

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES, :
 GOVERNMENT, :
 VS. : CR. NO. 05-394
 LEWIS LIBBY, :
 DEFENDANT, :

WASHINGTON, D. C.
OCTOBER 26, 2006

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE REGGIE B. WALTON

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I-N-D-E-X

WITNESS	DIRECT	CROSS
DR. ELIZABETH LOFTUS	11	52

E-X-H-I-B-I-T-S

DEFENDANT'S	IN EVIDENCE
1-8	18

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P-R-O-C-E-E-D-I-N-G-S

(THE DEFENDANT AND COUNSEL WERE PRESENT.)

THE DEPUTY CLERK: CRIMINAL ACTION NUMBER 05-394,
UNITED STATES OF AMERICA VERSUS LEWIS LIBBY.

COUNSEL, CAN YOU PLEASE IDENTIFY YOURSELVES FOR
THE RECORD.

MR. FITZGERALD: YES. YOUR HONOR, GOOD MORNING.
PAT FITZGERALD FOR THE UNITED STATES, JOINED BY THE USUAL
TEAM. I WILL MENTION ONE ADDITIONAL PERSON SITTING AT
COUNSEL TABLE IS DR. NEAL COHEN, A PSYCHOLOGIST, BUT WE ARE
NOT CALLING HIM AS A WITNESS. HE'S JUST GOING TO TELL ME
WHAT THE BIG WORDS MEAN. BUT THAT IS AN ADDITIONAL PERSON
HERE TODAY.

THANK YOU.

THE COURT: VERY WELL.

MR. CLINE: GOOD MORNING, YOUR HONOR. JOHN CLINE
FOR MR. LIBBY, WHO IS HERE. AND WE, TOO, HAVE THE USUAL
TEAM.

THE COURT: GOOD MORNING.

I HAVE READ THE PAPERS THAT HAVE BEEN SUBMITTED.
I DON'T HAVE ANY SERIOUS QUESTION ABOUT THE SCIENCE. I
WOULD AGREE THAT THERE OBVIOUSLY IS A SCIENCE IN REFERENCE
TO THE PROCESS OF MEMORY.

MY MAIN CONCERN, TO LET YOU ALL KNOW AHEAD OF TIME
SO YOU CAN FASHION YOUR PRESENTATION TO TRY AND ADDRESS THE

1 CONCERN, IS WHETHER THIS TESTIMONY WOULD AID THE JURY. AND
2 MY CONCERNS ARE, ONE, WHILE I UNDERSTAND WHAT SOME OF THE
3 RESEARCH APPARENTLY INDICATES ABOUT THE BELIEF THAT PEOPLE
4 HAVE ABOUT THEIR MEMORY, IT'S A LITTLE PERPLEXING TO ME THAT
5 ADULT, RATIONAL HUMAN BEINGS WOULD HAVE THOSE FEELINGS ABOUT
6 THEIR ABILITY TO REMEMBER.

7 I MEAN I THINK I HAVE A PRETTY GOOD MEMORY. I CAN
8 WALK UPSTAIRS SOMETIMES AND FORGET WHAT I WENT UPSTAIRS FOR.
9 AND I JUST THINK LIVING LIFE WOULD SAY TO THE AVERAGE PERSON
10 WHO IS A RATIONAL INDIVIDUAL THAT MEMORIES CAN BE FAULTY.
11 TIME CAN, OBVIOUSLY, IMPACT ON MEMORIES. PRESSURE OF OTHER
12 EVENTS CAN HAVE AN EFFECT.

13 IT SEEMS TO ME THAT IS SOMETHING THAT THE AVERAGE
14 PERSON WOULD APPRECIATE. BUT PUTTING THAT ASIDE, AND
15 ASSUMING THERE IS SOME MERIT TO THE POSITION, THE OTHER
16 CONCERN I HAVE RELATES TO THE SURVEYS OR THE RESEARCH
17 ITSELF.

18 AS I SAY, OBVIOUSLY, UNDER DAUBERT, THE SECOND
19 PRONG OF THE DAUBERT TEST REQUIRES THAT THE EVIDENCE HAS TO
20 BE OF ASSISTANCE TO THE JURY. AND NONE OF THE RESEARCH, AT
21 LEAST -- AND MAYBE YOU ALL CAN CORRECT ME IF I AM WRONG --
22 THAT HAS BEEN DONE IN THIS CASE HAS LOOKED AT THE SITUATION
23 AS FAR AS JURORS ARE CONCERNED, AFTER THEY HAVE GONE THROUGH
24 THE RIGORS OF THE TRIAL PROCESS.

25 FROM WHAT I CAN GLEAN, THE RESEARCH RANDOMLY MADE

1 CONTACT WITH PEOPLE WHO WERE QUALIFIED AS POTENTIAL JURORS
2 IN A JURISDICTION, AND THEY WERE ASKED QUESTIONS RELATED TO
3 PRIMARILY, I THINK, IN THE CONTEXT OF IDENTIFICATION
4 TESTIMONY, AND THEY WERE ASKED TO RESPOND TO QUESTIONS
5 RELATED TO THE ISSUE. BUT I DIDN'T SEE WHERE THERE WAS ANY
6 RESEARCH THAT DEMONSTRATED THAT AFTER A JUROR HAD GONE
7 THROUGH THE PROCESS OF VOIR DIRE, WHERE QUESTIONS WERE ASKED
8 THAT SPECIFICALLY WENT TO THIS ISSUE, HAD BEEN SUBJECTED TO
9 VIGOROUS CROSS-EXAMINATION BY GOOD COUNSEL, HAD HAD ARGUMENT
10 PRESENTED BY WAY OF CLOSING ARGUMENTS AND HAD INSTRUCTIONS
11 GIVEN BY THE COURT, WHICH I WOULD BE PREPARED TO DO, THAT
12 WOULD GIVE THE JURY FACTORS THAT THEY SHOULD FOCUS ON IN
13 MAKING AN ASSESSMENT AS TO THE ISSUE OF MEMORY -- WHETHER
14 AFTER ALL OF THAT HAS BEEN DONE, AT THE END OF THAT,
15 ASSUMING THAT THESE SURVEYS ARE CORRECT THAT PEOPLE DO HAVE
16 THIS BELIEF ABOUT MEMORY, THAT PEOPLE AT THE END OF THE
17 PROCESS WOULD STILL HAVE THAT PERSPECTIVE AND, IN FACT, IN
18 THE DELIBERATION PROCESS, CONDUCTED THEMSELVES BY WAY OF
19 THOSE DELIBERATIONS IN A WAY INCONSISTENT WITH THE REALITY
20 OF THE FALLACY OF MEMORY.

21 AND I DIDN'T SEE ANY RESEARCH THAT HAS ADDRESSED
22 IT FROM THAT PERSPECTIVE. AND IT IF HASN'T, THEN HOW CAN WE
23 SAY THAT THIS TESTIMONY IS, IN FACT, GOING TO BE AN AID TO
24 THE JURY BEYOND WHAT THE RIGORS OF THE TRIAL PROCESS
25 PROVIDES IN GIVING THE JURY A PERSPECTIVE THAT'S APPROPRIATE

1 AS TO THE ISSUE OF MEMORY?

2 THOSE ARE MY MAIN CONCERNS.

3 MR. CLINE: YOUR HONOR, WE HAVE DR. LOFTUS HERE
4 TODAY, WHO CAN TESTIFY. I THINK SHE CAN EXPLAIN BETTER THAN
5 I CAN THE EXTENT TO WHICH THE STUDIES DO TOUCH ON ACTUAL
6 JURORS AS OPPOSED TO POTENTIAL JURORS.

7 THE COURT: OKAY.

8 MR. CLINE: AND SO I WILL CALL HER IN JUST A
9 MINUTE, BUT I GUESS ONE POINT I WOULD LIKE TO MAKE -- AND I
10 THINK IT COMES UP IN THE SOME OF THE EYEWITNESS CASES THAT
11 WE HAVE CITED, AND I THINK THE DISTRICT COURT CASE FROM
12 KENTUCKY BRINGS OUT THIS POINT -- IS THAT THERE IS REALLY
13 NOTHING NECESSARILY IN THE TRIAL PROCESS THAT WILL EDUCATE
14 JURORS ON THESE POINTS IF THEY DON'T ALREADY UNDERSTAND
15 THEM.

16 IN OTHER WORDS, THERE IS THE POSSIBILITY OF
17 COUNSEL ARGUING AND CROSS-EXAMINING, BUT IN THE PROCESS OF
18 CROSS-EXAMINING, COUNSELS' QUESTIONS, OF COURSE, AREN'T
19 FACTS. AND THERE WILL BE NO WITNESS FROM WHOM WE CAN ELICIT
20 THESE PRINCIPLES -- THESE FINDINGS OF MEMORY RESEARCH,
21 UNLESS DR. BJORK IS ABLE TO TESTIFY.

22 JURY INSTRUCTIONS. IT IS CERTAINLY POSSIBLE THAT
23 YOUR HONOR COULD INCORPORATE INTO A JURY INSTRUCTION THE
24 PRINCIPLES THAT DR. BJORK WOULD TESTIFY ABOUT, BUT I DON'T
25 BELIEVE AN INSTRUCTION WOULD CONVEY TO THE JURY, ESPECIALLY

1 WITHOUT ANY SORT OF FACTUAL BACKGROUND OR EXPLANATION, THE
2 SIGNIFICANCE OF THE POINTS THAT DR. BJORK WOULD MAKE. IT IS
3 BETTER THAN NOTHING.

4 THE COURT: IF YOU OPEN THE DOOR TO PERMIT THIS
5 TESTIMONY, IT SEEMS TO ME THAT WE HAVE TURNED THE TRIAL
6 PROCESS OVER TO THE TESTIMONY OF EXPERTS BECAUSE IF EXPERTS
7 ARE NEEDED TO TESTIFY ON THIS ISSUE, IT SEEMS TO ME THAT IN
8 THE CONTEXT OF ANY ISSUE, THE ARGUMENT CAN BE MADE THAT
9 EXPERTS ARE NEEDED.

10 I MEAN MEMORY IS SOMETHING THAT HUMAN BEINGS HAVE
11 TO DRAW UPON ON A DAILY BASIS, AND I FIND IT VERY DIFFICULT
12 TO APPRECIATE THAT IF JURORS ARE REMINDED OF THIS TYPE OF
13 INFORMATION, THAT IT WOULD NOT TRIGGER SOMETHING IN THEIR
14 OWN MINDS ABOUT THEIR OWN EXPERIENCES REGARDING MEMORY, AND
15 WHILE THEY MAY NOT UNDERSTAND THE NUANCES OR THE MECHANICS
16 THAT COME INTO PLAY THAT CAUSE THESE PHENOMENONS TO OCCUR,
17 THAT THE PROCESS OF JUST LIVING LIFE WOULD CAUSE THEM TO BE
18 ABLE TO APPRECIATE, "YES, OVER TIME I FORGET THINGS. IF I
19 AM BUSY REGARDING OTHER THINGS, I MAY NOT FOCUS ON SOMETHING
20 THAT'S LESS SIGNIFICANT."

21 I MEAN THOSE ARE JUST EVERYDAY EXPERIENCES I THINK
22 THE AVERAGE HUMAN BEING EXPERIENCES. AND IT JUST SEEMS TO
23 ME THE NORMAL TRIAL PROCESSES WOULD TWEAK THEIR MEMORY OF
24 THESE EVENTS AND, THEREFORE, GIVE THEM AN APPRECIATION OF
25 THE FALLACIES OF MEMORY AND THAT THEY DON'T REALLY NEED

1 EXPERT TESTIMONY TO DO THAT.

2 LIKE I SAY, THEY MAY NOT KNOW THE TECHNICAL
3 NUANCES OF WHY THIS PHENOMENON OCCURS, BUT, NONETHELESS, IT
4 SEEMS TO ME THAT THEIR NORMAL LIFE EXPERIENCES WOULD TELL
5 THEM THAT PEOPLE'S MEMORIES ARE NOT LIKE TAPE RECORDERS. WE
6 ARE HUMAN BEINGS. WE FORGET. WE DON'T FOCUS ON THINGS, AND
7 AS A RESULT OF THAT, WE DON'T REMEMBER THEM.

8 I MEAN I THINK BACK TO WHEN I WAS PLAYING
9 FOOTBALL. I USED TO THINK I SCORED TOUCHDOWNS EVERY GAME,
10 BUT WHEN I WENT BACK AND LOOKED AT THE ACTUAL RECORD, I SAW
11 I DIDN'T.

12 MR. CLINE: I GUESS I HAVE A COUPLE RESPONSES.
13 ONE IS AT SOME LEVEL OF GENERALITY, IT IS CERTAINLY TRUE THE
14 FACT THAT MEMORY FADES IS A MATTER OF COMMON SENSE AND THAT
15 MEMORY FADES OVER TIME IS A MATTER OF COMMON SENSE.

16 WHERE I THINK IT STOPS BEING A MATTER OF COMMON
17 SENSE IS WHEN YOU GET INTO SOME OF THE MORE SUBTLE POINTS
18 WHICH ARE THE ONES THAT DR. BJORK IS GOING TO ADDRESS.

19 AND I'LL TELL YOU RIGHT NOW DR. LOFTUS, I THINK,
20 WILL TESTIFY THERE IS ONE POINT, AMONG THE 13 BJORK POINTS,
21 AS I'LL CALL THEM, THAT SHE WILL SAY SHE THINKS IS A MATTER
22 OF COMMON SENSE, AND THAT IS THAT YOU TEND TO REMEMBER
23 THINGS THAT ARE IMPORTANT TO YOU MORE READILY THAN YOU DO
24 THINGS THAT ARE UNIMPORTANT TO YOU.

25 BUT THE OTHER BJORK POINT -- FOR EXAMPLE, YOU

1 MENTIONED PEOPLE UNDERSTAND THAT MEMORY IS NOT A TAPE
2 RECORDER OR A VIDEO RECORDER.

3 WELL, YOU UNDERSTAND THAT, YOUR HONOR, AND I
4 UNDERSTAND THAT. BUT THE SURVEY SHOWED THAT AN AWFUL LOT OF
5 JURORS -- ALMOST HALF OF THE JURORS OR MAYBE MORE THAN HALF
6 -- DON'T UNDERSTAND THAT. THEY HAVE THIS IDEA THAT MEMORY
7 IS SOMEHOW THERE IN YOUR MIND JUST WAITING TO BE ACTIVATED,
8 LIKE A FILM OR A TAPE RECORDING. AND THAT IS WRONG, AND IT
9 IS WRONG IN AN IMPORTANT WAY.

10 THE OTHER POINT I WOULD MAKE -- AND THIS HAS COME
11 UP A COUPLE OF TIMES IN OUR DISCUSSIONS ABOUT THIS ISSUE.
12 IT IS SORT OF THE FLOODGATES QUESTION. IF YOU ALLOW A
13 MEMORY EXPERT HERE, YOU ARE GOING TO BE ALLOWING MEMORY
14 EXPERTS IN EVERY CASE.

15 AND I GUESS I HAVE TWO RESPONSES TO THAT. THE
16 FIRST ONE IS THAT -- I CAN'T SPEAK FOR MY COLLEAGUES HERE,
17 BUT I HAVE BEEN DOING THIS FOR TWENTY YEARS, AND I HAVE
18 NEVER HAD A CASE BEFORE WHERE I HAVE SOUGHT TO CALL A MEMORY
19 EXPERT. IT IS NOT BECAUSE THE IDEA WOULDN'T HAVE OCCURRED
20 TO ME. IT JUST DIDN'T FIT THE FACTS THE WAY I BELIEVE IT
21 DOES HERE.

22 SO I DON'T THINK IT IS GOING TO BE AS MUCH OF A
23 PROBLEM AS ONE MIGHT THINK. BUT THE OTHER POINT IS THIS.
24 LET'S ASSUME FOR A MOMENT THAT JURORS DON'T UNDERSTAND OR A
25 SIGNIFICANT PERCENTAGE OF JURORS DON'T UNDERSTAND HOW MEMORY

1 WORKS IN THE WAY THAT DR. BJORK WOULD POINT OUT.

2 AND LET'S ASSUME THAT THE JURORS, WHEN THEY DO
3 THEIR FACT-FINDING FUNCTION, RELY ON THOSE MISCONCEPTIONS.
4 WE ARE HERE TO FIND THE TRUTH. THAT'S WHAT TRIALS ARE
5 ABOUT. AND IF JURORS ARE RELYING ON MISCONCEPTIONS DAY IN,
6 DAY OUT TO REACH THE TRUTH, WE SHOULD DO SOMETHING ABOUT
7 THAT. AND IF THAT MEANS CALLING A MEMORY EXPERT, IT SEEMS
8 TO ME WE SHOULD CALL A MEMORY EXPERT AND NOT SIT BY AND LET
9 JURORS --

10 THE COURT: I WON'T QUIBBLE WITH YOU ON THAT.

11 MR. CLINE: I BEG YOUR PARDON?

12 THE COURT: I WON'T QUIBBLE WITH YOU ON THAT. I
13 DON'T DISAGREE WITH THAT.

14 MR. CLINE: IT DOES BOIL DOWN TO THE QUESTION OF
15 DO JURORS OR POTENTIAL JURORS MISUNDERSTAND -- AND WE
16 SHOULDN'T SPEAK ABOUT ALL POTENTIAL JURORS. I THINK WE'LL
17 FIND AS WE GO THROUGH THE STUDIES WITH DR. LOFTUS, THERE IS
18 A SIGNIFICANT PERCENTAGE OF JURORS WHO PROBABLY DO, ON EACH
19 OF THESE POINTS, UNDERSTAND THE BASIC THRUST OF THE POINT.
20 THE PROBLEM IS: WHAT ABOUT THE ONES WHO DON'T?

21 THE COURT: CAN'T WE FERRET THAT OUT DURING THE
22 VOIR DIRE PROCESS? I AM PRETTY LIBERAL WHEN IT COMES TO
23 PERMITTING COUNSEL TO ASK FOLLOW-UP QUESTIONS TO MY
24 QUESTIONS DURING THE INDIVIDUAL VOIR DIRE.

25 MR. CLINE: I GUESS I WOULD SAY THIS. I AM NOT

1 SURE WE CAN FERRET IT OUT DURING THE VOIR DIRE PROCESS, BUT
2 MAYBE MORE PRACTICALLY, VOIR DIRING A BUNCH OF JURORS ON ALL
3 OF THESE POINTS WOULD TAKE A LOT MORE TIME AND PROBABLY
4 PRODUCE A LESS PRECISE RESULT THAN JUST LETTING DR. BJORK
5 TESTIFY BECAUSE HIS TESTIMONY WILL BE RELATIVELY QUICK. HE
6 WILL BE CROSS-EXAMINED. THE GOVERNMENT MAY OR MAY NOT CALL
7 AN EXPERT, BUT IT SEEMS TO ME IT IS A LOT MORE EFFICIENT TO
8 DO IT THAT WAY AND MAKE SURE THEY HAVE THE INFORMATION THAN
9 TO TRY TO VOIR DIRE A WHOLE LARGE PANEL OF JURORS.

10 THE COURT: OKAY. WHY DON'T WE PROCEED WITH THE
11 TESTIMONY.

12 MR. CLINE: OKAY. DR. LOFTUS.

13 YOUR HONOR, I HAVE EIGHT EXHIBITS I PLAN TO USE
14 WITH DR. LOFTUS. MAY I HAND THOSE UP TO THE COURT?

15 THE COURT: YES.

16 (DR. LOFTUS, DEFENDANT'S WITNESS, SWORN.)

17 DIRECT EXAMINATION

18 BY MR. CLINE:

19 Q. GOOD MORNING, DR. LOFTUS.

20 A. GOOD MORNING.

21 Q. I AM GOING TO SPEND A LITTLE BIT OF TIME ON YOUR
22 QUALIFICATIONS, BUT NOT TOO MUCH BECAUSE WE DON'T HAVE A
23 JURY HERE.

24 THE DEPUTY CLERK: WILL YOU SPELL HER NAME?

25 MR. CLINE: I BEG YOUR PARDON?

1 THE DEPUTY CLERK: WILL YOU SPELL HER NAME?

2 BY MR. CLINE:

3 Q. WOULD YOU SPELL YOUR NAME, PLEASE?

4 A. MY NAME IS ELIZABETH LOFTUS. IT'S L-O-F-T-U-S.

5 Q. TELL US BRIEFLY, PLEASE, YOUR EDUCATIONAL BACKGROUND.

6 A. WELL, STARTING WITH COLLEGE, I WENT TO THE UNIVERSITY OF
7 CALIFORNIA, LOS ANGELES, AND GRADUATED WITH A BACHELOR'S
8 DEGREE IN MATHEMATICS AND IN PSYCHOLOGY IN 1966. THEN I
9 WENT TO STANFORD UNIVERSITY AND RECEIVED A MASTER'S DEGREE
10 IN 1967, FOLLOWED BY A PH.D IN PSYCHOLOGY IN 1970.

11 Q. OKAY. WHERE DO YOU WORK NOW?

12 A. I AM CURRENTLY ON THE FACULTY AT THE UNIVERSITY OF
13 CALIFORNIA, URVINE.

14 Q. WHAT DO YOU DO THERE?

15 A. WELL, MY TITLE IS DISTINGUISHED PROFESSOR, AND I HAVE
16 POSITIONS IN THE DEPARTMENT OF PSYCHOLOGY AND SOCIAL
17 BEHAVIOR AND ALSO IN THE DEPARTMENT OF CRIMINOLOGY, LAW AND
18 SOCIETY.

19 Q. IS IT FAIR TO SAY, TO CUT TO THE CHASE HERE, THAT YOU
20 HAVE DEVOTED THE PAST THREE DECADES OR SO OF YOUR
21 PROFESSIONAL LIFE TO THE STUDY OF HUMAN MEMORY?

22 A. YES.

23 Q. AND YOU HAVE STUDIED MEMORY, HAVE YOU NOT, BOTH IN THE
24 CONTEXT OF EYEWITNESS IDENTIFICATION AND IN THE CONTEXT
25 REMOVED FROM EYEWITNESS IDENTIFICATION, CORRECT?

1 A. CORRECT. MANY MEMORY STUDIES THAT HAVE NOTHING TO DO
2 WITH IDENTIFICATION, OR HAVE LITTLE TO DO WITH IDENTIFYING
3 PEOPLE.

4 Q. CAN YOU TELL US BRIEFLY WHAT THE RELATION IS BETWEEN THE
5 STUDY OF MEMORY IN THE CONTEXT OF EYEWITNESS IDENTIFICATION
6 AND THE STUDY OF MEMORY IN OTHER CONTEXTS?

7 A. WELL, FIRST OF ALL, THE STUDY OF MEMORY IS A KIND OF
8 UMBRELLA FIELD, AND THERE ARE THOUSANDS AND THOUSANDS OF
9 PSYCHOLOGISTS AROUND THE WORLD WHO STUDY MEMORY MORE
10 GENERALLY.

11 A SUBPROBLEM IN THE MORE GENERAL FIELD OF HUMAN
12 MEMORY IS THE PROBLEM OF EYEWITNESS TESTIMONY OR EYEWITNESS
13 IDENTIFICATION.

14 EYEWITNESS TESTIMONY WOULD BE MEMORY FOR CRIMES,
15 ACCIDENTS, OTHER COMPLEX EVENTS, OR LEGALLY RELEVANT EVENTS.
16 EYEWITNESS IDENTIFICATION IS THE STUDY OF THE ABILITY TO
17 IDENTIFY PEOPLE THAT YOU MAY OR MAY NOT HAVE SEEN BEFORE.
18 AND THESE ARE SUBPROBLEMS OF THE MORE GENERAL PROBLEM OF
19 HUMAN MEMORY.

20 Q. SO IS IT FAIR TO SAY THAT THE PRINCIPLES THAT APPLY TO
21 OR THE FINDINGS RELATING TO HUMAN MEMORY GENERALLY CAN ALSO
22 BE APPLIED TO THE PARTICULAR PROBLEM OF EYEWITNESS MEMORY?

23 A. CORRECT, AND VICE VERSA.

24 Q. OKAY. YOU HAVE HAD, I TAKE IT, MANY PUBLICATIONS IN THE
25 FIELD OF MEMORY?

1 A. YES.

2 Q. MANY OF THOSE PUBLICATIONS THAT YOU HAVE HAD HAVE
3 APPEARED IN PEER-REVIEW JOURNALS?

4 A. YES.

5 Q. CAN YOU TELL US JUST QUICKLY WHAT A PEER-REVIEW JOURNAL
6 IS?

7 A. WELL, PEER-REVIEW IS A PROCESS BY WHICH YOU SUBMIT YOUR
8 SCIENTIFIC ARTICLE FOR PUBLICATION IN A JOURNAL. GENERALLY,
9 A NUMBER OF REVIEWERS REVIEW THAT ARTICLE FOR IS IT A
10 SCIENTIFIC CONTRIBUTION; IT IS COMPETENTLY DONE; IS IT
11 WORTHY OF PUBLICATION IN THIS PARTICULAR JOURNAL; IS THE
12 AUDIENCE OF THE READERSHIP THE RIGHT AUDIENCE FOR THIS
13 MATERIAL -- THOSE KINDS OF ISSUES. AND THEN IF THE ANSWER
14 TO ALL OF THOSE QUESTIONS IS, YES, YOUR PAPER IS PUBLISHED
15 OR OFTEN PUBLISHED. AND THAT IS, IN ESSENCE, WHAT THE
16 PEER-REVIEW PROCESS IS LIKE.

17 Q. IT'S A RIGOROUS PROCESS DESIGNED TO INSURE, AMONG OTHER
18 THINGS, RELIABILITY, CORRECT?

19 A. RIGHT, AND THAT QUALITY MATERIAL IS BEING PUBLISHED.

20 Q. ALL RIGHT. YOU ARE, ARE YOU NOT, A MEMBER OF THE
21 NATIONAL ACADEMY OF SCIENCES?

22 A. I AM, YES.

23 Q. YOU HAVE TESTIFIED AS AN EXPERT MANY TIMES?

24 A. I HAVE PROBABLY TESTIFIED MAYBE 260 OR 270 TIMES IN THE
25 LAST 30 YEARS.

1 Q. IN SOME CASES, YOU HAVE TESTIFIED IN THE CONTEXT OF
2 MEMORY AS IT RELATES TO EYEWITNESS IDENTIFICATION?

3 A. YES.

4 Q. AND IN SOME CASES YOU HAVE TESTIFIED ABOUT ISSUES OF
5 MEMORY IN OTHER CONTEXTS, RIGHT?

6 A. CORRECT.

7 Q. CAN YOU GIVE US A COUPLE OF EXAMPLES OF CASES WHERE YOU
8 HAVE TESTIFIED ABOUT MEMORY OUTSIDE THE CONTEXT OF
9 EYEWITNESS MEMORY?

10 A. WELL, OUTSIDE THE CONTEXT OF EYEWITNESS IDENTIFICATION,
11 THERE ARE MANY CASES THAT INVOLVE MEMORY FOR OTHER ASPECTS
12 OF A SITUATION. SO, FOR EXAMPLE, I TESTIFIED IN THE
13 LITIGATION INVOLVING THE SOLDIERS WHO FLEW INTO A GONDOLA
14 CABLE IN ITALY AND SEVERED THE CABLE, AND MANY PEOPLE FELL
15 TO THEIR DEATH.

16 THE ISSUE WASN'T THE IDENTITY OF THE DEFENDANT OR
17 ANYBODY ELSE IN THAT, BUT WAS THE BEHAVIOR OF THE PLANE.
18 WAS IT FLYING TOO LOW? WAS IT GOING TOO FAST? WAS IT
19 HOTDOGGING? AND THERE WERE ISSUES OF POST-EVENT INFORMATION
20 AND POST-EVENT SUGGESTION THAT CAME INTO THAT PARTICULAR
21 CASE.

22 I HAVE TESTIFIED IN --

23 THE COURT: YOU MEAN MEMORY ABOUT PEOPLE HAVING
24 OBSERVED THE PLANE, OR PEOPLE WHO WERE FLYING THE PLANE, OR
25 WHAT?

1 THE WITNESS: NO, YOUR HONOR. IT WAS PEOPLE WHO
2 OBSERVED THE PLANE AND WERE MAKING CLAIMS ABOUT WHAT THEY
3 SAW AND REMEMBERED. IT JUST SO HAPPENED THAT THERE WAS
4 QUITE A BIT OF BIASED MEDIA COVERAGE THAT PRECEDED THEIR
5 RECOLLECTION. SO SOME OF MY EXPERT TESTIMONY HAD TO DO WITH
6 THE POSSIBLE IMPACT OF THAT BIASING INFORMATION.

7 BY MR. CLINE:

8 Q. JUST QUICKLY, ARE THERE OTHER CONTEXTS OUTSIDE OF THE
9 EYEWITNESS IDENTIFICATION CONTEXT WHERE YOU HAVE TESTIFIED?

10 A. WELL, I HAVE TESTIFIED, FOR EXAMPLE, IN A TRADE SECRETS
11 CASE WHERE ONE COMPANY IS SUING ANOTHER FOR MISAPPROPRIATION
12 OF TRADE SECRETS, AND THE ISSUE HAD TO DO WITH THE ABILITY
13 OF THE HUMAN MIND TO REMEMBER WHAT WAS LEARNED IN ONE
14 SETTING VERSUS WHAT WAS LEARNED AND REMEMBERED FROM ANOTHER
15 SETTING. NOTHING TO DO WITH EYEWITNESS IDENTIFICATION.

16 Q. WAS THERE A PERJURY CASE MANY YEARS AGO THAT YOU
17 TESTIFIED IN?

18 A. I DID, YES, A PERJURY CASE IN NEW YORK WHERE I TESTIFIED
19 ABOUT, AMONG OTHER THINGS, THE ABILITY TO REMEMBER WHEN
20 UNDER A GREAT DEAL OF PERSONAL STRESS.

21 Q. APART FROM YOUR TESTIMONY, YOU HAVE ALSO CONSULTED
22 WIDELY, HAVE YOU NOT?

23 A. YES.

24 Q. YOU HAVE CONSULTED WITH SOME FEDERAL GOVERNMENT
25 AGENCIES?

1 A. I HAVE, YES.

2 Q. INCLUDING THE F.B.I.?

3 A. WELL, I HAVE LECTURED ABOUT THE SUBJECT TO THE F.B.I.
4 AND THE SECRET SERVICE AND CONSULTED WITH THE C.I.A. AND
5 OTHER GOVERNMENT AGENCIES, USUALLY ABOUT MEMORY AND THE
6 MEMORY OF WITNESSES -- INTERVIEWING WITNESSES.

7 Q. OKAY. NOW, AMONG THE OTHER AREAS OF MEMORY STUDY THAT
8 YOU HAVE DONE, YOU HAVE EXAMINED THE EXTENT TO WHICH
9 POTENTIAL JURORS UNDERSTAND THE FINDINGS OF MEMORY RESEARCH
10 AS A MATTER OF COMMON SENSE, CORRECT?

11 A. I HAVE, YES.

12 Q. AND YOU HAVE CO-AUTHORED TWO ARTICLES THAT ADDRESSED
13 THAT TOPIC, RIGHT?

14 A. YES. IN ADDITION TO THE TWO ARTICLES, THERE ALSO IS A
15 DISCUSSION OF THAT SITUATION IN ONE OF MY BOOKS ON
16 EYEWITNESS TESTIMONY.

17 Q. ALL RIGHT.

18 A. OR MORE THAN ONE OF THE BOOKS, ACTUALLY.

19 Q. WE WILL GET TO THOSE ARTICLES IN JUST A SECOND.

20 MR. CLINE: MAY I APPROACH, YOUR HONOR?

21 THE COURT: YES.

22 BY MR. CLINE:

23 Q. LET ME HAND YOU WHAT I HAVE MARKED AS EXHIBIT ONE. IS
24 THAT YOUR C. V. AND PUBLICATION LIST?

25 A. YES.

1 MR. CLINE: YOUR HONOR, I WOULD LIKE TO OFFER THAT
2 AS DEFENDANT'S EXHIBIT NUMBER ONE.

3 THE COURT: ANY OBJECTION?

4 MR. FITZGERALD: NO, JUDGE. WE DON'T OBJECT TO
5 ANY OF THE EIGHT EXHIBITS.

6 THE COURT: VERY WELL. THEY WILL ALL BE ADMITTED
7 THEN IN YOU ARE GOING TO OFFER THEM.

8 MR. CLINE: GREAT. THANK YOU.

9 (WHEREUPON, DEFENDANT'S
10 **EXHIBITS NUMBERS 1 THROUGH 8**
11 WERE WAS RECEIVED IN
12 EVIDENCE.)

13 BY MR. CLINE:

14 Q. NOW, YOU UNDERSTAND, DR. LOFTUS, THAT MR. LIBBY SEEKS TO
15 CALL DR. ROBERT BJORK AS AN EXPERT WITNESS AT TRIAL ON
16 VARIOUS MATTERS RELATING TO MEMORY, CORRECT?

17 A. YES.

18 Q. AND SOME TIME AGO I PROVIDED YOU WITH A SUMMARY OF
19 DR. BJORK'S POINTS THAT HE PROPOSES TO TESTIFY ABOUT,
20 CORRECT?

21 A. YES.

22 MR. CLINE: MAY I APPROACH AGAIN, YOUR HONOR?

23 THE COURT: YES.

24 BY MR. CLINE:

25 Q. I HAND YOU WHAT I'VE MARKED AS EXHIBIT 2. IS THAT THE

1 SUMMARY THAT I PROVIDED TO YOU?

2 A. YES.

3 Q. AND I ASKED YOU, DID I NOT, TO ASSESS THE EXTENT TO
4 WHICH DR. BJORK'S 13 POINTS ARE MATTERS THAT JURORS KNOW OR
5 DON'T KNOW AS A MATTER OF COMMON SENSE OR COMMON KNOWLEDGE,
6 RIGHT?

7 A. YES.

8 Q. AND YOU HAVE MADE THAT ASSESSMENT AS BEST YOU CAN?

9 A. I TRIED TO, YES.

10 Q. OKAY. AND IN MAKING YOUR ASSESSMENT ABOUT DR. BJORK'S
11 POINTS, YOU HAVE RELIED ON CERTAIN STUDIES, HAVE YOU NOT?

12 A. WELL, I HAVE RELIED MOSTLY ON CERTAIN STUDIES THAT ARE
13 PUBLISHED AND, TO SOME EXTENT, ON MY OWN OBSERVATIONS, BUT
14 MOSTLY ON THOSE STUDIES.

15 Q. ALL RIGHT.

16 MR. CLINE: YOUR HONOR, MAY I APPROACH AGAIN?

17 THE COURT: YES.

18 BY MR. CLINE:

19 Q. DR. LOFTUS, I AM GOING TO HAND YOU WHAT I HAVE MARKED AS
20 EXHIBITS 3 THROUGH 8, AND I ASK YOU TO TAKE A MINUTE TO LOOK
21 AT THOSE.

22 ARE THESE THE STUDIES THAT YOU HAVE RELIED UPON?

23 A. YES.

24 Q. CAN YOU BRIEFLY GO THROUGH THESE EXHIBIT-BY-EXHIBIT AND
25 JUST TELL US WHAT THEY ARE AND IN A COUPLE SENTENCES

1 SUMMARIZE THE STUDIES, STARTING WITH EXHIBIT 3, WHICH IS
2 YOUR OWN 2006 STUDY?

3 A. YES. EXHIBIT 3 IS A 2006 PUBLICATION IN THE JURIMETRICS
4 JOURNAL THAT I HAVE CO-AUTHORED WITH THREE CO-AUTHORS. AND
5 IT REPORTS THE RESULTS OF A SURVEY THAT WAS CONDUCTED WITH
6 POTENTIAL JURORS FROM THE WASHINGTON, D. C. AREA.

7 THIS SURVEY GATHERED DATA IN 2004 AND PRESENTED
8 THOSE JURORS WITH A NUMBER OF QUESTIONS AND STATEMENTS
9 DESIGNED TO ASSESS WHETHER THEY UNDERSTAND THE WORKINGS OF
10 MEMORY OR HOW CERTAIN FACTORS AFFECT MEMORY, OR, CONVERSELY,
11 DO THEY HAVE MISCONCEPTIONS, OR DO THEY HOLD BELIEFS THAT
12 ARE INCONSISTENT OR CONTRADICTED BY SCIENTIFIC EVIDENCE.

13 Q. OKAY. WE WILL BE TALKING MORE ABOUT EACH OF THESE
14 STUDIES, BUT TURNING TO EXHIBIT 4, CAN YOU TELL US WHAT THAT
15 IS?

16 A. EXHIBIT 4 IS A STUDY THAT I CO-AUTHORED WITH KENNETH
17 DEFFENBACHER, PUBLISHED IN 1982. AND THIS IS A STUDY THAT
18 AGAIN TRIED TO PRESENT STATEMENTS AND QUESTIONS TO POTENTIAL
19 JURORS, OR PEOPLE WHO WOULD BE ABLE TO SERVE ON JURIES: ONE
20 SAMPLE IN THE STATE OF WASHINGTON, ONE SAMPLE IN THE STATE
21 OF NEBRASKA, AND THEN THE FINAL SAMPLE WERE POTENTIAL JURORS
22 FROM THE WASHINGTON D.C. AREA. AND IN RESPONSE TO CONCERNS
23 OF THE JUDGE, THAT LAST STUDY, THE ONE WITH THE
24 WASHINGTON, D. C. JURORS, DID INCLUDE INDIVIDUALS WHO HAD
25 FINISHED THEIR JURY SERVICE.

1 Q. ALL RIGHT. THANK YOU.

2 THE COURT: IN REFERENCE TO THOSE JURORS, LET ME
3 JUST ASK HAD THEY, IN FACT, BEEN INVOLVED IN A TRIAL WHERE
4 MEMORY WAS, IN FACT, AN ISSUE?

5 THE WITNESS: YOUR HONOR, WE DON'T KNOW THAT. ALL
6 WE KNOW IS THAT THEY WERE ENDING THEIR TWO WEEKS OF JURY
7 SERVICE WHEN THEY WERE APPROACHED AND PARTICIPATED IN THE
8 SURVEY, AND THEIR RESPONSES TO THE QUESTIONS WERE NOT
9 DIFFERENT FROM A GROUP THAT HAD NOT ACTUALLY BEEN RECRUITED
10 AFTER HAVING GONE THROUGH JURY SERVICE.

11 THE COURT: HAD THEY ALL BEEN JURORS WHO HAD
12 ACTUALLY SAT ON A JURY THROUGH THE ENTIRE PROCESS?

13 THE WITNESS: WE DON'T KNOW THAT. ALL WE KNOW IS
14 THAT THEY'D FINISHED THEIR TWO-WEEK JURY SERVICE. THAT IS
15 ALL WE KNOW. WE DIDN'T ASK THEM THE KIND OF QUESTIONS THAT
16 YOU ARE ASKING NOW.

17 THE COURT: OKAY.

18 BY MR. CLINE:

19 Q. TURN, PLEASE, TO EXHIBIT 5 AND TELL US WHAT THAT IS.

20 A. EXHIBIT 5 IS A 2006 PUBLICATION, THE FIRST AUTHOR OF
21 WHICH IS BENTON. SO SOMETIMES IT IS REFERRED TO AS THE
22 BENTON REPORT. AND THIS IS A STUDY OF, AGAIN, PRESENTING
23 ITEMS AND STATEMENTS AND QUESTIONS NOT ONLY TO POTENTIAL
24 JURORS, BUT ALSO TO JUDGES, AND LAW ENFORCEMENT, AND EXPERTS
25 TO BE ABLE TO COMPARE THE KNOWLEDGE THAT POTENTIAL JURORS

1 HAVE AND ALSO THE KNOWLEDGE THAT JUDGES AND LAW ENFORCEMENT
2 HAVE ABOUT THE FACTORS THAT AFFECT EYEWITNESS MEMORY OR
3 MEMORY, MORE GENERALLY.

4 Q. ALL RIGHT. EXHIBIT 6?

5 A. EXHIBIT 6 IS A 2001 PUBLICATION. THE FIRST AUTHOR OF IT
6 IS KASSIN -- SAUL KASSIN, WHO WAS A PROFESSOR AT WILLIAMS
7 COLLEGE AND HAS NOW MOVED TO JOHN JAY COLLEGE IN NEW YORK.
8 AND THIS IS A STUDY OF EXPERTS -- APPROXIMATELY 64 EXPERTS
9 -- ASKING THEM QUESTIONS ABOUT THEIR KNOWLEDGE OF THE
10 SCIENTIFIC EVIDENCE, WHETHER THEY FEEL CERTAIN PROPOSITIONS
11 ARE RELIABLE, WOULD THEY BE WILLING TO TESTIFY ABOUT THESE,
12 AND ALSO ASKING THEM WHETHER THEY THINK THAT AS A MATTER OF
13 COMMON SENSE, JURORS WOULD UNDERSTAND THESE PROPOSITIONS.

14 SO THIS IS A STUDY OF THE EXPERTS PUBLISHED IN
15 2001.

16 Q. ALL RIGHT. EXHIBIT 7, PLEASE.

17 A. EXHIBIT 7 BY WISE AND SAFER IS AN ATTEMPT TO FIND OUT
18 WHAT JUDGES BELIEVE TO BE TRUE ABOUT EYEWITNESS TESTIMONY
19 AND MEMORY. AND SO MANY OF THE STATEMENTS THAT HAD BEEN
20 POSED TO EXPERTS IN OTHER STUDIES ARE NOW POSED TO A SAMPLE
21 OF JUDGES. SO IT THEN COULD COMPARE THE JUDGES IN THIS
22 PARTICULAR SAMPLE AND THEIR KNOWLEDGE TO EXPERT OPINION.

23 Q. YOU HAVE MENTIONED A COUPLE OF STUDIES THAT TOUCH ON
24 JUDGES' UNDERSTANDING OF HOW MEMORY WORKS, CORRECT?

25 A. YES.

1 Q. WE ARE NOT GOING TO SPEND A LOT OF TIME ON JUDGES, YOUR
2 HONOR, BUT IS IT FAIR TO SAY THAT THE STUDY SHOWED THAT
3 JUDGES GENERALLY HAVE A BETTER UNDERSTANDING OF HOW MEMORY
4 WORKS THAN POTENTIAL JURORS?

5 A. ON MANY OF THE POINTS, YES.

6 Q. EXHIBIT 8?

7 A. EXHIBIT 8 IS A STUDY THAT WAS DONE BY DAN YARMEY. IT
8 WAS PUBLISHED IN 1983. THE TITLE IS "IS THE PSYCHOLOGY OF
9 EYEWITNESS IDENTIFICATION A MATTER OF COMMON SENSE?" AND
10 THIS IS A STUDY THAT COMPARED EXPERTS -- A NEW SAMPLE OF
11 EXPERTS TO POTENTIAL JURORS AND TO LEGAL PROFESSIONALS AND
12 LAW STUDENTS TO ASSESS THEIR LEVELS OF KNOWLEDGE OF THESE
13 PARTICULAR PROPOSITIONS HAVING TO DO WITH MEMORY AND
14 EYEWITNESS TESTIMONY.

15 Q. ALL RIGHT. BY THE WAY, EXHIBIT 8 HAS SOME SCRIBBLINGS
16 AND UNDERLININGS AND SO FORTH, RIGHT?

17 A. IT DOES, YES.

18 Q. AND THOSE ARE YOURS, ARE THEY NOT?

19 A. YES. THIS WAS A BOOK CHAPTER THAT I SCRIBBLED ON.

20 MR. CLINE: I APOLOGIZE FOR THIS, YOUR HONOR. IT
21 IS THE ONLY COPY WE COULD FIND.

22 BY MR. CLINE:

23 Q. OKAY. SO THOSE ARE THE STUDIES THAT YOU HAVE RELIED
24 UPON IN ATTEMPTING TO ASSESS WHETHER THE PROPOSITIONS DR.
25 BJORK INTENDS TO TESTIFY ABOUT ARE WITHIN JURORS' COMMON

1 KNOWLEDGE, CORRECT?

2 A. YES.

3 Q. I TAKE IT THOSE ARE NOT ALL THE STUDIES THAT HAVE EVER
4 BEEN DONE ON THE SUBJECT, RIGHT?

5 A. NO. THERE ARE MORE STUDIES, INCLUDING STUDIES THAT HAVE
6 LOOKED AT KNOWLEDGE OF POTENTIAL JURORS AND OTHER CITIZENS
7 IN OTHER PARTS OF THE WORLD, BUT I DID NOT BRING IN ALL THE
8 REST OF THE LITERATURE.

9 Q. THESE ARE THE ONES YOU FOUND MOST PERTINENT?

10 A. WELL, SINCE MANY OF THEM WERE RECENT, THEY ARE GIVING US
11 CURRENT INFORMATION.

12 Q. AND IS IT FAIR TO SAY THAT THESE STUDIES, EXHIBITS 3
13 THROUGH 8, HAVE FINDINGS THAT BEAR UPON, IN YOUR VIEW, SOME
14 OF DR. BJORK'S POINTS, BUT NOT ALL?

15 A. CORRECT.

16 Q. WHAT I WOULD LIKE TO DO THEN IS TO START WITH THE BJORK
17 POINTS FOR WHICH THE STUDIES DO HAVE FINDINGS THAT YOU
18 BELIEVE ARE HELPFUL. ALL RIGHT? LET'S BEGIN WITH POINT
19 ONE.

20 THIS IS THE POINT, YOUR HONOR, THAT BEGINS WITH
21 THE PROPOSITION THAT HUMAN MEMORY DOES NOT FUNCTION LIKE A
22 TAPE RECORDER, AND THEN IT GOES ON TO DISCUSS SOME OF THE
23 DYNAMICS OF MEMORY.

24 DR. LOFTUS, HAVE YOU FOUND STUDIES THAT YOU
25 CONSIDERED HELPFUL IN ASSESSING WHETHER POTENTIAL JURORS

1 WOULD UNDERSTAND WHAT'S SET FORTH IN POINT ONE OF
2 DR. BJORK'S PROPOSED TESTIMONY AS A MATTER OF COMMON
3 KNOWLEDGE?

4 A. WELL, POINT ONE, OF COURSE, IS A LITTLE BIT LONGER AND
5 MORE COMPLICATED THAN WHAT YOU JUST READ AND HAS TO DEAL
6 WITH PRE- AND POST-EVENT INFORMATION, BUT I AM GOING TO TAKE
7 THAT UP LATER BECAUSE IT IS ALSO RELATED TO ANOTHER POINT.

8 ON A PIECE OF DR. BJORK'S POINT ONE, DO JURORS
9 THINK THAT HUMAN MEMORY WORKS LIKE A VIDEO TAPE RECORDER,
10 THAT YOU RECORD THE EVENT AND PLAY IT BACK LATER AT A LATER
11 TIME, AT LEAST ONE STUDY DOES HAVE A QUESTION THAT BEARS ON
12 THAT. IT'S THE STUDY -- THE 2006 STUDY THAT I CO-AUTHORED
13 THAT IS PUBLISHED IN THE JURIMETRICS JOURNAL, THE ONE THAT
14 SURVEYED A THOUSAND WASHINGTON, D. C. POTENTIAL JURORS.

15 Q. LET ME INTERRUPT YOU FOR ONE SECOND.

16 A. YES.

17 Q. DO YOU HAVE SOME NOTES THAT WOULD BE HELPFUL TO YOU IN
18 TALKING ABOUT THESE STUDIES?

19 A. WELL, I DO. I DID PREPARE SOME NOTES SO THAT I COULD
20 FIND THE PROPER PAGE OF THESE ARTICLES QUICKLY AND NOT WASTE
21 EVERYBODY'S TIME.

22 Q. ALL RIGHT.

23 THE COURT: DO YOU HAVE ANY OBJECTION TO HER USING
24 THOSE?

25 MR. FITZGERALD: NO, JUDGE.

1 THE COURT: VERY WELL.

2 MR. CLINE: WE HAVE PROVIDED A COPY TO THE
3 GOVERNMENT.

4 THE COURT: OKAY.

5 MR. FITZGERALD: I AM HAPPY TO HAVE IT RECEIVED AS
6 AN EXHIBIT, IF THAT HELPS.

7 MR. CLINE: NO. JUST FOR HER ASSISTANCE.
8 BY MR. CLINE:

9 Q. OKAY. DR. LOFTUS, I AM SORRY TO INTERRUPT. CONTINUE,
10 PLEASE, WITH POINT ONE OF DR. BJORK'S PROFFERED TESTIMONY.

11 A. ON PAGE 195 AND 196 OF THIS JURIMETRICS ARTICLE --

12 Q. THIS IS EXHIBIT 3 YOU ARE TALKING ABOUT?

13 A. THIS IS EXHIBIT 3. ONE CAN READ THAT THESE POTENTIAL
14 JURORS WERE ASKED A QUESTION LIKE THIS:

15 "NOW I AM GOING TO READ YOU A SERIES OF
16 STATEMENTS, AND I WOULD LIKE YOU TO TELL ME WHETHER YOU
17 BELIEVE EACH ONE IS TRUE OR FALSE."

18 AND THEN ONE OF THOSE STATEMENTS IS: "THE ACT OF
19 REMEMBERING A TRAUMATIC EVENT IS LIKE A VIDEO RECORDING IN
20 THAT ONE CAN RECALL DETAILS AS IF THEY HAD BEEN IMPRINTED OR
21 BURNED INTO ONE'S BRAIN."

22 OF THIS SAMPLE OF APPROXIMATELY A THOUSAND
23 POTENTIAL JURORS, 46 PERCENT SAID THEY THOUGHT THAT WAS
24 TRUE, 48 PERCENT SAID THEY THOUGHT IT WAS FALSE, AND 6
25 PERCENT SAID THEY WEREN'T SURE WHETHER IT WAS TRUE OR FALSE.

1 SO HERE IS A QUESTION THAT IS TELLING YOU --
2 WHETHER YOU WANT TO USE THE 46-PERCENT FIGURE THAT SAID IT
3 WAS TRUE, OR COMBINE IT WITH THE SIX PERCENT WHO SAID THEY
4 WEREN'T SURE, PRODUCING A FIGURE OF 52 PERCENT -- THAT ABOUT
5 HALF OF THIS SAMPLE AGREED WITH THIS STATEMENT THAT AT LEAST
6 FOR A TRAUMATIC EVENT, MEMORY WORKS LIKE A VIDEO RECORDING,
7 AND THAT DEFIES WHAT WE KNOW ABOUT THE WORKINGS OF MEMORY.
8 I MEAN VIRTUALLY ALL MEMORY EXPERTS GO OUT OF THEIR WAY TO
9 MAKE THE POINT THAT IT DOESN'T WORK LIKE A VIDEO TAPE
10 RECORDER.

11 Q. ALL RIGHT. ANYTHING ELSE ABOUT POINT ONE OTHER THAN THE
12 POST-EVENT INFORMATION THAT WE WILL GET TO IN A MINUTE?

13 A. WELL, THIS IS ACTUALLY THE ONLY QUESTION THAT I COULD
14 FIND THAT REALLY GETS AT THAT VIDEO-RECORDING ISSUE. SO I
15 WOULD MOVE ON TO LATER POINTS.

16 THE COURT: SO I DON'T FORGET MY QUESTIONS THAT I
17 HAVE, LET ME JUST ASK, DOCTOR, IN THOSE SITUATIONS WHERE
18 THOSE TYPES OF RESPONSES WERE GIVEN, WHICH OBVIOUSLY ARE NOT
19 ACCURATE, WERE THERE ANY EXPERIMENTS DONE WHEREBY THE
20 POTENTIAL INDIVIDUALS WERE THEN SUBJECTED TO SOMETHING OF A
21 TRAUMATIC NATURE, AND THEN ASKED TO RECALL IT, AND THEN TOLD
22 ACTUALLY WHAT OCCURRED THAT WOULD SHOW THAT THEIR RECALL WAS
23 ACTUALLY OFF-POINT, AND THEN RESURVEYED TO SEE WHETHER THEY
24 STILL HELD THOSE BELIEFS?

25 THE WITNESS: NO.

1 THE COURT: THANK YOU.

2 BY MR. CLINE:

3 Q. POINT TWO. AND THIS HAS TO DO WITH THE RECONSTRUCTION
4 PROCESS AT THE TIME OF RETRIEVAL AND HOW THAT CAN BE
5 AFFECTED?

6 A. DR. BJORK'S POINT TWO ON RECONSTRUCTION BEING AFFECTED
7 BY THINGS LIKE EXPECTATIONS AND SO ON -- IN EXHIBIT 6, WHICH
8 IS THE STUDY BY KASSIN OF APPROXIMATELY 64 EXPERTS, ONE OF
9 THOSE ITEMS, WHICH IS ITEM 16, WHICH YOU CAN SEE ON PAGE
10 408, IS AN ITEM THAT READS: "AN EYEWITNESS'S PERCEPTION AND
11 MEMORY FOR AN EVENT MAY BE AFFECTED BY HIS OR HER ATTITUDES
12 AND EXPECTATIONS."

13 NINETY-TWO PERCENT OF THE EXPERTS SAID THAT THIS
14 WAS A RELIABLE STATEMENT. YOU CAN SEE THAT FIGURE BY GOING
15 TO TABLE 4 AND GOING DOWN ABOUT SIX ITEMS -- OR SEVEN -- AND
16 YOU WILL SEE THAT 92 PERCENT OF THE EXPERTS SAY THAT THAT IS
17 RELIABLE.

18 AND, IN GENERAL, THE EXPERTS DON'T THINK IT IS
19 HIGHLY COMMON SENSE. OF COURSE, THESE EXPERTS WHO ARE
20 THINKING IT IS NOT HIGHLY COMMON SENSE DID NOT HAVE THE
21 BENEFIT OF THE 2006 BENTON RESEARCH, WHICH ACTUALLY LOOKED
22 AT JURORS. REMEMBER, THIS WAS THE STUDY THAT WAS DONE IN
23 THE STATE OF TENNESSEE. WHEREAS 92 PERCENT OF THE KASSIN
24 EXPERTS SAY THAT'S A RELIABLE STATEMENT, WHEN JURORS ARE
25 ACTUALLY ASKED ABOUT IT, IT IS HIGH, BUT IT IS NOT AS HIGH.

1 ONLY 81 PERCENT OF THE JURORS SAY THAT THAT STATEMENT IS
2 GENERALLY TRUE. THIS IS A SIGNIFICANT DIFFERENCE.

3 WHEN THE TENNESSEE JUDGES ARE COMPARED TO THE
4 EXPERTS, IT IS NOT SIGNIFICANTLY DIFFERENT. SO WHAT WE CAN
5 SAY, BASED ON THE TENNESSEE STUDY, IS THE JUDGES SEEM TO
6 UNDERSTAND THIS AT A LEVEL THAT IS CLOSE TO THE EXPERTS.
7 THE JURORS DON'T UNDERSTAND IT AS MUCH.

8 Q. AND THE "IT" THAT THEY DON'T UNDERSTAND IS THAT
9 ATTITUDES AND EXPECTATIONS CAN AFFECT THE RECONSTRUCTION OF
10 A MEMORY?

11 A. RIGHT. I MEAN IN THAT PARTICULAR ITEM, THERE IS A
12 FAIRLY HIGH RATE OF SAYING "GENERALLY TRUE," BUT IT IS STILL
13 SIGNIFICANTLY BELOW THAT OF THE EXPERTS.

14 AND THERE IS ONE OTHER STUDY THAT BEARS ON THIS
15 POINT, AND THAT IS THE STUDY OF JUDGES THAT WAS DONE BY WISE
16 AND SAFER. THEY, BY THE WAY, ARE HERE IN WASHINGTON, D. C.
17 AT CATHOLIC UNIVERSITY.

18 AND WHEN WISE AND SAFER PRESENTED THAT SAME
19 STATEMENT TO JUDGES -- I WOULD HAVE TO CHECK AND SEE WHETHER
20 THEY WERE WASHINGTON, D. C. JUDGES OR WHETHER THEY WERE FROM
21 A LARGER SAMPLE, BUT THE JUDGES GAVE A RESPONSE THAT WAS
22 CLOSE TO THE EXPERTS.

23 SO, AGAIN, THE JUDGES SEEMED TO UNDERSTAND THIS.
24 THAT IS, THEY GIVE A FIGURE THAT IS SIMILAR TO THE EXPERTS.
25 THE JURORS LESS SO. AND THAT'S WHAT WE KNOW ABOUT THAT

1 POINT, BASED ON THESE STUDIES.

2 Q. TO SORT OF VAGUELY INCAPSULATE THE POINT, WE ARE TALKING
3 ABOUT HOW EXPECTATIONS AND ATTITUDES CAN AFFECT THE
4 RECONSTRUCTION OF A MEMORY?

5 A. YES.

6 Q. OKAY. LET'S MOVE TO POINT 3 -- DR. BJORK'S POINT 3.

7 A. COULD I JUST CLARIFY?

8 Q. SURE.

9 A. I MEAN I DON'T MEAN TO BE SO PICKY, BUT THE QUESTION
10 TALKS ABOUT PERCEPTION AND MEMORY, AS OPPOSED TO BJORK'S
11 POINT TWO, WHICH TALKS ABOUT RECONSTRUCTION BEING AFFECTED
12 BY THESE THINGS. SO THE QUESTION IS INCLUDING EVEN SEEING
13 SOMETHING AT THE TIME.

14 Q. ALL RIGHT.

15 A. SO IT'S A PICKY POINT, BUT JUST TO BE PRECISE.

16 Q. OKAY. LET'S TURN TO BJORK'S POINT 3, AND THIS HAS TO DO
17 WITH THE CORRELATION BETWEEN A PERSON'S CONFIDENCE IN A
18 MEMORY AND THE ACTUAL ACCURACY OF THAT MEMORY.

19 A. YES. NOW, CONFIDENCE AND ACCURACY IS SOMETHING THAT
20 PSYCHOLOGISTS HAVE BEEN STUDYING AND WRITING ABOUT FOR QUITE
21 SOME TIME. AND SO WE KNOW THAT THE RELATIONSHIP BETWEEN
22 CONFIDENCE AND ACCURACY IS A RELATIVELY WEAK ONE. THAT
23 PEOPLE CAN BE VERY CONFIDENT ABOUT THINGS, EVEN WHEN THEY
24 ARE WRONG, AS WELL AS BE CONFIDENT WHEN THEY ARE RIGHT.

25 TO ASCERTAIN WHETHER PEOPLE IN GENERAL -- JURORS

1 IN PARTICULAR -- UNDERSTAND THIS ASPECT OF CONFIDENCE AND
2 ACCURACY, OR OTHER THINGS THAT THE SCIENCE HAS SHOWN ABOUT
3 CONFIDENCE LEVELS, THE JURIMETRICS 2006 STUDY THAT SURVEYED
4 A THOUSAND POTENTIAL JURORS IN THE D. C. AREA DID ASK A
5 QUESTION, NAMELY, "AN EYEWITNESS'S LEVEL OF CONFIDENCE IN
6 HIS OR HER IDENTIFICATION IS AN EXCELLENT INDICATOR OF THAT
7 EYEWITNESS'S RELIABILITY?" AND THE RESULTS SHOWED THAT 39
8 PERCENT THOUGHT THAT WAS TRUE. FIFTY-FIVE PERCENT SAID IT
9 WAS FALSE, AND SIX PERCENT WEREN'T SURE.

10 THAT WAS ONE QUESTION IN THE JURIMETRICS STUDY,
11 BUT THE JURIMETRICS STUDY ALSO HAD ANOTHER QUESTION ASKING
12 THOSE POTENTIAL JURORS TO COMPARE A CONFIDENT WITNESS WITH
13 ONE THAT WAS LESS CONFIDENT. AND IN MAKING THAT COMPARISON,
14 31 PERCENT SAID THAT THE CONFIDENT WITNESS WOULD BE MUCH
15 MORE RELIABLE THAN THE NON-CONFIDENT ONE. SEVENTEEN PERCENT
16 SAID THE CONFIDENT WITNESS IS SLIGHTLY MORE RELIABLE. THAT
17 STARTS TO GET CLOSEST TO THE BEST ANSWER. TWENTY-SIX
18 PERCENT -- MOST OF THEM SAID THEY WOULD BE EQUALLY RELIABLE.
19 ABOUT 17 PERCENT SAID THE LESS-CONFIDENT WITNESS WOULD BE
20 MORE RELIABLE. AND NINE PERCENT SAID NEITHER WOULD BE
21 RELIABLE, OR THEY WEREN'T SURE.

22 THESE ARE JUST A COUPLE OF EXAMPLES SHOWING
23 JURORS' EITHER LACK OF KNOWLEDGE, CONFUSION, OR INABILITY TO
24 GIVE THE RIGHT ANSWER TO A QUESTION THAT WOULD TAP INTO
25 THEIR UNDERSTANDING OF THE CONFIDENCE-ACCURACY RELATIONSHIP.

1 THERE IS ONE MORE STUDY OR ONE MORE BIT OF DATA ON
2 THIS THAT I THINK IS IMPORTANT TO MENTION, AND THAT IS IN
3 THE KASSIN 2001 PAPER THAT QUESTIONED THE EXPERTS, ASKING
4 THEM THIS QUESTION: AN EYEWITNESS'S CONFIDENCE IS NOT A
5 GOOD PREDICTOR OF HIS OR HER IDENTIFICATION ACCURACY? -- IT
6 IS WORDED DIFFERENTLY, BUT THE EXPERTS -- 87 PERCENT OF THEM
7 SAID THIS WAS RELIABLE. AND THEY REALLY DIDN'T THINK JURORS
8 WOULD UNDERSTAND THIS.

9 WELL, WE HAVE DATA FROM BENTON, THE TENNESSEE
10 POTENTIAL JURORS. WHAT DO JURORS UNDERSTAND? AND WHEREAS
11 87 PERCENT OF THE KASSIN EXPERTS THOUGHT THAT WAS RELIABLE,
12 ONLY 64 PERCENT OF THE JURORS SAID IT WAS GENERALLY TRUE, A
13 SIGNIFICANT DIFFERENCE.

14 SO HERE WE SEE EVIDENCE THAT JURORS DEVIATE
15 SUBSTANTIALLY FROM EXPERTS IN THIS FIELD IN TERMS OF THEIR
16 UNDERSTANDING OF THE CONFIDENCE-ACCURACY RELATIONSHIP.

17 Q. NOW, ON EACH OF THESE POINTS THAT WE HAVE EXAMINED --
18 AND, OF COURSE, THERE ARE MORE TO COME -- IS IT FAIR TO SAY
19 THAT THE STUDY SHOWED THAT SOME PERCENTAGE OF JURORS DO
20 UNDERSTAND ACCURATELY THE POINT?

21 A. OH, ABSOLUTELY. ON EVERY ITEM, YOU WILL GET SOME
22 JURORS -- AND SOMETIMES QUITE A FEW OF THEM -- GIVING THE
23 RIGHT ANSWER.

24 Q. AND THEN THERE ARE ALSO OTHERS WHO DON'T UNDERSTAND,
25 CORRECT?

1 A. CORRECT.

2 Q. ALL RIGHT. LET'S MOVE TO -- IS THERE ANYTHING MORE ON
3 CONFIDENCE AND ACCURACY, POINT 3?

4 A. WELL, THERE IS ANOTHER ASPECT OF CONFIDENCE. THERE HAS
5 BEEN A NUMBER OF STUDIES RECENTLY THAT SHOW THAT CONFIDENCE
6 IS MALLEABLE. THAT CONFIDENCE IS AFFECTED BY INFORMATION
7 THAT SOMEBODY GETS LATER.

8 IF YOU SAY TO A WITNESS, "YOU KNOW THAT'S THE
9 RIGHT ANSWER," OR "ANOTHER WITNESS SAID THE SAME THING," IT
10 INCREASES THE CONFIDENCE OF THAT FIRST WITNESS. IT DIDN'T
11 DO ANYTHING TO THE ACCURACY, BUT IT MAKES THEM MORE
12 CONFIDENT. AND SO DO JURORS UNDERSTAND THAT CONFIDENCE IS
13 MALLEABLE AND THAT IT CAN BE AFFECTED BY THINGS THAT HAPPEN
14 LATER?

15 THE KASSIN 2001 EXPERTS WERE ASKED A QUESTION
16 ABOUT THIS -- WHAT DO THEY BELIEVE TO BE TRUE, AND WOULD
17 THEY FIND THIS INFORMATION RELIABLE. WOULD THEY BE WILLING
18 TO TESTIFY ABOUT IT IN COURT?

19 THEY WERE ASKED THE QUESTION: AN EYEWITNESS'
20 CONFIDENCE CAN BE INFLUENCED BY FACTORS THAT ARE UNRELATED
21 TO ACCURACY? AND THE EXPERTS SAID THAT WAS RELIABLE 95
22 PERCENT OF THE TIME -- 95 PERCENT OF THE EXPERTS SAID THAT
23 WAS RELIABLE, AND THEY DID NOT THINK JURORS WOULD FIND THAT
24 TO BE A MATTER OF COMMON SENSE.

25 WELL, A FEW YEARS LATER, BENTON IN TENNESSEE WENT

1 OUT AND ASKED THE JURORS: WHAT DO YOU THINK ABOUT THAT
2 STATEMENT? AND WHEREAS THE 95 PERCENT OF EXPERTS SAID THAT
3 THAT WAS RELIABLE, THE JURORS SAID "GENERALLY TRUE" ONLY
4 FIFTY PERCENT OF THE TIME, WHICH IS QUITE A LARGE
5 DIFFERENCE.

6 Q. SO, IN OTHER WORDS, TO SIMPLIFY IT, ROUGHLY HALF THE
7 JURORS -- POTENTIAL JURORS, I SHOULD SAY -- ROUGHLY HALF OF
8 THE POTENTIAL JURORS DIDN'T UNDERSTAND THAT POINT, THAT
9 CONFIDENCE IS MALLEABLE.

10 A. RIGHT. ONLY HALF OF THEM GAVE THE ANSWER "GENERALLY
11 TRUE." THAT MEANS THE OTHER HALF WOULD HAVE GIVEN EITHER
12 "GENERALLY FALSE" OR MAYBE THEY MIGHT HAVE SAID THEY DIDN'T
13 KNOW.

14 Q. ALL RIGHT.

15 ANYTHING ELSE ON CONFIDENCE AND ACCURACY?

16 A. WELL, THERE ARE OTHER STUDIES THAT BEAR ON THIS, BUT I
17 THINK THAT WE HAVE ENOUGH EXAMPLES HERE SHOWING THAT EXPERTS
18 AGREE ON THIS POINT AND JURORS ARE DEMONSTRATING A LACK
19 OF -- MANY OF THEM, A LACK OF AWARENESS OF THIS PHENOMENON.

20 Q. ALL RIGHT. SHALL WE TAKE POINTS FOUR AND FIVE TOGETHER?

21 A. YES. I THINK THEY ARE RELATED. THE IDEA THAT THERE CAN
22 BE A MEMORY-CONJUNCTION ERROR -- THAT YOU CAN TAKE A DETAIL
23 FROM THIS SITUATION AND COMBINE IT WITH YOUR MEMORY FOR
24 ANOTHER SITUATION AND CONSTRUCT AN ALTERED MEMORY OUT OF IT.
25 THAT IS A MEMORY-CONJUNCTION ERROR. AND THE IDEA OF

1 SOURCE-MISATTRIBUTION ERROR WHERE YOU REMEMBER THE CONTENT
2 FROM ONE SITUATION AND YOU REMEMBER THE SOURCE FROM A
3 DIFFERENT SITUATION, AND YOU COMBINE THOSE TOGETHER -- THEY
4 ARE REALLY A CLOSELY-RELATED PHENOMENA.

5 Q. ALL RIGHT. AND DID YOU FIND STUDIES THAT ARE HELPFUL IN
6 ASSESSING THE EXTENT TO WHICH JURORS UNDERSTAND THOSE
7 PHENOMENA AS A MATTER OF COMMON KNOWLEDGE?

8 A. NOTHING IN THESE ARTICLES USES THE WORD
9 "SOURCE-MISATTRIBUTION ERROR" OR "MEMORY-CONJUNCTION ERROR,"
10 BUT THERE IS A CLOSELY RELATED PHENOMENON, AN EXAMPLE OF A
11 MEMORY CONJUNCTION ERROR THAT IS ASKED ABOUT IN SOME OF
12 THESE STUDIES OF JUROR KNOWLEDGE. AND I AM THINKING ABOUT
13 THE PHENOMENON OF UNCONSCIOUS TRANSFERENCE.

14 THERE HAVE BEEN MANY STUDIES -- ACTUALLY, A FEW
15 STUDIES OF UNCONSCIOUS TRANSFERENCE THAT SHOW THAT SOMETIMES
16 PEOPLE WILL SEE A PERSON IN ONE SITUATION, AND HE LOOKS
17 FAMILIAR. AND THEY THINK THEY SAW HIM BEFORE IN A DIFFERENT
18 SITUATION THAN THE ONE THEY REALLY SAW HIM IN. SO THEY
19 THINK THEY ARE IDENTIFYING SOMEBODY WHO COMMITTED A CRIME,
20 WHEN, IN FACT, THEY ARE IDENTIFYING SOMEBODY WHO SHOPPED IN
21 THE STORE ON A FEW OCCASIONS.

22 THAT IS AN UNCONSCIOUS TRANSFERENCE, WHERE YOU
23 MISTAKENLY IDENTIFY SOMEBODY FROM A DIFFERENT CONTEXT.

24 THE KASSIN EXPERTS IN 2001 WERE ASKED A QUESTION
25 AND ASKED WHETHER THEY THOUGHT THIS WAS RELIABLE.

1 "EYEWITNESSES SOMETIMES IDENTIFY, AS A CULPRIT, SOMEONE THEY
2 HAVE SEEN IN ANOTHER SITUATION OR CONTEXT?" EIGHTY-ONE
3 PERCENT OF THE EXPERTS THOUGHT THIS WAS RELIABLE, AND THEY
4 DIDN'T THINK IT WOULD BE COMMON SENSE --

5 Q. I'M SORRY. LET ME JUST INTERRUPT ONE SECOND. WHEN YOU
6 SAY 81 PERCENT OF THE EXPERTS THOUGHT THIS WAS RELIABLE, YOU
7 MEAN 81 PERCENT OF THE EXPERTS THOUGHT THAT PROPOSITION WAS
8 CORRECT?

9 A. RELIABLE, RIGHT. THOSE EXPERTS WERE ALSO ASKED WHETHER
10 THEY THOUGHT THIS WAS COMMON SENSE. AND THEY DIDN'T THINK
11 IT WOULD BE COMMON SENSE. BUT WHEN BENTON GAVE THAT SAME
12 STATEMENT TO JURORS -- POTENTIAL JURORS -- 31 PERCENT -- I
13 AM SORRY -- 30 PERCENT OF THOSE JURORS THOUGHT THE STATEMENT
14 WAS GENERALLY TRUE.

15 SO YOU CAN SEE THERE IS A SIZABLE DIFFERENCE
16 BETWEEN THE EXPERTS' APPRECIATION OF THE STATEMENT AT 80
17 PERCENT AND THE JURORS' APPRECIATION AT 30 PERCENT.

18 SO THERE IS ANOTHER EXAMPLE OF JURORS NOT
19 DEMONSTRATING AN APPRECIATION FOR THE IDEA THAT THIS
20 PHENOMENON CAN HAPPEN, AT LEAST IN THAT WAY.

21 Q. ARE THERE ANY OTHER STUDIES THAT ARE HELPFUL ON POINTS
22 FOUR AND FIVE?

23 A. WELL, THE JURIMETRICS STUDY FROM 2006, THE ONE THOUSAND
24 POTENTIAL JURORS FROM WASHINGTON, D. C. -- THEY WERE ALSO
25 ASKED A QUESTION THAT WOULD HAVE TAPPED INTO THEIR

1 UNDERSTANDING OF UNCONSCIOUS TRANSFERENCE. IT SHOWED
2 SOMEWHAT HIGHER RATES OF JUROR UNDERSTANDING, WITH 73
3 PERCENT SAYING THAT THE STATEMENT THEY WERE ASKED WAS TRUE.
4 THE QUESTION WAS WORDED A LITTLE BIT DIFFERENTLY, AND WE
5 DON'T HAVE AN EXPERT FIGURE TO COMPARE THAT 73 PERCENT TO.

6 Q. BUT LET'S ASSUME THAT 73 PERCENT OF JURORS DID
7 UNDERSTAND THAT. I TAKE IT ONE CAN INFER THAT 27 PERCENT
8 EITHER DIDN'T KNOW OR HAD IT WRONG.

9 A. RIGHT. TWENTY-ONE PERCENT HAD IT WRONG, AND SIX PERCENT
10 DIDN'T KNOW.

11 Q. OKAY.

12 A. OR SAID THEY WEREN'T SURE.

13 Q. LET'S MOVE TO POINT 6.

14 A. WELL, POINT 6 IS -- THE ESSENCE OF POINT 6 IS IF
15 SOMEBODY RECALLS SOMETHING WRONG INITIALLY, LATER ON THEY
16 MAY HAVE A TENDENCY TO REPEAT THAT ERROR. AND IN THESE
17 STUDIES OF JUROR KNOWLEDGE, THERE'S NOT A QUESTION THAT ASKS
18 ABOUT THAT EXACTLY THAT WAY. THESE QUESTIONS -- THESE
19 STUDIES CERTAINLY WEREN'T DESIGNED WITH THIS PARTICULAR FACT
20 SITUATION IN MIND. BUT THERE IS ONE QUESTION THAT COMES
21 CLOSE TO THE ESSENCE OF THE IDEA THAT IF YOU MAKE AN ERROR,
22 THERE IS AN INCREASED TENDENCY TO REPEAT THAT ERROR OR A
23 TENDENCY TO REPEAT THAT ERROR LATER ON. AND THAT WOULD COME
24 FROM THE STUDY THAT I CO-AUTHORED WITH DEFFENBACHER BACK IN
25 1982. THIS IS EXHIBIT 4.