

Pretrial Proceedings (Baldwin|Misskelley|Echols)
Notes by James R. Elkins
January 13, 2009

Mr. Fogelman and Mr. Davis: Prosecutors

Mr. Price and Mr. Davidson: representing Damien Echols.

Mr. Wadley and Mr. Ford: representing Jason Baldwin

Mr. Stidham and Mr. Crow: representing Jessie Misskelley

August 4, 1993

Arrestment for the three defendants (pp. 10-16)(Trial Transcript version)

State's discovery motion (p. 17):

Baldwin: requesting blood, saliva, head hair, body hair, pubic hair, fingerprints, footprints, and a handwriting specimen.

Misskelley: requesting blood, saliva, head hair, body hair, pubic hair, fingerprints, footprints

Echols: Footprints.

Argument by Mr. Wadley and Paul Ford who represent Jason Baldwin (p. 17): Arguing that as to Baldwin all of "these things" had already been obtained, and were obtained pursuant to an illegal search warrant. (P. 18)

State (Mr. Fogelman) indicates that blood, hair and saliva was taken from Baldwin at the time of his arrest. (P. 19). Fogelman contends that since some or all of these materials were not included in the search warrant that the State has made no use of them and has not sent them to the state crime lab.

There's a dispute between the Defense and the Prosecution as to whether Baldwin's handwriting sample has already been taken. (P. 20).

Court: Rules in favor of the prosecution noting that the matter requested by the State is routinely discoverable so long as the State claims that it can lead to "substantial evidence." (P. 21).

Mr. Stidham (on behalf of _____) argues that the taking of the samples violates

the 4th Amendment (pp. 21-22)

Defense counsel seeks reassurance that they can be present at the taking of the samples. (P. 23).

State indicates that it has provided 1,335 pages to the defense to date. (P. 24).

Defense Counsel (Mr. Ford) requests that the State provide: 1) a list of witnesses, 2) a list of all documentary evidence they intend to introduce, 3) list of all tangible evidence they intend to introduce. (P. 26) **NOTE: THE DEFENSE IS ALSO ENTITLED TO EVIDENCE THE STATE DOES NOT PLAN TO INTRODUCE, SO CALLED *BRADY* MATERIAL—THAT IS EVIDENCE THAT WOULD POSSIBLY EXONERATE THE DEFENDANT.**

An argument ensues as to whether the State can simply provide the Defense with its entire file or whether the State must designate the evidence it actually plans to introduce. (Pp. 26-) The State contends that it cannot produce a list of evidence to be introduced prior to trial. (P. 29). The Defense says he'll settle for the list 10 days prior to Trial. (P. 29). The Court rules that the State must provide such a list 10 days prior to the trial. (Pp. 29-30).

Defense requests and is granted permission by the Court to copy the entire Crime Lab file. (P. 30). Later (p. 32), Mr. Davidson, for Damien Echols indicates that he's asking for "notes" as well as the autopsy and the full crime lab file. The Court agrees with Davidson that they can have "everything" as Davidson put it. (P. 32).

State posed no objection to the severance of the trial of Misskelley because of his statement (i.e. confession). (P. 31). Court granted the severance.

Defense Counsel (Mr. Wadley) tells the court that he's going to ask for a severance for Baldwin. (P. 31).

Discussion between Defense, State, and the Court as to whether the Crime Lab personnel should be required to talk to the defense. State contends it would not be appropriate to "order them to." (P. 33). Court seems to agree, but contends he thinks the Crime Lab people will talk to the defense.

Mr. Stidham: Talks about a motion filed to allow the Defense "separate and individual questioning of jurors at the time of the voir dire." (P. 33). Court indicates that he has allowed this procedure in the past.

Court ruled that there would be full stenographic coverage. (P. 34).

Defense: Request that the jury charge be reduced to writing. The Judge notes that he always does that. (P. 34).

Fees: Question about Fees for Defense Counsel Who Have Been Appointed by another Judge comes up (p. 35). Public defenders are not involved in the case due to a conflict of interest; consequently other legal counsel has been appointed. Court: “All I can say is the Court will certainly take up and consider your request for attorney’s fees, and I will order attorney’s fees that are appropriate and within the law.” (P. 36). Mr. Ford further request that the Court order that their “expenses” be reimbursed. (P. 36). Ford request payment of defense counsel, fees and expenses on a monthly basis rather than in a lump sum at the end of the question which would require defense counsel to “self-finance” the case. (Pp. 36-37). Court asks the Prosecutor if he has any objection. He notes that he things the Attorney General’s Office should be involved as the State rather than the county should be picking up the tab. (P. 37). The Court notes previous cases in which there is a question as to whether the County or the State should pick up the bill for appointed defense lawyers and tells the Prosecutor to file a petition to bring in the Attorney General’s Office. (P. 38). The Judge instructs Defense Counsel to prepare “detailed” monty statements. “I’m talking,” he said, “about detailed.” (P. 38). Later, when Mr. Ford indicates that he will be filing monthly reimbursement requests for time and expenses, the Judge says: “Ill look into that. I understand your problem. I just don’t know who’s going to pay you yet.” (P. 39).

Trying the Case for the Press: Court cautions counsel about “direct conversations with the media about the case or about the presentation of the case” and reminded the lawyers “of the Code of Ethics” in this regard. He notes that he has not issued a gag order. (P. 38-39).

Change of Venue: Discussion about a hearing on a Change of Venue request (p. 39-40).

SEPTEMBER 27, 1993 (Website transcription)

Payment of Attorney’s Fees: There’s an issue raised as to the limited amount of State money available to pay the attorneys — something like \$55,000 in the fund for the entire state for the year in question. (P. 2, of my printout).

The Attorney General’s witness indicates that a capital case may require, 800 to 1,000 hours of preparation. (P. 4) (less hours in a case where everything is “local” but more if you’ve never tried a capital case).

The witness indicates that a reasonable fee would be \$70 to \$75 an hour. Perhaps, no more than \$30 t \$40 an hour for a less experience attorney.

Mr. Price, on c/e asks the witness whether the federal habeas corpus rate for death penalty cases is not \$125/hour.

Price further inquires whether \$40 an hour and \$60 hour for courtroom time is not the fee for Federal appointed lawyers. (P. 5).

A second witness for the Attorney General's Office (Mr. Montgomery) indicates that Mr. Ford and Mr. Price called the Public Defender's Office in Crittenden County and agreed to their appointment if the Public Defender did not represent the defendants. (P. 8). The Public Defender's Office "conflict" seems to have been in representing all three of the defendants. Mr. Montgomery seemed to think his office would represent one of the defendants (but he says, it wasn't his call). (P. 8). The decision about the Public Defender's office not representing any of the defendants was made by the Municipal Judge. (P. 8).

Mr. Montgomery testifies that he discussed with Mr. Price and Mr. Ford a possible fee cap of \$75/hr. to the extent that the county was going to pay their fees. (P. 9). He also mentions a \$50 fee. The total cap would be \$15,000, and they could apply to the judge for additional compensation. (P. 9).

Mr. Montgomery testifies that he discussed the fee arrangement with the County Attorney and they approved it.

On further examination, Mr. Montgomery admits that he assumed the State was going to be picking up the fees, and that his discussions with Price and Ford deal only with the possibility of the public defender's office funds being a backup to state funds. (P. 10).

The yearly budget for Mr. Montgomery — public defender for 16 years — was \$180,000 for the year. (P. 12).

Note: Three budgets and three possible fee sources involved: public defender's office, county, and state. None of them, we might note, particularly well endowed. The problem is made more complicated by the passage of a new state statute governing the matter after the attorneys were appointed. (The lawyers were appointed in June, 1993, and the new law went into effect on July 1, 1993)(P.14). Evidently (based on testimony; p. 15), the Act in effect prior to the New Law put the burden for attorney's fees on the County where the crime was committed.

We learn that there has been litigation in Arkansas on this issue of attorney's fees.

We learn that there are *no state funds* available in the budget to pay the attorneys (p. 16).

The Court after listening to the witness from the Public Defender's Office and the witness from the Attorney General's Office asks for briefs on the issue. "Obviously, the attorneys are going to be paid reasonable fees." (P.16). But then, the Judge goes on to note, "I don't want to dwell on how the lawyers are going to be paid until the case is over with." (P. 17).

Change of Venue: (pp. 19-) Each of the defendant's filed a motion for a change of venue.

Mr. Crow on behalf of Jessie Misskelley notes the extensive publicity surrounding the case and that the Memphis, Tennessee media coverage had been extensive. Most notably, the *Memphis*

Commercial Appeal even went so far as to print the alleged confession. (P. 20).

“I would venture to say, there’s not a person in Crittenden County who hasn’t heard about this case and not a person in Crittenden County who hasn’t formed an opinion on this case.”

[Note: All defense counsel has argued is that there has been “extensive” press coverage and that as a result opinions have been formed about the case. The only telling argument he made, to me, was the publication by the *Memphis Commercial Appeal* of the Misskelley statement/confession. There was no effort on the part of Mr. Crow to argue the prejudicial nature of the press coverage. That is, there was no direct link made between the extensive coverage and the formation of public opinion about the case.]

[Another thing I note is that Mr. Crow never presents what the “standards” are to be used by the Court in making its determination. He refers frequently to an Arkansas Sup. Ct. case that he thinks is similar in nature, but he doesn’t actually attempt to argue that the holding in that case is determinative as to the change of venue in his case.]

Mr. Crow seeks to have the Court declare the state change of venue provision unconstitutional.

The issue of being limited to one venue change — apparently a limitation established by law/or precedent is discussed. Basically, the Court seems to indicate that he’s willing to issue a second venue change if necessary. (Pp. 22-23)

State when it finally addresses the change of venue issue moves immediately to the standard established in the statute: Defendants must establish that their clients have been prejudiced to the point that they cannot have a fair trial. (P. 24). State argues that “media coverage alone—extensive media coverage—does not prevent the defendants from having a fair trial nor does it give them a right to a change of venue.” (P. 24). Prosecutor goes on to note: “...there has been nothing listed nor stated in the affidavits presented by the defendants or filed with this Court to indicate that these defendants cannot receive a fair trial in Crittenden County.” (P. 24). He goes on to point out that the State has filed affidavits to the contrary.

Court orders a change of venue to Craighead County. (P. 26).

Motion for Severance of Baldwin from Echols: (p. 29-):

Defense counsel is concerned about:

—being limited to only 12 peremptory challenges if Baldwin is tried with Echols. (P. 30) and the 12 challenges divided between the two sides.

—the need for different jurors for the two defendants;

—pretrial publicity about Echols; the publicity about the occult aspects of the case are associated with Echols rather than Baldwin (Pp. 30-31)

—there may be the presentation of antagonistic defenses, although the attorney admits he doesn't really know what Echols defense is, and hasn't discussed it with his lawyers (p. 31)(and thus his argument is speculative rather than factual at this point).

Mr. Price, Echols counsel, also joins in the argument requesting a severance on behalf of Echols based on the antagonistic defense argument (Baldwin's lawyers may argue Baldwin was not at the scene of the crime but that Echols may have been). (P.32).

Mr. Price (for Echols) discusses the Arkansas case that lies out the factors — seven factors — to be considered in severance decision. (P. 34).

Court decides to deny the motion for severance. (P. 36). **[This is the first time in the pretrial proceedings that I'd have ruled differently than did the trial judge. In my view, Mr. Price and Mr. Ford made a good argument on the grounds of an "antagonistic defense" as a primary factor to justify the severance.]**

Motion (by Mr. Ford & Mr. Wadley on behalf of Baldwin) to suppress evidence (p. 39 -)

There's discussion about who has the burden of proof in support of the search warrant and the suppression of evidence. They hold off on determination of the issue until the affidavit in support of the warrant and the officer who served it is available in the courtroom.

Motion to allow individual and sequestered voir dire of the potential jurors. (P. 43).

The Court allows individual questioning but holds off on the request for sequestration request. There's discussion of the possibility of sequestering 3 jurors at a time, The Court indicates it will not so limit the number for his questioning; that he'll do them 12 at a time. The Court comes around and finally accepts questioning of the jurors 3 at a time. (P. 44).

Investigative Officers Identified and Baldwin's Attorney, Mr. Ford wants to depose them (pp. 44-45):

—Gary Gitchell is head of the investigative division of the West Memphis Police Department.

— Bryn Ridge is a detective for the West Memphis Police Department and was the affiant for the search warrant.

— Mike Allen (involved in some manner)

State objects to the disposition of the officers involved. Evidently, there is no legal requirement for the State to submit to such depositions. Mr. Ford seeks the deposition not as of right by rules of discovery but to secure a fair trial for his client, for “due process.” The Court rules that he will enter an order for the State’s witnesses to make themselves available for questioning but will not order formal discovery by way of depositions.

Defense Counsel complain (as they have before) about the fact that the State is throwing everything at them, there is a lot of it, and not identifying what evidence will be used. (P. 46-47).

Court says it will rule on an item by item basis, based on what they want that they have not gotten. The defense counsel is concerned about the disorganized way the “file” information is being presented to them. The Prosecutor responds: “He’s wanting us to organize his file.” (P. 47). Mr. Wadley: “No, Judge. We want the file to be presented to us in an orderly manner” (P. 47). The Court: “What is it you are asking for?” (P. 47)

Mr. Ford: “So the open file policy is in compliance [with the rules of discovery]?”

The Court: “Yes. Unless you can specifically show me or have some grievance to where they have withheld evidence from you.” (P. 49).

Motion (by Mr. Ford) to inspect and examine the physical evidence: (P. 50)

He notes that he’s talked with the State Crime Lab people but did not view the tested items. Still other items were shipped off to Alabama or Georgia for examination. The Court asks whether a time for viewing can be arranged.

Mr. Ford expands his request: “My request is that not only we be given an opportunity to look at it but that we be given the opportunity to have it independently tested, examined” AND that the State (or whoever the Court designates) pay the expenses for these independent experts.

The Court first response is that: An expert is an expert and he’s amenable to defense experts only if there is “some justification for questioning that expert’s finding” otherwise . . . **[Of course, the Judge is right in only the limited sense that the expert in an ideal world is supposed to be a true expert. Defense counsel may be in a position of simply not knowing, without its own experts, what kind of issues it can raise, how it can question the finds of the State’s experts. The judge mentions the old issue about “cost” again, and its pretty clear that that is a factor is his thinking about this issue of defense experts. And, of course, judicial economy: Defense experts complicate the trial.]** Mr. Ford makes the point I was making here: “I have no basis to have—I don’t know anything about hair or fibers or DNA. I’m an attorney not a scientist. I don’t know if there’s any basis to question that or not.” (P. 52).

The Court tries to find a middle ground: Can all three defendants agree on the same expert? The Court will want to know the cost. The Court will want some basis for thinking the defense expert is going to differ with the State's expert. (P. 52).

The Court goes on to sound as if he is amenable to the Defense request (but still they are going to have to make some showing of the need). **[The Judge seems rather accommodating to the Defense; State has posed no series objections.]**

Then, the Court seems to go back on what he has just said: "Y'all are going to have to share the expert that the State or County is paying for. I don't think we need three additional experts." **[I'm confused at this point on where the Court stands on the matter of independent experts. My best guess is that he will require a particularized showing of the need for the expert based on reasonable concerns of the Defense.]**

On the Motion to Suppress:

Byrn Ridge testified that he meet with the judge who approved the search warrant during the course of preparing his affidavit. So the judge who's going to rule on the search warrant is helping the police officer with the "elements needed to go in this Affidavit in order for it to be a legal document." (P. 62).

We learn that Judge Rainey (the search warrant judge) had expressed concerns about "some discrepancies in the initial statement of Mr. Misskelley." (P. 63). One of the "obvious discrepancies" was the time when the homicides occurred.

[There are repeated instances in which Mr. Stidham, on behalf of Misskelley, tries to insure that the press does not have further access to, or occasion to write about, his client's statement. The Court continually supports the idea of an open courtroom and displays no affinity for in camera proceedings.]

During the course of the

//further notes—in progress//