psychology of Interrogations, Confessions and Testimony. Basically what Dr. Gudjonsson is doing is, as the title suggests, is looking at a wide variety of issues in the psychology of interrogations, confessions and testimony. This is in one place where he also reiterates some of the things he had done in the past on the suggestibility scale. As I recall in the past looking through the index, I think he lists fifty-six references to himself dealing with those issues.

CROW: Do you have any information about Mr. Gudjonsson?

WILKINS: He currently is, I think his title is, I dont know what his title is. Hes at the Institute of Psychiatry in London. He does fairly well, worldwide recognized as a leading authority on false confessions and testimony and police interrogation techniques.

CROW: So its your testimony here today that Mr. Gudjonsson is a, Dr. Gudjonsson, excuse me, is a world recognized authority in this area?

WILKINS: Yes.

CROW: Ok, do you know anything about the Suggestibility Scale? Do you know who developed it?

WILKINS: Dr. Gudjonsson did.

CROW: Gudjonsson did?

WILKINS: Yes.

CROW: Do you know, has it been employed?

WILKINS: Yes.

CROW: Does it have a scientific basis?

WILKINS: Yes.

CROW: I think weve met the (unintelligible) showing, your Honor, that its based on scientific criteria

DAVIS: Ive got some questions. Is there a standardized Gisli Gudjonsson Suggestibility Scale?

WILKINS: Yes there is.

DAVIS: Is there a standardized test?

WILKINS: Yes.

DAVIS: Is that the test that you had performed on Jessie Misskelley?

WILKINS: Yes.

DAVIS: Ok. Do you have a copy of that test with you?

WILKINS: Yes I do.

DAVIS: Do you have the test results?

WILKINS: Yes I do.

DAVIS: Ok. What (unintelligible)

WILKINS: Heres a copy of the test. (pause) Oh, heres, Im sorry, heres another one. What year is this? Yes, heres another one.

DAVIS: What scientific or empirical data has been used to validate this test?

WILKINS: Uh, Dr. Gudjonsson has used it in a wide variety of circumstances, using, interpreting the differences with intelligence levels, self concept levels, predictability in a wide variety of cases.

DAVIS: How many American subjects and subjects in this country has he used in his evaluations?

CROW: I object, your Honor, I dont see the relevance of whether it was

DAVIS: Its

CROWE: Excuse me, may I finish my objection your Honor?

THE COURT: Go ahead.

CROW: I dont see the relevance. If this was the possible relevance, I guess, if this was done in some third world country or something where maybe the academic standards were low. But this is in Great Britain and also in Iceland. I think the standards are the same for educational excellence. I dont see the relevance.

DAVIS: Your Honor

THE COURT: Overruled. I can foresee some possible relevance so proceed.

WILKINS: I dont know how many that Dr. Gudjonsson himself has done in this country.

DAVIS: Are you aware of any hes done in this country?

WILKINS: None that he has done.

DAVIS: Ok. And the truth of the matter, that the data and empirical evidence that has been accumulated has been based on his tests of people in his native country and also in England, correct?

WILKINS: No, there are, there is tests they have developed. Its been used in this country as well.

DAVIS: Well youre using his scale

WILKINS: Yes.

DAVIS: But you dont have any evidence that that has ever been tested on people from the United States of America?

WILKINS: As I recall, Dr. Ofshe has done some of that.

DAVIS: The other expert in this case?

WILKINS: Yes.

DAVIS: Ok. In fact, in his book the primary reference that Mr. Gudjonsson makes as far as references to any experts, the person referred to most is himself correct?

WILKINS: No. Well, in terms of theI dont know whether thats true. Its in terms of the areas where hes used the Suggestibility Scale. There are thousands of, hundreds of other references in there.

DAVIS: But how many times was it he refers to himself as far as basing the expertise of his book?

WILKINS: Fifty-six.

DAVIS: Ok and he refers to your other expert out here, the guy from Berkley, California how many times?

WILKINS: Three or four, I dont know

DAVIS: Ok.

WILKINS: Without looking.

DAVIS: And you know what the age groups were that this empirical evidence was gathered on? What age groups of the people that were studied?

WILKINS: From ages, uh, I think some of the older ones were ages twelve and thirteen through older adults.

DAVIS: Ok, this test here that were talking about, do you have any evidence or can you show us any reference where that that test was done on an age group including people as young as seventeen years old?

WILKINS: Im sorry, I cant.

DAVIS: Ok

WILKINS: What happened to the book?

CROW: Get the book?

WILKINS: Yes. (pausing while looking through book). On page, uh, Two studies investigating the suggestibility scores of boys between the ages of eleven and sixteen: the results of both studies indicate that youths are no more suggestible than adults unless their answers are subjected to negative feedback, then they become markedly more suggestible than adults.

DAVIS: How many subjects were there in that test?

WILKINS: Thirty-one delinquent boys, twenty normal males. A second one with, uh, forty.

DAVIS: Ok, so were talking about empirical evidence based on ninety people?

WILKINS: At least, one study. Beyond that we can find more if you want to

DAVIS: And those are ninety people that werent born, raised, socialized in a society such as ours?

WILKINS: I dont know how many cross-cultural differences you want to find but obviously it was done in Great Britain, there are some differences.

DAVIS: Well, cross-cultural differences are a pretty important factor in determining whether your scientific research is valid or not, correct?

WILKINS: No, it should not be. The rationale of scientific inquiry is that it develops universal principals, universal concepts. It doesnt make any difference whether the laws of physics apply in the United States is the same way they apply in Uganda. That the basic rationale of scientific undertaking, youre developing universal principles.

DAVIS: So, under that theory I assume

WILKINS: Now, there may well be individual differences within those theories, possibly, but that should not makeif were talking about scientific principles, it shouldnt make any difference where it was done.

DAVIS: Well, if were using a standardized test and were using it on people who come from different cultures and background, its your testimony that it doesnt matter what culture or background it is?

WILKINS: Im sayingno, Im not saying that. Im saying that if were going to deal with the scientific basis, the basic premise of science is that we are trying to develop universal principles.

DAVIS: But thats the question I asked. You dont know if you developed a universal principle

WILKINS: No.

DAVIS: until you test it universally, do you?

WILKINS: Right.

DAVIS: Well, and the truth of the matter is the test in this particular instance had been done with one small segment of the population in another country, correct?

WILKINS: As far as I know.

THE COURT: Have you ever used this test before?

WILKINS: No I have not.

THE COURT: Can you relate to the Court any person in the field of forensic psychology in this state or any surrounding states or in this country that you know of that has utilized this test?

WILKINS: Dr. Ofshe from Berkley, Dr. Arnett from Hawaii

FOGLEMEN: I think your question is forensic psychologist

THE COURT: Forensic psychologists

WILKINS: All right, then Dr. Arnett in Hawaii, Dr. Unger Reiger in Minnesota, Dr. Gamalt in Salt Lake City, Dr. Zimmerman in Louisiana, those come to my mind

THE COURT: Are you telling the Court that this is a universally recognized phenomenon in the field of psychology that is reported to be reliable and is accepted in the field in general?

WILKINS: Im saying that the area of suggestibility has been investigated in psychology for a long time in a wide variety of areas. This particular test, ok, this particular test has been around eight, ten years, I dont know the exact date, something of that sort, and it is a method that is being experimented with, looked at and dealt with.

THE COURT: Well, I certainly understand suggestibility and Im quite certain that it has been enquired into in learned treatises for years. The question is, has this test been accepted in the field of psychology as a valid testing tool to determine suggestibility? And is it accepted in the field?

WILKINS: And I dont know how to answer that, your Honor.

THE COURT: Well, yes or no.

WILKINS: But I dont know whether its yes or no.

THE COURT: Well, are you telling me that its not a universally accepted, scientific tool thats utilized for testing?

WILKINS: Im saying that the MMPI and the WAIS-R are not universally accepted tools, that

THE COURT: Well, theyve been around for quite awhile.

WILKINS: Yes, uh-huh. Yes, and all Im saying to you is when you said accepted in the field is that different people in the field accept different things as valid and reliable. Different people in different parts of the field use different things.

THE COURT: Well, Im just trying to determine whether or not its scientifically accurate. In the first place, nobodys really indicated to me what the test is or what the scientific basis is. Youve used the term that there was some empirical studies done which means somebody took the effort to test it, at least, on some segment of society and documented the results.

CROW: Your Honor, for the record, (unintelligible) the test that was done.

THE COURT: All right, Im gonna read it here in a minute.

STIDHAM: Your Honor, am I to understand the States objection is that Dr. Gudjonsson is from Iceland and practiced psychiatry in London?

FOGLEMEN: Dr. Gudjonsson is not testifying.

STIDHAM: Well, it seems to me that the prosecutions objection is based on Well, this is something that comes from Great Britain, and

THE COURT: Are you making a statement or an objection?

STIDHAM: Your Honor, Im makingIm trying to determine what the nature of their objection is.

THE COURT: Well, their objection is that the test that hes purporting to report is not scientifically accurate, that it does not meet the Frye test and is not of scientific import and therefore not admissible. Now thats the plain, simple objection and Im trying to weed it out and determine whether or not its a test based upon any credible research and whether or not its a test that is recognized in the field and one which people rely upon. Thats the sole issue.

WILKINS: I thought the witness testified to that, your Honor.

FOGLEMEN: He said he didnt know whether it was generally accepted or not.

CROW: He also testified he didnt think the MMPI was generally, excuse me, universally accepted.

WILKINS: It is generally accepted by a wide number of people. Now what that means in terms of the field, I dont know how to deal with that.

CROW: Your Honor

THE COURT: Wait a minute. (Pause, Court reading) Did you make up this suggestibility tale here yourself?

WILKINS: No, I did not.

THE COURT: Is this little scenario, is that the one thats suggested in this textbook?

WILKINS: Yes.

THE COURT: Are there any other variations of it?

WILKINS: No. That one is not in the textbook. Its from an article by Dr. Gudjonsson where the actual scale is published but he did make reference to it

THE COURT: What is the scale? Tell me what the scale is.

WILKINS: The scale iswhat youre concerned with is you read a short story, ok, about some facts. Then your concern is that how well does the person recall the facts? About the story? Then youre concerned with if I begin to apply pressure to you, will you change your response? Thats

THE COURT: What is the scientific method that's employed with this?

WILKINS: I'm not sure what you're asking me.

THE COURT: Well, if you had a seventeen-year-old boy

WILKINS: There is a

THE COURT: That had a low IQ in front of you, and you being a professional person, a doctor, would that not in and of itself, the position you hold create some level of suggestibility?

WILKINS: Probably. Which is

THE COURT: What is the scientific method that's employed?

WILKINS: There is a scoring criteria used to measure yield, what's called yield. There is a (?) about what you say to them to apply pressure, which that is standardized.

THE COURT: What is the standardization that's employed in the method? It would seem to me that whoever the testing

WILKINS: And I guess my thought about that is there probably is some suggestive elements to that but we spent a half hour awhile ago talking about the suggestive elements in a lot of tests in psychology. That's some of them are less objective than others.

THE COURT: All right, I don't know. Go ahead any other questions?

CROW: Your Honor, if I might, my understanding of the Arkansas Supreme Court is they abrogated the Frye Rule, were not under Frye anymore now based on 703, rule 703. The last sentence in 703 says talking about a test, anytime the expert can base an opinion on it if of a type reasonably relied upon by experts in the particular field not generally, by experts in the particular field, in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Your Honor, I think he's testified as to numerous experts in the field that relied on this test.

THE COURT: Well, I think that's what I asked him, was this a recognized test that's relied upon by experts in his field?

WILKINS: And to that I answered yes, when you asked me Is it widely I don't know what you mean by widely is all I was not trying to be difficult, I was trying to decide what, if we were talking about it being universal or not, or by 9/10ths or 2/3rds or what

THE COURT: What is it that an expert in this area can how they can benefit the jury's finding of the fact? That's what I want to know. What is it that he can testify to that a jury wouldn't already have the capability of doing on their own?

CROW: Your Honor, I think every individual would have a different suggestibility, amount of suggestibility. And that I don't think that's obvious from a jury watching Mr. Misskelley from across the room, or even listening to him testify, as to how suggestible he is or isn't. Similarly, while a jury might have a general idea what someone's IQ is, if you look at them or watch them you kind of get an idea what you think, but, we certainly allow in evidence every day someone's IQ.

THE COURT: Well the issue in this case, besides guilt or innocence, which is probably the paramount concern, is your defense notion and idea that the police overrode his free will and either told or suggested to him what his responses should be in a confession or statement, however you characterize it. Now, that's an issue that the jury will have to resolve

CROW: Yes, Your Honor.

THE COURT: So what is it that this expert or any other expert can give to the jury that would aid and assist them in arriving at that ultimate finding that he was over-reached (?) or

STIDHAM: Doctor Gudjonsson's scale measures suggestibility in individuals. It's empirical, doctors and psychologists use it to measure suggestibility among individuals. The suggestibility scale and the results Dr. Wilkins conducted in Mr. Misskelley will help the jury understand his level of suggestibility.

CROW: Some individuals may have a high level of suggestibility, other ones may have low. We're attempting to

THE COURT: I'm reading the Rule 704 with regard to the ultimate issue, and the annotation of 1984 by Congress amending it I don't know if Arkansas has amended it, apparently we haven't

CROW: We have not, Your Honor

THE COURT: The quote is added to Rule 704 is 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.

CROW: Your Honor

THE COURT: And I'm inclined to believe that the Arkansas Court would accept that modification.

CROW: Your Honor, if I may respond to that. Nothing we are going to put on here is going to have Dr. Wilkins or any other expert testify as to what was, as to whether Mr. Misskelley had the proper mental state to commit this alleged crime. The issue

THE COURT: That's not the sole issue.

CROW: Your Honor, I understand that. (unintelligible) whether he is suggestible or not, if that is theIm, youre going back so far. Again, a mental state includes IQ and we certainly allow that type of evidence in, Your Honor. And to say that just because anything dealing with mental state so that we dont let it in is a total abrogation of what the rules are. Your Honor, whether or not Mr. Misskelley is suggestible is a separate issue from whether he was guilty or innocent. The jury could find he was very suggestible yet believe that hes guilty.

STIDHAM: The jury is to decide the voluntariness of the statements to the police, Your Honor. The suggestibility

END OF AUDIO

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WILKINS: --and the generally accepted results are yes in about 18% of all murder cases. Now then, if they do happen, how are we to studyhow are we to look at those instances and those places where that may or may not have happened and what factors are involved in the person involved in that who would be more inclinedwho would be more inclined to be influenced into making a false confession. The scale, then, is one of many options that is used, much like we dont depend on any one scale for personality assessment, we use several. The suggestibility scale, which has been used in a wide variety of placesmany of them in Great Britain, I agree, but it has been used in a wide variety of places. It has all kinds of reliability data, it has validity datathat it has been demonstrated to be a valid and reliable instrument. It has been used a great deal outside this country; it is becoming increasingly used in this country. I havent used it before in my practiceI have not until recently, the last couple of years done any false confession patients. I did one a while ago in this case, then, as far as my using it has nothing to do with it being worthless as it is due to the fact that Ive never had need for it before.

THE COURT: Its not based upon the objective findings of the examiner?

WILKINS: Is it based on the objective findings of the examiner

THE COURT: Your conclusions that are drawn from questions that you asked after you read a one-paragraph statement to someone.

WILKINS: Yes.

THE COURT: And is it not based further upon your interpretation of those responses to some standard?

WILKINS: No. Well, I dont know what you mean by that. There is a yes/no category; if they say this, its yes, if they dont then its no. So in that sense there ismy interpretation has nothing to do with it. It depends on what they say if it fits in category A or category B. So, my interpretation of what they say is not at issue.

THE COURT: Its not like math where theres an exact response, this is something that has to be interpreted

WILKINS: There is nothing in psychology thats an exact response like math.

THE COURT: All right, you got any other questions?

DAVIS: Yes, sir.

THE COURT: Go ahead.

DAVIS: Isnt it truehow do you perform this test? How do you do it?

WILKINS: You tell the person that youre doingIm going to read you a story. I want you to remember as many things as you can.

DAVIS: Ok, and then you read them the story?

WILKINS: Yes.

DAVIS: And then who asks the questions?

WILKINS: I do.

DAVIS: Ok, and is it the reflection in your voice on certain questions and how the question is asked in order that

WILKINS: No.

DAVIS: In order to increase suggestibility?

WILKINS: No.

DAVIS: You just ask them in a deadpan voice, each question?

WILKINS: Yes.

DAVIS: No difference each time?

WILKINS: No.

DAVIS: No inflection?

WILKINS: No.

DAVIS: And then you interpret from their responses based on this scale?

WILKINS: You what you first do then is to see in the questions, there are some questions that are accurate in the sense of being what is in the story. There are some questions that you ask them that are not accurate in terms of what is being said in the story regarding size, race, weapons, different things. Was it three people or was it two people the question is Was it three people, and they answer yes or no. Now, the questions are designed so that its either factual or non-factual according to whats in the story itself. You then see what their score is in terms of how many accurate ones that they get. You then say to them This is really important. You didnt do very well this time. I want you to think carefully about it and were going to do it again.

DAVIS: And the manner in which you say that would determine the degree of suggestibility that that has on the person?

WILKINS: Certainly. And if you get more and more hostile, you may get more and more yield.

DAVIS: And the manner in which you your mannerisms, your characteristics, the tone of voice, your appearance, how close you are to them, all those things may affect it, correct doctor?

WILKINS: And all that is (unintelligible) of doing it.

DAVIS: Well, all those things would affect it.

WILKINS: Surely, yes.

DAVIS: Ok. And you have never administered this test before, correct?

WILKINS: No.

DAVIS: Have you had anyone to any schools or training on how to give it?

WILKINS: No.

DAVIS: This textbook that you showed us looks nearly brand new. Did you buy it right before you gave the test?

WILKINS: No, in fact I got the test the test came a long time ago.

DAVIS: Did you buy the book after the test?

WILKINS: Uh, I may have because it just came out not very long ago. I cant remember when I did buy it.

DAVIS: So, you hadnt even read the book before you gave the test, correct?

WILKINS: Uh, yes I had, in fact. Or, I had read parts of the book, yes. The book was published in 1992.

DAVIS: You never had any training on how to give this test, right?

WILKINS: Well, Im not sure what youdhow youd do that, no.

DAVIS: Ok.

WILKINS: Its described word for word what you do in the administrations and instructions.

DAVIS: Well, youve had training in how to give the MMPI, correct?

WILKINS: Yes.

DAVIS: In fact, you go to school to learn how to give those tests, right?

WILKINS: Yes.

DAVIS: Standardized tests you learn in school and you learn as part of your professional training how to give those tests, correct?

WILKINS: Yes.

DAVIS: Ok. And this, you never had any training at all in how to give it, right?

WILKINS: No.

DAVIS: And the first time you ever gave it was on this guy sitting over here?

WILKINS: Yes.

DAVIS: Ok. And youre in here today and you plan to testify as an expert based on a test thats never been connever been scientifically tested in this country, on male individuals in the United States of America, based on one test and no particular training in that test field? Is that right?

WILKINS: I guess so.

DAVIS: Your Honor

CROW: Your Honor, as far as training goes I think its clear that he followed the instructions

WILKINS: And I think beyond that, too, is that I also have twenty years of experience in a wide variety of other issues which also makes it like Im not the first personits not the first test that Ive ever seen.

DAVIS: Well, could Mr. Crow have picked up those directions and read them and conducted this test on his client?

WILKINS: Yes.

DAVIS: And hed be just as qualified as you to testify as to the results if hed read

WILKINS: No, he would not be as qualified to interpret their meaning.

DAVIS: But you havent had any training in how to interpret that, correct?

WILKINS: Ive had training in how to interpret suggestibility. Its well known in the field, its been taught forever.

THE COURT: What is the ultimate thing youre trying to get him to testify to, based on this test?

STIDHAM: Your Honor, Mr. Misskelleys results from the Gudjonsson Suggestibility Scale which is a scientific test, which has empirical findings to back it up that are all in this book. Dr. Wilkins has testified to the fact that its commonly used by experts in this field, and we submit that under the rules of evidence that its admissible and it goes toshould go to the (??) to help them determine the issue of voluntariness of the statements made to the West Memphis Police Department.

DAVIS: Your Honor, of course our basis for objection is that it is notthere hasnt been a basis or clear showing that the results of this test in this particular instance, under these circumstances have any scientific validity based on their failure to show proper scientific and empirical data to support the test based on the test examiners lack of qualification, training or experience in giving the test and his very own admission that his interpretation is an important aspect of the results of the test and he told the Court that he has no training, no experience, no background in conducting this test until this particular case.

STIDHAM: Your Honor, the State has had nine months to retain an expert to put in front of the Jury to testify in rebuttal to this.

DAVIS: Judge, the State doesnt believe that theres an expert on the face of the Earth that can give any kind of test that can tell any more about suggestibility than what twelve people sitting right there can figure out on their own

STIDHAM: Judge, Ive got one in the next room that I plan to call to testify here in a few minutes.

DAVIS: Well, and we dont believe hes worth the

CROW: Your Honor, if I understand the States last comment, then, its not an issue of any type of training for this test thats the issue, or any type of how many times that you do it whether its once or twenty million, they dont think the test is valid. Thats not for him to decide, Your Honor.

THE COURT: Im gonna take a ten minute recess so I can weed through all this garbage.

CROW: Thank you, Your Honor.

END OF AUDIO

CONTINUANCE OF IN CAMERA HEARING

THE COURT: All right, gentlemen, the Courts ruling is as follows: The Court is of the opinion that the test regarding suggestibility is flawed in that it does not meet a scientific standard upon which the profession generally relies. Secondly, that Doctor Wilkins absence of experience, training and education in the utilization of the test would fatally flaw any results that he might conclude from such test. I will, however, allow Doctor Wilkins to continue his testimony; for you to elicit from him his opinion, if he has one, as to the defendant Jessie Misskelleys likelihood or probability of having information suggested to him. In other words, Ill allow you to ask Doctor Wilkins Doctor Wilkins, based upon your examination, your testing and your complete information from whatever source regarding Mr. Misskelley, do you have an opinion as to whether or not he is a overly suggestible individual? And if he says, I have such an opinion based upon that training and information and testing, What is the opinion? And hell be allowed to give that opinion. If that opinion is that he is suggestible, than Im gonna allow the State to do everything they can to discredit that testimony: calling additional expert witnesses, questioning his data, questioning his competency in the area. But Im not going to allow him to parrot out the results of a test that I consider to be lacking in scientific foundation, first, and secondly his ability to such a test should it have any scientific basis thats recognized within the field. So, its a two-fold objection that Im ruling. One, I dont think its scientific. Two, if it is scientific, hes not qualified to administer it. But that does not preclude him from him testifying as to his general opinion and notions based upon the field of forensic psychology that Mr. Misskelley was suggestible, if that makes sense.

STIDHAM: Can I have a moment, your Honor, with Mr. Crow?

THE COURT: All right.

CROW: (unintelligible)

THE COURT: Sure.

THE COURT (to unknown): That goes back to him. Yes. Well, thatd be a profferis this being offered as a proffer?

UNKNOWN: Yes, your Honor.

THE COURT: All right, it may be received for identification purposes as a proffer of evidence.

DAVIS: Your Honor, well agree to a copy being substituted (unintelligible)

THE COURT: Sure, ok.

CROW (at the bench, whispering): I have a question for the Court, just for record purposes

THE COURT: Well, shes not getting it right now

CROW: Ok, well at this point let me just ask the question whether she gets it or not. As far as preserving our record, do we need to have him go into what he would have testified to about the results? I mean, just to tell the Court what he would

THE COURT: Why dont you just outline what he would have testified to. Just dictate it right now.

CROW: Ok.

THE COURT: This is an offer of proof of the testimony that Doctor Wilkins would have given had the Court permitted him to testify with regard to the Suggestibility Scale, is that what its

STIDHAM: Gudjonsson Suggestibility Scale, your Honor.

THE COURT: Spell that, cause I sure couldnt say it.

STIDHAM: Your Honor, would it be appropriate to have the witness

THE COURT: Yea, you can say what it would have been, but let him testify if you want to.

CROWE: (unintelligible) Just very briefly outline it, your Honor.

THE COURT: Ok, thats fine. Ive heard that, sometimes, and changed my mind so it might be a good idea.

STIDHAM (to Wilkins): Would you briefly outline to the Court what your testimony would have been with regard to Gudjonssons Suggestibility Scale?

WILKINS: I would have reported that I had given the scale and that the yield scores, as theyre known as, I would have given.

CROW: Would you have gone through the talked about how the test was given?

WILKINS: Yes I would have.

CROW: And how the scoring was done?

WILKINS: Yes I would have.

CROW: And explained how the pressure was stepped up at each stage?

WILKINS: Yes.

CROW: And the results?

WILKINS: Yes.

THE COURT: Well, let me ask you this: I assume that you have an opinion based upon your evaluation. Is your opinion based solely and only and entirely upon this Suggestibility Test?

WILKINS: No, it is not.

THE COURT: All right, then I assume that if I allow you to give your opinion that your opinion would not be altered or affected by the Courts ruling prohibiting a discourse on the method, the questions and the technique employed in the Suggestibility Scale.

WILKINS: No, it would not.

THE COURT: All right. All right, gentlemen. Basically hes saying it wouldnt make any difference how I ruled.

STIDHAM: Wed still like to offer this

THE COURT: Sure.

CROW: Thank you, your Honor.

STIDHAM: Thank you, your Honor, very much.

THE COURT: Ok

WILKINS: (unintelligible)

THE COURT: Yes sir. Now gentlemen, you understand if he gives that opinion the States gonna be permitted to go into the factual basis and go into all this stuff that weve just been spending twenty-five minutes on about how reliable are some of the test data.

STIDHAM: Your Honor, hes not gonna testify

THE COURT: But on the other hand, I don't want you all to go into tests that I've basically said that I don't have much confidence in, but certainly his ability to administer the test might be appropriate.

CROW: Your Honor, his testimony is that what he has proffered is that his opinion of suggestibility outsidetaking this test completely away, is that he's still suggestible.

FOGLEMEN: Then why was it even proffered in the first place?

CROW: It's one of the things that he based his opinion on, your Honor.

THE COURT: I think he would have been allowed to give that opinion or any other qualified person would have been able to give an opinion that's based upon their education, training and experience. What you wanted to do was introduce the actual test.

STIDHAM: That's correct, your Honor.

THE COURT: Well, I mean he apparently is telling us now that it wouldn't have mattered, wouldn't have affected his opinion it would have been the same.

STIDHAM: He still has an opinion that's based not simply on what we've offered for proffer.

THE COURT: Well, let me ask another question. Doctor Wilkins, could you have arrived at your same opinion based upon a reasonable degree of scientific certainty in the field of forensic psychology had you not administered or even obtained results on the Suggestibility Scale?

WILKINS: Yes.

THE COURT: All right, gentlemen.

CROW: Thank you, your Honor.

THE COURT: Let's proceed.

(UNIDENTIFIED): Are we going to get the jury back in here?

DAVIS: Is that opinion based on any other test?

THE COURT: I don't know, that's something you'll have to ask. I've asked enough. Call the Jury back in, I'm gonna let the Jury have a recess and I'm gonna announce that question, gentlemen.

JURY RETURNS

THE COURT: All right, court will be in session. All right, ladies and gentlemen again I'm going to apologize for having you pop up and down and the number of recesses we've taken but if you'll remember back when we were picking the Jury I warned you that those interludes would occur.

and that theyre necessary and that theyre in the interest of justice, so please be patient with us and again I apologize for it. I received a question from one of the jurors, I believe Mrs. Lutor, that quote Why was the rule not invoked for Doctor Wilkins as it was with all the other witnesses? The rule, as youve heard me describe, can be waived for members of the family; can be waived for persons that are testifying in an expert capacity. The State now has a psychologist in the courtroom that will be allowed to hear pertinent parts of the testimony, and for those reasons Doctor Wilkins was excused from the rule, so that shouldnt give you any concern whatsoever in your consideration of this case. The Court had made that ruling and I simply didnt tell you, so now I am telling you. The experts, the rule is generally waived for them. Not in all cases, however, but in this case it was. Anything else, gentlemen, before the noon recess? Were ready to proceed, ladies and gentlemen, but Im tired, the court reporters tired and were gonna take a lunch break at this time until 1:00. With the usual admonition not to discuss the case among yourselves or with anyone, you should not let anyone attempt to influence you at all in this case. And with that reminder you may stand in recess until 1:00.

RECESS

RETURN TO OPEN COURT

(AUDIO BEGINS WITH COURT ALREADY IN SESSION)

CROW: Doctor Wilkins, did you personally interview Mr. Misskelley?

WILKINS: Yes I did.

CROW: How much time did you spend with him?

WILKINS: I expect doing the testing and the interview time probably in the neighborhood of eighteen to twenty hours.

CROW: Do you have an opinion based on your interaction with him, your observances, as to whether or not he would be suggestible more so, less so or average?

WILKINS: I think Jessie would be quite suggestible.

CROW: Did you do any evaluation as to his dependency status?

WILKINS: We talked part of that comes from Jessies social history as weve been pointing out before and as in the past is that Jessie comes from a family system that has a fair amount of alcohol abuse and some child abuse as well. And when we look at dependent Im sorry when we look at abusing families, one of the things we see a lot of is whats called co-dependency. And by co-dependency were talking about people in the system taking responsibility for other peoples actions, other peoples feelings. In this case in terms of children, one of the things that they begin to look at and deal with is that somehow theyre doing something wrong, that theyre the fault of, that theyre the cause of the abuse occurring. Therefore, they can figure out how to please, how to act right, whatever that may be for the abusing person that the abusing person will stop abusing

them. That is a child has kind of a general tendency to accept fault and to try to please the abusing person.

CROW: Just one moment, your Honor. Pass the witness.

CROSS EXAMINATION

DAVIS: Doctor Wilkins, you indicated that you examined Jessie Misskelley some eighteen hours, is that correct?

WILKINS: Yes.

DAVIS: Have you done some examination on him since we last had some hearings?

WILKINS: Yes I have.

DAVIS: Ok. Now, and at that time you gave basically the same opinion that youve given here and at that time you had done eleven hours (of) examination, correct?

WILKINS: In terms of the information that wed dealt with, yes, at that time, basically the same.

DAVIS: So, your opinion that youre telling us about was formulated after a total of eleven hours of examination of this defendant?

WILKINS: No, there were additional things that were done in the hours afterwards that also were important to me.

DAVIS: Any significant changes that we should be aware of in your nine-page report that you made based on those first eleven hours?

WILKINS: Um, one of the sessions with Jessie was, uh, I made up a false story; in about a half an hour got Jessie to confess to a robbery that didnt occur

DAVIS: Your Honor, Excuse me, your Honor were going to have to approach the bench on that one.

BENCH CONFERENCE

DAVIS: I had never heard this story before, but I think what hes getting readyhe, its some sort of creative test that he came up with where he created a false story and then, as I understand it hes gonna say that in ten minutes he had Jessie confessing to something in his office regarding some made-up story about

THE COURT: Well, Im not gonna allow that.

FOGLEMEN: I think he already testified to it, your Honor, and wed ask that it be stricken

(speaking over each other)

RETURN TO OPEN COURT

THE COURT: All right, ladies and gentlemen, the last answer was not responsive to the question asked by the prosecutor; you're instructed to disregard the last answer of the witness as unresponsive to the question directed to him.

DAVIS: Doctor, did you take a history from the defendant prior during the course of your examination of him?

WILKINS: Yes I did.

DAVIS: Ok, and in that history, tell us what he related to you regarding his drug and alcohol use and gas huffing, things of that nature.

WILKINS: He related to me that particularly in a period, I think, as I recall from about age thirteen to fifteen or so he huffed gas regularly, on a pretty regular basis, almost daily. He also had used alcohol and also had experimented with other drugs.

DAVIS: What other type drugs, Doctor?

WILKINS: Uh, pot, as I recall. I'd have to look for the other ones let me see if I can remember.

DAVIS: Ok, and this person that you've characterized as being about, I think education-wise, second or third grader, did he also indicate to you regarding number of sexual partners he had had?

WILKINS: Yes he did

CROW: Your Honor, I object.

THE COURT: I'm sorry?

CROW: I object, your Honor. Can we approach the bench?

THE COURT: All right.

BENCH CONFERENCE, WHISPERED

CROW: I fail to see the relevance of talking about sexual partners

(speaking over each other)

DAVIS: Its my understanding that theyve characterized the defendant to be a nearly childlike, mentally slow individual and I think his actions, which are consistent with those of a teenager or those of a more mature individual and including

THE COURT: All right, Ill allow you to ask it in that fashion. Yea, wait a minute

CROW: In response to that, we are all aware of severely mentally retarded people who have (unintelligible)

(talking over each other)

CROW: Excuse me, if I can finish, that have sexual liaisons. That has nothing to do with truthfulness or

THE COURT: Well, the way hes proffered the question to the Court at the bench here is thats a legitimate premise that he can direct to the doctor and then ask him Is that in conformity with normal adolescent behavior? I mean youre talking about argumentative factor, which you can of course interject.

RETURN TO OPEN COURT

DAVIS: And Doctor, in your report initially, and Im looking at page three of that report, do you have a copy of it?

WILKINS: Yes I do.

DAVIS: Ok. Jessie advised you that he was a heavy gas huffer for approximately two years?

WILKINS: Yes.

DAVIS: And that was when he was approximately thirteen or fourteen?

WILKINS: As I recall, yes.

DAVIS: And he also stated that he has used pot, is that correct?

WILKINS: Yes.

DAVIS: And he also stated that he has been a heavy alcohol user as well?

WILKINS: Yes.

DAVIS: And he also indicated to you that he had been active sexually with a number of partners, is that correct?

WILKINS: Yes.

DAVIS: And sexual activity, while maybe not being condoned by society, that is something that is people in this teenage range become interested in, in normal developmental course, correct?

WILKINS: Yes.

DAVIS: Ok. And so the indication that he had a number of sexual partners by the age of seventeen when you evaluated him, that would be consistent with a normal developmental teenager, correct?

WILKINS: Not necessarily.

DAVIS: Would it be inconsistent with that?

WILKINS: No, it wouldn't be inconsistent but it would not necessarily be consistent.

DAVIS: Now you've indicated that on your exam that you performed the WAIS-R test?

WILKINS: Yes.

DAVIS: Is that a standardized test?

WILKINS: Yes.

DAVIS: Is that a test that involved any objectivity or subjectivity on your part, excuse me.

WILKINS: Yes.

DAVIS: Ok. And the WAIS-R is the test that you use to determine the defendant's IQ?

WILKINS: Yes.

DAVIS: And in that particular test, what was the performance IQ?

WILKINS: 75? Let me yes.

DAVIS: Now, you had in your file some past tests that had been conducted on Jessie to determine IQ, did you not?

WILKINS: Yes I did.

DAVIS: Ok. And in 89 did you have a test, an IQ test that was performed on him to determine what his functioning was at that point?

WILKINS: Uh, let me yes I did. I need to find the records to find exactly what

DAVIS: Sure, Doctor, go ahead.

WILKINS: I cant remember (unintelligible). Yes, Im sorry. Ok, yes.

DAVIS: Ok, and what was that performance IQ in 1989?

WILKINS: 1989, uh, Im sorry, its not in this report. Ill have to dig out all the old evidence, I thought it was in this report and its not.

DAVIS: Sure, I understand.

WILKINS: In, uh, which year are we talking about now?

DAVIS: 1989.

WILKINS: 1989 we had a performance of 84 and a verbal of 68 and a full-scale of 74.

DAVIS: Ok, and in 1992 there was also prior to the time you did your examination there was another IQ test, correct?

WILKINS: Yes.

DAVIS: What was his performance IQ at that time?

WILKINS: 88.

DAVIS: Ok, and what was his full-scale IQ at that time?

WILKINS: 73.

DAVIS: Ok, so the two past IQ examinations that had been performed on him immediately prior to the one that you did indicated that his performance level was in the average range, is that correct?

WILKINS: Uh, low average, yes. The first placed low average, the second one average, yes.

DAVIS: Ok, well am I correct in understanding that anything above 80 is in the average?

WILKINS: That depends on the criteria you want to go by. Typically its Social Security uses 80 above, other places use 84, so yea.

DAVIS: So, by most criteria 84 and 88 would be in the average range?

WILKINS: Yes.

DAVIS: Ok. And when we talk about performance IQ, describe what that is, what that involves.

WILKINS: Those entail, problem solving, conceptualization tasks, thinking tasks, they're non-verbal. Example is putting together puzzles. Being able to show you a pattern of blocks and you have to build designs that match the pattern of blocks. It's conceptualization in a non-verbal form, problem solving in a non-verbal form.

DAVIS: And in regard to that he rates about average, right?

WILKINS: On those two testings, yes.

DAVIS: Now the MMPI-2, that was another test that you conducted on him, is that correct?

WILKINS: Yes.

DAVIS: Now I don't want to get too complicated cause I don't understand all this stuff, but I notice down here you said, let's see, you said he had a high or you said a mild elevation in the F scale.

WILKINS: Yes.

DAVIS: Ok. Now Doctor it's true that what you actually found was a T value in that F scale of 83.

WILKINS: Yes.

DAVIS: Now are you telling me that that's a mild elevation?

WILKINS: It's an elevation above normal levels.

DAVIS: Well don't they rank the elevations as far as the T scale is concerned isn't that something that's actually ranked in terms of low range, middle range, moderately high range and very high range?

WILKINS: Yes. That may have been a mistake then. I may well have mispronounced what it was supposed to be.

DAVIS: This is a text regarding MMPI Handbook. Show me here what an 82 to 88 T score on the F scale indicates to you in that book.

WILKINS: Uh, very high.

DAVIS: Very high?

WILKINS: Yes. This would not be quite the same because this is for the MMPI rather than the MMPI-2, which changed criteria, but it would still be in the high range.

DAVIS: So when you put in here that that was a mild elevation, that would not be accurate would it?

WILKINS: No. It would not be. No.

DAVIS: And then from that statement that it was a mild elevation you interpreted that that could show malingering, right?

WILKINS: Yes.

DAVIS: And malingering means what, Doctor?

WILKINS: It means, uh, making up stuff. Trying to present yourself as being ill when you're not for some particular gain.

DAVIS: Did you explain to Jessie what these tests were being performed for?

WILKINS: We talked some about them in general, yes.

DAVIS: Ok. And he knew that you were coming to court to testify about the results of these tests?

WILKINS: Yes.

DAVIS: And you talked with his lawyers before you took the test or gave him the test?

WILKINS: Yes.

DAVIS: And do you know whether he talked with his lawyers that he was gonna take those tests?

WILKINS: Not that I know of. I don't know.

DAVIS: Ok. Well, in your report you said that because of that elevation in that T scale that 83 score, because of that mild elevation that gave you some concern about malingering?

WILKINS: Yes.

DAVIS: But you characterized it as a mild elevation.

WILKINS: Yes.

DAVIS: When you characterize it as a significant or very high elevation, it gives you more concern for malingering, doesn't it?

WILKINS: Uh, the T value I used the raw scale value, so no. An 83 gives pause for both malingering and for how valid the scale is for a variety of reasons.

DAVIS: Well you indicated in your report that a mild elevation would give pause, correct?

WILKINS: Any elevation gives pause.

DAVIS: Well a very high elevation would give you, for lack of a better word, a whole lot of pause, Ok?

WILKINS: Yes.

DAVIS: And what you did was in your report instead of saying that, interpreting that to be malingering, you just discounted that and said that just didn't place any significance on it, correct?

WILKINS: I don't think that's what I said, but

DAVIS: Well you didn't indicate in your report that you felt like it was malingering or that he was not actually attempting to answer the questions correctly or anything of that sort?

WILKINS: I said that it did not appear to be the most appropriate interpretation that he was malingering.

DAVIS: You said the mild elevation of the F scale can be viewed as an attempt at malingering, however this does not appear to be the most appropriate interpretation.

WILKINS: Yes.

DAVIS: So when presented with the option of whether he's malingering on the test, or whether he's giving you valid responses, you chose the valid responses, correct?

WILKINS: With caution, yes.

DAVIS: Well then you go on to make a great deal of interpretation about the results of that MMPI, correct?

WILKINS: Yes.

DAVIS: Now is it true, and I want to be sure I understand this, I talked about I asked you about the F scale, and in an MMPI there's two other scales, the L and the K?

WILKINS: Yes.

DAVIS: Ok. So the F scale is kind of there to determine if the person is giving you valid responses?

WILKINS: (unintelligible)

DAVIS: Ok, and he ranked very high in terms of whether he might not be?

WILKINS: Yes, right.

[taken from transcript]

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Q. Okay. And then the L and the K are the ones that you really draw your conclusions from as far as the significance of the test, right?

A. No.

Q. What do the L and the K tell you?

A. The L, F, and K are each what are called validity scales. They each measure a different part of whether or not you're looking at a valid profile. If they're responding valid, they look at different things. You draw your interpretation on the other ten scales that come afterwards. Now, the purpose of the first three scales, the L, K and F, are to decide if because of ten things I have going over here are they real or valid. Do they look like that they're that the person tried to lie, they tried to make up stories, and you use these three to decide that so you make an interpretation of these.

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Q. Did you indicate that the responses on the L and K were normal?

A. Yes.

Q. Okay, and then you got the high very high range on the F scale?

A. Yes.

Q. How did you draw the conclusion from normal scores on the L and K range? You said the validity profiles indicate normal responses.

A. On the L and K.

Q. Right. And then the F has this high range that's either indicative of malingering or not understanding the questions?

A. Yes.

Q. And then you go on to draw nearly well

A. And all I said again is that is that is that is that we need to that we need to consider this very carefully because of the high F scale.

Q. And if in fact malingering was what we have on this test, then the validity of the other scores would not be relevant, correct? It would not be as you would not depend on them?

A. Right. Right.

Q. Now, you also gave what's called a Bender Gestalt?

A. Yes.

Q. What is what in the world is a Bender Gestalt?

A. That's a series of nine stimulus pictures you have

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a person copy.

Q. So if I'm giving you show me a picture if I'm taking the Bender Gestalt?

A. Yes.

Q. Then I have a pen or pencil and I try to draw that picture?

A. Yes.

Q. Okay. And what were the results you found out about let's see you found significant problems with perseveration and line qualities?

A. Yes.

Q. What does that mean?

A. Perseveration means the tendency to go on, and on, and on, and on, and on. Some of the drawings have dots and lines, and the tendency to not be able to stop stop with the drawing and not going on. The uh line quality refers to light, dark line qualities.

Q. And didn't you note in your report, also, that the defendant seemed to have a tremor or shake in his hands?

A. Yes. Yes.

Q. Okay, wouldnt that affect the validity of the results you get on a Bender Gestalt

A. It may well

Q. If the persons kind of got a shake to their hand?

[MISSING TRANSCRIPT PAGES 1485 & 1486]

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assurance, low self-concept, a lot of withdrawal, and over-concerned with interpersonal warmth, a need to demonstrate masculinity, a marked pattern of very weak and inadequate strength, sexual immaturity and some preoccupation with phallic symbols?

A. Yes.

Q. And that was all in those three little pictures?

A. Yes. Yes.

Q. Okay. Where were the phallic symbols in that?

A. Uhin terms of the tree itselfit look phallic.

Q. Wait. Wait. Wait a minute. Is that picture the one youre saying? (INDICATING.)

A. (EXAMINING.) Yes. Yes. Um-hum.

Q. And now, is this

A. The fact that its a large chimney, yes. It deals with over-concern with sexuality.

Q. Okay. Thatthat chimney on this picture is where you come up with the over-concern for sexuality?

A. One of the places.

MR. DAVIS: Your Honor, could I have this marked as States Exhibit whatever?

THE WITNESS: My ethics require they only go to somebody who is licensed to look at them.

THE COURT: Well, Im going to overrule that and Im going to allow it to be received into evidence.

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(STATES EXHIBIT NUMBER ONE A IS RECEIVED INTO EVIDENCE.)

BY MR. DAVIS:

Q. Would you circle the part of that that shows where it is that he has what was that with sexuality?

A. Over-concern. (MARKING.)

MR. DAVIS: Your Honor, Ill just make these a composite exhibit States Exhibit whatever the number is.

THE COURT: And, gentlemen, if theres any question about my ruling as to the admissibility it would be my further ruling that any confidentiality provision or privilege has been waived.

MR. STIDHAM: I believe thats what the doctor was referring to, your Honor.

THE COURT: Well, I think thats what it was, too. And that under these circumstances youre proffering the witness theyre waived.

BY MR. DAVIS:

Q. Doctor, also in addition to that long litany of things I read that you gathered from these three drawings, you also gathered that you see defensiveness, aggressive tendencies, and the need to compensate for feelings of inferiority. Is that also true?

A. Yes.

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Q. Okay.

MR. DAVIS: Your Honor, may I exhibit these to the jury?

THE COURT: Yes, you may.

(STATES EXHIBIT NUMBER ONE A IS EXHIBITED TO THE JURY.)

BY MR. DAVIS:

Q. Now, I underis there any sort of written test that goes along with this

A. No.

Q. that you made all of these conclusions from?

A. No.

Q. Now, the WRAT-R test

A. Yes.

Q. and thats not like R-A-T, thats like W-R-A-T, right?

A. Right.

Q. Okay. What is that?

A. Its a measure of reading, writing, and spelling basic skills.

Q. And what you measure in that is his performance on those tests, correct?

A. Yes.

Q. Okay, and there is a difference between function and performance, correct?

A. Yes.

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Q. In other words, I could go in and completely fail a test whereas I could go out in the real world and function in society and do certain acts.

A. Under certain circumstances.

Q. Okay. And in fact if the person intentionally or fails to put out a proper effort, then what youre actually measuring is his performance and not his ability to function?

A. In any test youre always measuring performance.

Q. And if the person going into it knows that it would be to his benefit to have a low performance, then they can act in such a way that thats just exactly what they did?

A. Surely.

Q. Now, the next test, the REY. Its a auditory-verbal learning test?

A. Yes.

Q. Okay. Now, what does that one involve?

A. That involves a list of words that you read to the subject and they try to remember as many of them as they can, then you read the list again, and again, and see how many they remember over trial.

Q. Would it be a fair you just keep reading the list to them and the same words are in there

A. Yes.

Q. and then after a period of time they should remember more words as you go along?

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A. Yes.

Q. So you expect to see a curve with an increase in the number of words they recall?

A. Yes.

Q. Which indicates that they're smart enough to pick up on it?

A. It indicates that their memory for individual items is fairly normal in this case.

Q. Okay, and that's what you found out, correct?

A. Yes.

Q. In other words, you did the REY test when you give those words to him, this defendant sitting over here was pretty normal?

A. Yes.

Q. Now, the clock drawing test.

A. Yes.

Q. I couldn't find that in my book. What is that?

A. That's that's a drawing designed to a test designed by Edith Cappa at Boston University.

Q. Okay. What do we do when we take that test?

A. That's basically you have the person draw you a clock and they put the they put the draw the clock with the face and then you ask them to set the time at twenty minutes to four.

Q. And what did that test tell you?

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A. Looking at it do they can they conceptualize the time can they recognize a fairly accurate perception from memory of a fairly common object.

Q. What result did you get I don't see anything in there anything in your report about your clock test?

A. Maybe there's not there should have been. (EXAMINING.) Uh that must have been overlooked. It is not it was fairly normal.

Q. Oh, okay.

A. So I just the drawing itself was fairly normal. There was no major

Q. Okay.

A. It was of no particular value in terms of information.

Q. Okay. So that test really didn't tell you much of anything?

A. No.

Q. Okay. What about this by you indicated there was a bicycle drawing test?

A. Yes. You just you just have the person draw you a bicycle.

Q. So during this course of the test Jessie got to draw a tree, a house, a person, a clock, and a bicycle?

A. And he also got to draw some designs he got to draw some designs from memory. Uh he got to do the WAIS-R, got to do the MMPI, got to do an achievement basic achievement

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test in reading, spelling, and arithmetic, got to do a Rorschach test.

Q. What about the bicycle drawing test. You said in here it's indicative of Jessie's difficulty and recall of visual information?

A. Yes. Jessie did a fairly simple drawing of a bicycle. He has trouble recalling details of

Q. So would I let me let me see if this is right. You show him a bicycle?

A. No, I don't show him anything.

Q. Okay. You just ask him to draw one?

A. Yes, from memory.

Q. Okay. And then you evaluate what he draws?

A. Yes.

Q. Okay, whether its a good lookingI mean, how do you evaluate what

A. Uhuhuhtheres a twenty point scaling. It has a twenty point score, and it deals with the details, the size of the tires, whether it has handlebars, whether it has a gear sprocket, whether it has spokes, those are the kinds of things that you measure how complete or incomplete it is.

Q. Okay. And so thats another basis that your opinion rests on?

A. Yes.

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Q. Now, the Rorschach test you indicated there were no non-remarkable responses to it. Is that true?

A. Yes.

Q. Okay. And he tended to pick out pieces and to produce fairly normal and common responses. There is no indication of significant psychopathology. Is that correct?

A. Yes.

Q. Okay.

A. On that test. Okayon that test there was not

Q. Okay. And the Rorschach is kind one of the cornerstones of psychology. Isnt that true? I mean one of the real

A. Forfor certain people, yes.

Q. Okay. Well, its the ink blot test, right?

A. Yes.

Q. Okay.

A. Behaviorists would call it absolutely worthless so it depends upon what field youre in.

Q. And as far as Jessie was concerned there was no indication of psychopathology. What does that mean? What is psychopathology?

A. Uh, psychiatric illness.

Q. You've got mental diagnosis?

A. Yes.

Q. Okay. There is no indication of that on that test?

A. No.

[FROM THE AUDIO]

DAVIS: Ok. Now, you also told us about these stories that you told him the Kohlberg's Moral Development?

WILKINS: Yes.

DAVIS: Are those standardized tests?

WILKINS: Standardized in the sense they're fairly widely used and that there are scoring instructions and manuals for them.

DAVIS: There are validity scales to determine whether you're getting valid results or not?

WILKINS: Not in the same way there are for the MMPI or not in the same way for MMPI.

DAVIS: Ok, so you don't know if the person is actually putting forth any effort or whatever when they're or whether they're actually attempting honestly to answer your questions or respond to that test?

WILKINS: You never know that.

DAVIS: But some of these standardized tests actually like the one we talked about, the F scale, they include things that tell you

WILKINS: The MMPI includes things that tip you off.

DAVIS: And in this case when you saw that, you disregarded that in his evaluation, correct?

WILKINS: No I did not.

DAVIS: Now this Piaget stuff the stuff with the play dough?

WILKINS: Yes.

DAVIS: Ok. That is to designis to determine kind of whether the person is a concrete thinker or not, right?

WILKINS: That one is designed to test whats called concept assessment, yes. Whether theyre concretewhether they can form concepts or not. (unintelligible) of matter, primarily.

DAVIS: Its designed to determine the difference between abstract thinking and concrete thinking

WILKINS: In broad terms, ok.

DAVIS: Ok. And theres nothingprobably at least half the population, to some extent, are what are called concrete thinkers, wouldnt you agree?

WILKINS: Yes.

DAVIS: Ok. So I mean the fact that the test indicated this defendants a concretehas concrete thought patterns

WILKINS: Not in the same way, no. Im saying that theres a difference between being able to conserve matter and being a concrete thinker, that being a concrete thinker is a higher level of development than being able to conserve matter.

DAVIS: But there are a lot of people that as far as their concrete thinking and their results on this test can function perfectly normally in society and be concrete thinkers as indicated by that test.

WILKINS: People can be concrete thinkers and perform relatively normal in society.

DAVIS: And know right from wrong?

WILKINS: Yes.

DAVIS: And conform their conduct to what the law requires?

WILKINS: Yes.

DAVIS: Which is what you found in this case

WILKINS: Yes

DAVIS: This defendant knew right from wrong, correct?

WILKINS: Yes.

DAVIS: No doubt at the time that this incident occurred he knew what criminal conduct was and he knew you shouldn't do it?

WILKINS: Yes.

DAVIS: Now as I understand it, based on your evaluation you did not in fact you specifically found that Jessie Misskelley was not mentally retarded, correct?

WILKINS: Yes.

DAVIS: Ok. And the

WILKINS: In a psychological sense.

DAVIS: Well, and the diagnosis that you rendered for Jessie Misskelley was one: adjustment disorder with depressed mood?

WILKINS: Yes.

DAVIS: Ok. And Doctor, would it be expected that someone that was incarcerated awaiting trial on capital murder charges of three eight-year-olds would be suffering from depressed mood?

WILKINS: That's precisely the reason for the diagnosis, yes.

DAVIS: Ok, so nothing

WILKINS: That's nothing terribly exciting, no.

DAVIS: Ok and then the next diagnosis was psychoactive substance abuse?

WILKINS: Yes.

DAVIS: And that has to do with his drug use and his gas huffing and alcohol, marijuana?

WILKINS: Yes.

DAVIS: Ok. And then you have boarder intellectual functioning, which is your IQ evaluation?

WILKINS: Yes.

DAVIS: And then you have developmental disorder?

WILKINS: Yes.

DAVIS: And that's NOS, is that correct?

WILKINS: Yes.

DAVIS: And that means that he didnt fit any of the normal diagnoses, thats just kind of catch-all, right?

WILKINS: He had trouble with some reading, some writing, those things we would expect normal somebody his age to have done better at.

DAVIS: And doesnt it the DSMR-III, which is your kind of the Bible of psychology, doesnt that tell you that you dont make those NOS diagnoses you be very careful with those

WILKINS: Yes

DAVIS: Because those are real borderline?

WILKINS: Yes.

DAVIS: In fact, its a real close call between a diagnosis and somebody whos normal?

WILKINS: Not necessarily.

DAVIS: But

WILKINS: It may mean that they dont fit neatly into any one category.

DAVIS: But the manual, the DSM-III tells you you dont make that diagnosis and you be very careful before you put somebody in that category, correct?

WILKINS: It tells you to be very careful before you put anybody in any category. I dont think theres any extra caution on that one.

DAVIS: So letknew the difference between right and wrong?

WILKINS: Yes.

DAVIS: And he had the ability to form his conduct to that required by the law at the time of this incident?

WILKINS: Yes.

DAVIS: And he wasnt mentally retarded?

WILKINS: No.

DAVIS: And in fact on his previous IQ tests he had an average performance level?

WILKINS: Yes.

DAVIS: One second, your Honor.

DAVIS: Which Doctor, let me ask you which one of these tests that we've gone over contributed to your determination that this defendant was suggestible?

WILKINS: Uh, some on the house tree person.

DAVIS: Those three drawings that the jurors looked at?

WILKINS: Yes.

DAVIS: Ok.

WILKINS: Uh, probably the majority would have come from uh, interview data.

DAVIS: Ok. Just from talking with him, this

WILKINS: Social history, those kinds of things.

DAVIS: Now was that an opinion that you drew based on that first eleven hours, or is it that

WILKINS: Yes.

DAVIS: Ok. And so basically that's not a result of any test, that's just kind of a gut feeling you have based on your experience and expertise?

WILKINS: Yes.

DAVIS: No further questions.

CROW: Doctor, I'll try to be brief. The full-scale IQ score from the 89 results?

WILKINS: Uh, for 89 were uh, a full-scale of 74, verbal of 68.

CROW: Ok. Full-scale for the 92 results?

WILKINS: Uh, 73.

CROW: And the full-scale you gave him?

WILKINS: 72, I think, wasn't it? Let me make sure what I said.

CROW: I think that's correct, Doctor.

WILKINS: 72.

CROW: Scores were consistent?

WILKINS: Yes. There's one from 83 that was a 67, uh

CROW: Has Jessie Misskelley ever been diagnosed in the past as being mentally retarded?

WILKINS: Yes.

CROW: Ok. That's all I have, Doctor.

THE COURT: Anything else?

DAVIS: You yourself didn't diagnose this defendant as being mentally retarded, correct?

WILKINS: No I did not.

THE COURT: All right, you may stand down

CROW: Sorry, your Honor, one question. I apologize, your Honor. When you say mentally retarded, that's using a psychological standard?

WILKINS: Right.

CROW: It's not applying any kind of legal standard?

WILKINS: No.

DAVIS: Judge, to my knowledge therefor the purposes of this trial there is no legal standard. It's the

CROW: I believe there is, your Honor. (unintelligible)

THE COURT: Approach the bench, gentlemen.

BENCH CONFERENCE:

THE COURT: What is the legal standard you're suggesting? Because as far as I know the legal standard is going to be determined by what the psychiatrist and psychologists say

CROW: (unintelligible)

THE COURT: I know what you're talking about on the statute that statute, it just says that there's rebuttable presumption that below 65

CROW: (unintelligible) it sets out exactly the qualifications, its not dealt by IQ, it defines what mentally retarded is by the statute, your Honor. It says if its this, this and this, it is

STIDHAM: Legislature has defined it.

CROW: Legislature defined it, your Honor. I mean I dont know any way around that.

THE COURT: Ok, let me see that statute.

CROW: Yes, your Honor.

RETURN TO OPEN COURT

THE COURT: All right, ladies and gentlemen. Were gonna take a ten minute recess with the usual admonition not to discuss the case with anyone.

END OF AUDIO