AND IN EXHIBIT 4, IF YOU LOOK AT PAGE 27, YOU WILL SEE THAT WE ASKED OUR POTENTIAL JURORS A SET OF QUESTIONS. THERE WERE 14 QUESTIONS DESIGNED TO TAP INTO A VARIETY OF TOPICS AND WHETHER THEY UNDERSTOOD THOSE TOPICS. AND ONE OF THEM -- ONE OF THOSE TOPICS IS ABOUT WHETHER VIEWING PHOTOGRAPHS AND PERHAPS SELECTING SOMEBODY FROM A PHOTOGRAPH THAT YOU MIGHT HAVE SEEN BEFORE AND PICKING THE WRONG PERSON, WILL THE ERROR PERSIST LATER ON WHEN YOU ARE AT A LIVE LINEUP OR TRYING TO IDENTIFY SOMEBODY IN PERSON.

OUR POTENTIAL JURORS WERE ASKED THIS QUESTION. A ROBBERY IS COMMITTED. LATER A CLERK WHO IS ROBBED AT GUNPOINT IDENTIFIES SOMEONE FROM A SET OF PHOTOGRAPHS AS THE PERSON WHO PERPETRATED THE CRIME. STILL LATER, THE CLERK IS ASKED WHETHER THE ROBBER IS PRESENT IN A LINEUP. WHICH OF THE FOLLOWING STATEMENTS IS TRUE? AND THE CORRECT ANSWER TO THIS IS "GUILTY OR NOT, IF THE PERSON IDENTIFIED IN THE PHOTOS IS PRESENT, HE/SHE IS LIKELY TO BE IDENTIFIED FROM THE LINEUP AS WELL?"

IT WAS TRYING TO TAP INTO THIS IDEA OF AN INCREASED CHANCE OF CONTINUING WITH THAT SAME ERROR AT THE TIME OF THE LINEUP.

IN THIS PARTICULAR STUDY, 60 PERCENT OF THE WASHINGTON STATE POTENTIAL JURORS GOT THE CORRECT ANSWER. FIFTY-TWO PERCENT OF THE NEBRASKA SAMPLE GOT THE CORRECT ANSWER.
I think an even better study of this phenomenon, though, is the one that was done by Yarmey and Jones because they were able to compare experts' opinions to jurors'. And we did not do that.

Q. One quick question on your article with Deffenbacher.
A. Yes.

Q. I take it D.C. jurors, who were the third cohort of persons that you asked, were not asked the question?
A. That's right. When we actually -- in the third study in this paper when we actually looked at the D.C. jurors, including ones who had gone through their two weeks of jury service -- although we don't know what kind of trial they served on, if they did -- we didn't ask this question of them.

Q. All right. Okay. You were about to move to Yarmey and Jones I think.
A. Yes. I just wanted to mention Yarmey and Jones -- this was the 1983 Canadian sample. They looked at experts and compared them to jurors. And, basically, one hundred percent -- they gave that same question that Deffenbacher had used to all of these subjects or participants in Canada. Sixteen of their experts picked answer "A." That is what the experts are likely to say -- they agree that is the right answer -- but less than half of the jurors gave that correct answer.
Q. WHAT PERCENTAGE OF THE EXPERTS GAVE THE CORRECT ANSWER?
A. ONE HUNDRED PERCENT.
Q. ONE HUNDRED PERCENT. AND WHAT PERCENTAGE OF THE JURORS?
A. THEY HAD TWO SAMPLES OF JURORS: ONE FROM A STUDENT
POPULATION OF POTENTIALS JURORS, AND THE OTHER FROM A
BROADER CITIZEN POPULATION. AND THOSE FIGURES WERE 43
PERCENT AND 45 PERCENT. SO NOT REALLY DIFFERENT FROM EACH
OTHER. SLIGHTLY LESS THAN HALF --
Q. ALL RIGHT.
A. -- ARE GIVING THE RIGHT ANSWER. SOMewhat MORE THAN HALF
ARE GIVING THE WRONG ANSWER TO A QUESTION THAT COULD
DEMONSTRATE SOME APPRECIATION FOR THE IDEA THAT AN INITIAL
RECALL THAT'S IN ERROR MIGHT PERSIST.
Q. ALL RIGHT. ANYTHING ELSE ON POINT 6 THAT YOU THINK IS
HELPFUL ON THIS ISSUE OF WHETHER JURORS UNDERSTAND THE POINT
AS A MATTER OF COMMON SENSE?
A. NO, NOT FROM THESE STUDIES.
Q. ALL RIGHT. NOW, THE NEXT POINT ON WHICH YOU FOUND THE
STUDIES THAT YOU CONSIDERED HELPFUL WAS POINT 8, CORRECT?
A. YES.
Q. AND THIS HAS TO DO WITH DIVIDED ATTENTION?
A. RIGHT. THE ESSENCE OF DR. BJORK'S POINT 8 IS THAT
DIVIDED ATTENTION AT THE TIME YOU ARE ENCODING, WHICH MEANS
WHEN YOU ARE HAVING THE EXPERIENCE THAT YOU ARE LATER GOING
TO TRY TO REMEMBER, WILL HURT YOUR ABILITY TO LATER RECALL
AND I DO HAVE TO SAY THAT NONE OF THESE STUDIES OF JUROR COMMON KNOWLEDGE THAT I HAVE REVIEWED TALKS ABOUT DIVIDED ATTENTION AS A PHRASE OR A CONCEPT. SO THE ONLY THING THAT I COULD FIND THAT I THINK SOMewhat RELATES TO THIS IDEA OF DIVIDED ATTENTION IS THERE ARE SOME SITUATIONS WHERE YOU HAVE SOMETHING GOING ON DURING THE EVENT THAT IS SO SIGNIFICANT THAT IT CAPTURES ATTENTION, AND THAT IS A CRIME SITUATION WITH A WEAPON PRESENT.

Q. THIS IS WHAT IS KNOWN COLLOQUIALy AS THE "WEAPON-FOCUS" ISSUE, CORRECT?

A. RIGHT. "WEAPON-FOCUS". WHEN A WEAPON IS PRESENT IN A CRIME SITUATION, IT OFTEN CAPTURES THE WITNESS' ATTENTION -- NOT ALL OF IT, BUT A LOT OF IT. IT LEAVES LESS TIME AVAILABLE FOR LOOKING AT OTHER PARTS OF THE SCENE, AND IT RESULTS IN A REDUCED ABILITY TO REMEMBER THOSE OTHER DETAILS, INCLUDING THE FACE OF THE PERSON THAT MIGHT BE HOLDING THE WEAPON.

THAT'S WHAT THE SCIENTIFIC STUDY SHOWED. THAT IS WHAT "WEAPON-FOCUS" IS, A PHENOMENON.

AND THERE ARE SOME STUDIES -- SOME ITEMS IN THESE STUDIES THAT TRY TO TAP INTO DO JURORS APPRECIATE THIS.

I MEAN WE DON'T EXPECT THEM TO APPRECIATE THE TECHNICALITIES THAT THE EYE-FIXATION DEVOTED TO THE WEAPON IS PROBABLY GOING TO -- IS GOING TO BE A LITTLE BIT LONGER,
335 milliseconds, instead of 250 milliseconds on a non-weapon. We don't expect them to appreciate that level of specificity, but do they appreciate the general idea that the weapon can draw attention away and result in reduced ability?

And the Kassin study of experts had a question on this. It asked this question: do you agree that this statement is reliable: the presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face?

Eighty-seven percent of the experts thought this was reliable. Ninety-seven percent of them said it had a research basis. But when those figures were compared to jurors, do jurors understand this?

We looked to the Benton Tennessee jurors because they are asked the same item. The presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face? They respond either "generally true," "generally false" or "don't know." And only 39 percent said that they thought this was generally true.

So that's quite a big difference between the experts' appreciation of this and the potential jurors'.

Q. The experts being in the 80's and the jurors at 39 percent, correct?

A. Correct.
Q. ALL RIGHT.

AND, AGAIN, "WEAPON-FOCUS" IS NOT PRECISELY
ANALOGOUS TO DIVIDED ATTENTION, BUT IT IS RELATED, IN YOUR
VIEW?
A. WELL, I THINK IT IS RELATED. THE DIVIDED -- YOU KNOW,
YOU CAN HAVE YOUR ATTENTION DIVIDED BECAUSE YOU ARE MENTALLY
WORRYING ABOUT SOMETHING ELSE, OR YOU CAN HAVE YOUR
ATTENTION DIVIDED BECAUSE SOMETHING IS DRAWING YOUR
ATTENTION AWAY FROM SOMETHING ELSE. THOSE AREN'T EXACTLY
THE SAME THINGS, BUT I THINK THEY ARE KIND OF COUSINS OF
EACH OTHER.
Q. ALL RIGHT. ANYTHING ELSE ON POINT 8, THE DIVIDED
ATTENTION?
A. WELL, I COULD POINT TO, YOU KNOW, OTHER STUDIES THAT
SHOW LACK OF APPRECIATION OF THIS PHENOMENON OF
"WEAPON-FOCUS," BUT I THINK I HAVE MADE THE POINT FAIRLY
WELL.
Q. ALL RIGHT.
A. THERE ARE OTHER EXAMPLES OF IT IN THESE STUDIES.
Q. ALL RIGHT. LET'S MOVE TO POINT TEN, AND THAT'S THE LAST
OF DR. BJORK'S POINTS FOR WHICH YOU FOUND THE STUDIES THAT
YOU CONCLUDE ARE HELPFUL IN ASSESSING JUROR UNDERSTANDING,
CORRECT?
A. CORRECT.
Q. ALL RIGHT. POINT TEN HAS TO DO WITH RETROACTIVE
INTERFERENCE, RIGHT?
A. RIGHT. RETROACTIVE INTERFERENCE -- THE EXTENT TO WHICH
NEW INFORMATION THAT YOU GET AFTER AN EVENT CAN CAUSE A
WEAKENING OF YOUR MEMORY FOR THINGS THAT HAPPEN EARLIER, OR
NEW INFORMATION THAT YOU GET AFTER AN EVENT IS SOMETHING WE
CALL POST-EVENT INFORMATION. IT CAN NOT ONLY LEAD TO A
WEAKENING OF EARLIER INFORMATION, BUT IT CAN ALSO LEAD TO
THE CREATION OF DISTORTED AND SOMETIMES EVEN WHOLLY FALSE
MEMORIES -- DISTORTED OR WHOLLY FALSE MEMORIES THAT YOU CAN
BE VERY DETAILED ABOUT, OR CONFIDENT ABOUT, OR EVEN
EMOTIONAL ABOUT.

THAT'S THE SCIENCE. AND, IN FACT, THAT IS THE
AREA WHERE I HAVE DONE HUNDREDS OF STUDIES INVOLVING MAYBE
20,000 PEOPLE OR MORE.

DO JURORS UNDERSTAND THAT POST-EVENT INFORMATION
CAN AFFECT SOMEBODY'S MEMORY? WELL, BENTON ASKED THE
TENNESSEE JURORS WHETHER IT WAS GENERALLY TRUE OR GENERALLY
FALSE THAT -- HERE'S THE ITEM -- "EYEWITNESS TESTIMONY ABOUT
AN EVENT OFTEN REFLECTS NOT ONLY WHAT THEY ACTUALLY SAW, BUT
ALSO INFORMATION THEY OBTAINED LATER ON?"

NINETY-FOUR PERCENT OF THE KASSIN EXPERTS AGREED
WITH THAT STATEMENT, BUT IN TERMS OF JURORS, THE TENNESSEE
JURORS, ONLY 60 PERCENT AGREE. AND THAT IS A SIGNIFICANT
DIFFERENCE.

Q. SO, IN OTHER WORDS, JUST TO CLARIFY THAT, YOU HAVE GOT
NEAR UNANIMITY ON THE PART OF EXPERTS THAT THAT IS A CORRECT STATEMENT, RIGHT?
A. RIGHT.
Q. AND YOU HAVE GOT 40 PERCENT OF JURORS WHO EITHER HAVE IT WRONG OR DON'T UNDERSTAND?
A. CORRECT.
Q. ALL RIGHT. ANYTHING ELSE ON RETROACTIVE INTERFERENCE?
A. WELL, IN A SOMewhat HIGHER FIGURE, BUT WE CAN'T COMPARE IT TO EXPERTS. THEY WEREN'T EXACTLY ASKED. BUT LET ME GIVE THIS, TOO, IN THE INTEREST OF COMPLETE DISCLOSURE HERE BECAUSE IT DOES SHOW A LITTLE BIT BETTER OR SOMEWHAT BETTER JUROR UNDERSTANDING.
THE JURIMETRICS STUDY, THE 2006 POTENTIAL JURORS FROM D. C. WERE ASKED A QUESTION ABOUT THIS. IT WAS WORDED DIFFERENTLY, BUT IT DID GET A HIGHER PERCENT OF JURORS SAYING -- GIVING AN ANSWER THAT REFLECTS THE SCIENCE.
AND THE WORDING WAS "EWITNESSES CAN BELIEVE THEY REMEMBER DETAILS ABOUT A CRIME THAT THEY ACTUALLY LEARNED ABOUT LATER FROM SOMEONE ELSE, SUCH AS THE POLICE?" AND 80 PERCENT THOUGHT THAT WAS TRUE. SIXTEEN PERCENT THOUGHT IT WAS FALSE. FOUR PERCENT WERE NOT SURE.
Q. SO EVEN WORDED THAT WAY, YOU HAVE GOT ROUGHLY A FIFTH OF THE JURORS WHO EITHER HAD IT WRONG OR DON'T UNDERSTAND,
A. THAT'S CORRECT. ANYHOW, THE DATA SPEAK FOR THEMSELVES.
WE COULD TRY TO FIGURE OUT WHY THE ANSWER IS SLIGHTLY DIFFERENT. I AM NOT SURE.

Q. ALL RIGHT. SO THOSE ARE THE POINTS FOR WHICH -- THE BJORK POINTS OUT OF THE 13 FOR WHICH YOU HAVE FOUND STUDIES OF JUROR KNOWLEDGE THAT YOU BELIEVE ARE HELPFUL IN ASSESSING THE EXTENT TO WHICH THOSE POINTS ARE KNOWN, CORRECT?
A. CORRECT.

Q. LET'S TURN NOW TO THE REMAINING POINTS, AND I WOULD LIKE TO BEGIN WITH POINT 7. AND POINT 7 IS, TO QUOTE DR. BJORK'S DISCLOSURE, "A PERSON IS MORE LIKELY TO ENCODE ACCURATELY AND RETRIEVE ACCURATELY INFORMATION THAT IS IMPORTANT TO HIM THAN INFORMATION THAT IS UNIMPORTANT TO HIM," CORRECT?
A. CORRECT.

Q. NOW, YOUhaven'T FOUND ANY STUDIES THAT ADDRESS WHETHER JURORS KNOW THAT AS A MATTER OF COMMON SENSE, CORRECT?
A. I COULD NOT FIND ANY ITEMS THAT ADDRESSED THAT. IT SEEMS TO ME THAT IT MIGHT BE A MATTER OF COMMON SENSE. I PROBABLY WOULDN’T HAVE WORDED THE POINT THAT WAY BECAUSE I WOULD HAVE SAID HIM OR HER, BUT WE’LL LEAVE THAT ASIDE.

Q. BUT PUTTING ASIDE THAT POINT, DRAWING ON YOUR KNOWLEDGE OF THE FIELD AND YOUR WORK IN THE FIELD, THAT IS ONE THAT YOU BELIEVE IS PROBABLY A MATTER OF COMMON KNOWLEDGE, CORRECT?
A. RIGHT. I THINK THE STATEMENT IS TRUE, BUT I THINK PROBABLY IF WE WERE TO GO OUT AND ASK POTENTIAL JURORS, THEY
WOULD PROBABLY SAY, "THAT MAKES SENSE TO ME."

Q. OKAY. LET'S LOOK AT POINT 9. THIS HAS TO DO WITH DIVIDED ATTENTION AT THE TIME OF RETRIEVAL, AS COMPARED TO POINT 8, WHICH HAS TO DO WITH DIVIDED ATTENTION AT THE TIME OF ENCODING, CORRECT?

A. CORRECT.

Q. DID YOU FIND ANYTHING IN THE STUDIES THAT YOU LOOKED AT THAT CONSIDERED WHETHER JURORS UNDERSTAND POINT 9 AS A MATTER OF COMMON SENSE?

A. I COULD NOT FIND ANY QUESTION DESIGNED TO TAP INTO JUROR KNOWLEDGE THAT WOULD GET AT THIS ISSUE OF WHETHER YOU ARE DISTRACTED AT THE TIME YOU ARE RETRIEVING THE INFORMATION OR RECONSTRUCTING THE PAST AND WHAT EFFECT THAT MIGHT HAVE. I JUST DON'T THINK THERE IS ANYTHING HERE. THERE ARE NO DATA BEARING ON IT. I AM NOT SURE WHAT WOULD HAPPEN IF WE DESIGNED A QUESTION TO TRY TO TAP INTO JUROR KNOWLEDGE. YOU KNOW, WE MIGHT FIND THAT SOME OF THEM AREE'T GIVING THE RIGHT ANSWER.

Q. OKAY. POINT 11. THIS HAS TO DO WITH WHAT'S CHARACTERIZED HERE AS THE "FORGOT IT ALL ALONG" PHENOMENON?

A. THE "FORGOT IT ALL ALONG" PHENOMENON -- NOW, THIS REFERS TO A SITUATION WHERE YOU THINK YOU ARE REMEMBERING SOMETHING FOR THE FIRST TIME AND THAT YOU HAVEN'T REMEMBERED IT FOR AN AWFUL LONG TIME, OR YOU HAVEN'T KNOWN IT BEFORE. AND THEN IT LATER TURNS OUT THAT YOU DID REMEMBER IT EARLIER, AND YOU
DID THINK ABOUT IT EARLIER, DESPITE THE FACT THAT YOU ARE
FEELING SOME ACTUAL SURPRISE AT THE TIME AT REMEMBERING IT.

THIS PHENOMENON HAS RECENTLY BEEN EXAMINED, IN
FACT, BY MY FORMER PH.D STUDENT, DR. SCHOOLER, WHO IS NOW A
PROFESSOR AT THE UNIVERSITY OF BRITISH COLUMBIA. HE IS THE
ONE WHO COINED THE TERM "FORGOT IT ALL ALONG" EFFECT. AND
IT'S SOMETHING THAT HAS BEEN REALLY RECENTLY WRITTEN ABOUT
IN THE LITERATURE IN THE LAST FIVE OR SIX YEARS.

THERE IS NO QUESTION IN THESE JUROR KNOWLEDGE
STUDIES THAT ASKED ABOUT THE "FORGOT IT ALL ALONG" EFFECT.

Q. DO YOU HAVE AN INTUITION THAT YOU WOULD BE PREPARED TO
SHARE WITH US AS TO WHETHER THIS IS SOMETHING THAT JURORS
WOULD UNDERSTAND AS A MATTER OF COMMON SENSE OR COMMON
KNOWLEDGE?

A. I THINK IF WE DESIGNED A QUESTION TO SEE WHETHER THEY
THOUGHT THIS WAS LIKELY TO HAPPEN OR THIS WAS A REAL
PHENOMENON, WE MIGHT FIND MANY JURORS THAT DON'T GET THE
RIGHT ANSWER TO THAT QUESTION. BUT, AGAIN, THIS IS JUST AN
INFERENCE BASED ON THE FACT THAT WHEN HE DISCOVERED THIS
PHENOMENON AND WROTE ABOUT IT, IT WAS CERTAINLY INTERESTING.
HE PUBLISHED IT. PEOPLE BEGAN TO CITE THE PHENOMENON. SO I
THINK EXPERTS IN THE FIELD DIDN'T THINK IT WAS COMMON SENSE.

Q. THAT WAS GOING TO BE MY NEXT QUESTION. I TAKE IT SINCE
THIS IS A RECENT DISCOVERY AND A FAIRLY NEW FINDING IN THE
FIELD OF MEMORY RESEARCH, THAT THAT'S THE CASE. THAT
EXPERTS IN THE FIELD -- UNTIL RECENTLY, EVEN THE EXPERTS IN
THE FIELD DIDN'T UNDERSTAND THIS PHENOMENON. IS THAT
CORRECT?
A. WELL, THEY WEREN'T THINKING ABOUT IT, AND THEY WEREN'T
APPRECIATING IT.
Q. OKAY. POINT 12 -- THIS HAS TO DO WITH VERBATIM RECALL
AND JUST RECALL AND, AMONG OTHER POINTS, THAT VERBATIM
RECALL DROPS OFF QUICKLY.
A. ITEM 12 REALLY IS ABOUT THE RECALL OF CONVERSATIONS.
AND DR. BJORK IS MAKING AN EXCELLENT POINT HERE, FOR WHICH
THERE IS RESEARCH THAT SHOWS THAT VERBATIM RECALL DROPS OFF
FAIRLY QUICKLY.

REMEMBERING THE EXACT WORDING -- UNLESS YOU HAVE
SOME SPECIAL REASON TO REMEMBER THE EXACT
WORDING, REMEMBERING THE EXACT WORDING OF A CONVERSATION
DROPS OFF FAIRLY QUICKLY IN A MATTER OF A FEW DAYS. YOU
MIGHT REMEMBER THE GIST OF A CONVERSATION LONGER AND, IN
FACT, DO, BUT THE VERBATIM RECALL DROPS OFF QUICKLY.

YOU KNOW, I THINK THAT IS KIND OF AN INTERESTING
AND SURPRISING FINDING. THERE IS NO QUESTION IN THE STUDIES
OF JUROR KNOWLEDGE THAT TAPS INTO THAT DIRECTLY, BUT MY
INFERENCE WOULD BE THAT PEOPLE ARE NOT GOING TO APPRECIATE
HOW QUICKLY THE VERBATIM OF A CONVERSATION FADES AWAY.
Q. FINALLY, LET'S TURN TO POINT 13. THIS HAS TO DO WITH
THE PROPOSITION THAT FORGETTING IS AN EFFICIENT USE OF
MEMORY. IN OTHER WORDS, WITHOUT FORGETTING, MEMORY COULDN'T FUNCTION.

ARE THERE ANY QUESTIONS THAT YOU HAVE FOUND THAT DEAL WITH WHETHER JURORS UNDERSTAND THAT AS A MATTER OF COMMON SENSE?

A. WELL, I WASN'T FOCUSING ON THAT PART. AS YOU KNOW, BJORK POINT 13 IS LONG AND SOMETHAT COMPPLICATED, BUT THE PART OF THAT THAT I WAS FOCUSING ON IS THE PART THAT SAYS THAT PEOPLE SUPPRESS OR FORGET INFORMATION THAT'S OUT OF DATE. YOU KNOW, THAT YOU CAN SUPPRESS INFORMATION.

Q. RIGHT.

A. THERE ISN'T REALLY ANYTHING IN THESE STUDIES OF JUROR KNOWLEDGE THAT ASKS ABOUT THEIR APPRECIATION OF THE IDEA THAT YOU CAN SUPPRESS INFORMATION THAT YOU DON'T NEED ANYMORE?

Q. ALL RIGHT.

A. IT IS A TRUE STATEMENT, AND THERE IS SCIENTIFIC WORK TO BACK IT UP, BUT I JUST DON'T KNOW OF ANY JUROR KNOWLEDGE.

Q. PUTTING ASIDE STUDIES, OF WHICH THERE ARE NONE, TO YOUR KNOWLEDGE, IS THAT A POINT ON WHICH YOU HAVE A VIEW ON WHETHER JURORS WOULD UNDERSTAND THAT AS A MATTER OF COMMON SENSE?

A. WELL, IF PEOPLE IN GENERAL UNDERSTAND THAT MEMORIES FADE AND YOU CAN FORGET THINGS, WHICH I THINK IS SOMETHING OF A MATTER OF THE COMMON SENSE, THEN, YOU KNOW, YOU MIGHT EXPECT
 THEM TO AGREE WITH THE IDEA THAT WE SUPPRESS OR FORGET
THINGS THAT ARE OUT-OF-DATE.
Q. ALL RIGHT. SO, ALTHOUGH WE DON'T HAVE STUDIES, IT IS
POSSIBLE, IN YOUR VIEW, THAT 13 WOULD GO INTO THE CATEGORY
OF COMMON SENSE PROPOSITION?
A. I THINK IT IS SOMETHING OF A MATTER OF COMMON SENSE
SENSE. IT IS SOMEWHAT COMPLICATEDLY WORDED. SO I AM JUST
NOT SURE WHICH LITTLE PIECE OF IT TO FOCUS ON. BUT I DON'T
SEE ANYTHING HERE THAT STRIKES ME AS BEING ANYTHING FOR
WHICH THERE IS SCIENTIFIC WORK AND STRONG EVIDENCE THAT
JURORS DON'T KNOW IT.
Q. ALL RIGHT.
A. I MEAN THERE ARE PLENTY OF OTHER THINGS THAT JURORS
DON'T KNOW AND DON'T APPRECIATE THAT WE HAVEN'T EVEN TALKED
ABOUT -- THEIR LACK OF APPRECIATION OF TIME ESTIMATION AND
HOW LONG EVENTS LASTED AND SO ON -- BUT ON THIS PARTICULAR
POINT, NO.
Q. ALL RIGHT. PUT ASIDE NOW FOR A MOMENT THE QUESTION OF
WHAT JURORS UNDERSTAND AS A MATTER OF COMMON SENSE. I HAVE
NOT ASKED YOU TO EXAMINE THE STUDIES THAT ARE LISTED IN
DR. BJORK'S DISCLOSURE -- THAT'S EXHIBIT 2 -- AS THE BASES
FOR HIS OPINION. AND I HAVEN'T ASKED YOU TO DETERMINE
WHETHER THOSE STUDIES SUPPORT HIS 13 POINTS, CORRECT?
A. CORRECT.
Q. WITH THAT IN MIND, AND WITH THAT UNDERSTANDING, IS THERE
ANYTHING IN THOSE 13 POINTS WITH WHICH YOU, AS AN EXPERT ON
MEMORY, DISAGREE?
A. NO. THESE ARE VERY SENSIBLE STATEMENTS FOR WHICH I
BELIEVE THERE IS SCIENTIFIC SUPPORT AND BASIS.
Q. ALL RIGHT. THANK YOU VERY MUCH.

MR. CLINE: HOLD ON ONE SECOND, PLEASE, YOUR
HONOR. MAY I HAVE A MOMENT?

THE COURT: YES.

MR. CLINE: THANK YOU, YOUR HONOR.

THE COURT: I NEED TO GIVE THE REPORTER A 
TEN-MINUTE RECESS.

(A RECESS WAS TAKEN.)

(AFTER RECESS.)

THE COURT: CROSS-EXAMINATION?

MR. FITZGERALD: I AM SORRY, JUDGE. I DIDN'T HEAR
YOU.

THE COURT: I SAID, "CROSS-EXAMINATION"?

MR. FITZGERALD: OH, THANK YOU, JUDGE.

CROSS-EXAMINATION

BY MR. FITZGERALD:

Q. I GUESS IT IS ABOUT GOOD AFTERNOON, DR. LOFTUS.
A. GOOD AFTERNOON.

Q. NOW, LET'S MAKE A COUPLE OF THINGS CLEAR. WHEN WE TALK
ABOUT THE SCIENCE OF PSYCHOLOGY, WE ARE TALKING ABOUT A
SCIENCE THAT CONDUCTS STUDIES IN VERY SPECIFIC CONTEXTS,
CORRECT?

A. THAT'S CORRECT.

Q. SO WHEN WE TALK ABOUT EYEWITNESS IDENTIFICATION ALONE, WE JUST DON'T DO STUDIES ON EYEWITNESS IDENTIFICATION. WE FOCUS ON WHETHER OR NOT A PERSON HAS BEEN IDENTIFIED IN A SHOWUP WHERE ONE PERSON IS PRESENTED AS "IS THIS THE MAN WHO ROBBED YOU?" VERSUS A LINEUP WHERE THEY ARE ASKED TO LOOK AT SIX PEOPLE AND SAY, "DO YOU SEE THE PERSON WHO ROBBED YOU?" CORRECT?

A. THAT WOULD BE AN EXAMPLE OF A STUDY THAT SOMEONE MIGHT DO, YES.

Q. AND WE CAN DO A STUDY OF WHETHER OR NOT THERE WAS A LINEUP CONDUCTED VERSUS A PHOTOGRAPHIC SPREAD -- A LIVE VIEW OF SIX PEOPLE VERSUS SIX PHOTOGRAPHS, CORRECT?

A. YES.

Q. AND IN THE CONTEXT, WE COULD LOOK AT WHETHER PHOTOS ARE SHOWN SEQUENTIALLY, ONE AFTER THE OTHER, OR SHOWN SIMULTANEOUSLY, SIX PHOTOGRAPHS IN A SPREAD, CORRECT?

A. YES, THAT HAS BEEN DONE.

Q. AND YOU COULD LOOK AT WHETHER OR NOT THE PHOTO DISPLAYS ARE A DOUBLE-BLIND PROCEDURE WHERE THE PERSON WHO SHOWS THE PHOTOGRAPHS DOESN'T KNOW WHAT THE RIGHT ANSWER IS, CORRECT?

A. YES, THAT'S A PHENOMENON, TOO.

Q. AND YOU CAN TEST WHETHER OR NOT IF THE PERSON TELLS SOMEONE, "YOU HAVE GOT THE RIGHT ANSWER," OR DOESN'T TELL
THAT SOMETHING -- WHETHER THAT AFFECTS AN IDENTIFICATION, CORRECT?
A. YES.
Q. AND YOU CAN STUDY WHETHER OR NOT THE FACT THAT A CRIME IS VIOLENT WILL AFFECT AN EYEWITNESS IDENTIFICATION, CORRECT?
A. YES.
Q. AND YOU CAN STUDY WHETHER OR NOT IF THERE IS A CROSS-RACIAL IDENTIFICATION, WHETHER THAT AFFECTS THE RELIABILITY OF AN IDENTIFICATION, CORRECT?
A. YES.
Q. AND YOU CAN STUDY WHETHER OR NOT IF A GUN IS INVOLVED, IT AFFECTS THE RELIABILITY OF AN IDENTIFICATION, CORRECT?
A. YES.
Q. AND YOU CAN STUDY WHETHER OR NOT THE AGE OF THE PERSON MAKING THE IDENTIFICATION IS RELIABLE, CORRECT?
A. WHETHER THE AGE MATTERS.
Q. YES. AND IN YOUR SCIENCE, YOU TEST THESE --
A. YOU SAID WHETHER THE AGE IS RELIABLE. AND THAT'S NOT, I DON'T THINK, WHAT YOU MEANT.
Q. WHETHER THE AGE MATTERS IN MAKING THE IDENTIFICATION RELIABLE.
A. YES. THANK YOU.
Q. AND YOU TEST THESE HYPOTHESES BY NOT ASSUMING THAT SOMETHING WILL HAPPEN OR WHETHER IT WILL HAVE SOME AFFECT
OR NO AFFECT BY ACTUALLY TESTING IT TO SEE WHETHER OR NOT --
WHEN YOU PUT THIS TO THE TEST OF EXPERIMENT OR SURVEY,
WHETHER OR NOT THERE IS AN EFFECT, CORRECT?
A. YES.
Q. AND THAT IS WHAT MAKES IT SCIENTIFIC, CORRECT?
A. WELL, THAT IS ONE EXAMPLE OF THE SCIENTIFIC METHOD AT
WORK.
Q. NOW, WHEN YOU TESTIFIED TODAY, WE INTRODUCED A NUMBER OF
DIFFERENT STUDIES YOU RELIED UPON TO TALK ABOUT WHAT JURORS
MAY APPRECIATE ABOUT MEMORY AND EYEWITNESS IDENTIFICATION,
CORRECT?
A. CORRECT.
Q. WHEN THE D. C. STUDY WAS CONDUCTED OR PUBLISHED IN
2006 -- AND I WILL KEEP TRYING TO REFER TO THE EXHIBIT
NUMBERS IF I CAN KEEP THE SHEETS STRAIGHT -- AND THAT WOULD
BE EXHIBIT NUMBER 4 -- I AM SORRY. EXHIBIT NUMBER --
A. THREE.
Q. THREE. YES. THANK YOU.
EXHIBIT NUMBER THREE. THAT IS A STUDY YOU
PARTICIPATED IN WITH THE DISTRICT OF COLUMBIA PUBLIC
DEFENDER SERVICE, CORRECT?
A. YES.
Q. AND WHEN YOU PUBLISHED THAT SURVEY, YOU INDICATED IN
2006 THAT UNTIL NOW, NO ONE HAS APPROPRIATELY MEASURED WHAT
JURORS KNOW ABOUT EYEWITNESS RELIABILITY, CORRECT?
A. YOU WILL HAVE TO POINT ME TO THE PHRASE YOU ARE REFERRING TO.

Q. I'LL DIRECT YOU TO PAGE 192 OF THAT SURVEY. IF WE CAN'T PULL IT UP ON THE SCREEN, I WILL TRY AND PULL OUT THE PAGES.

I THINK WE HAVE TO TURN THE SCREENS ON.

THE COURT: YES, WE CAN TURN THEM ON.

MR. FITZGERALD: OKAY. IT IS A PART OF EXHIBIT 3, PAGE 192.

THE COURT: DO YOU HAVE IT ON YOUR SCREEN NOW?

THE WITNESS: I DON'T HAVE ANYTHING ON THE SCREEN, YOUR HONOR.

MR. FITZGERALD: JUDGE, CAN YOU SEE IT ON YOUR SCREEN?

THE COURT: I DON'T. I DON'T HAVE IT NOW. IT WAS ON.

DO YOU HAVE IT NOW?

THE WITNESS: YES.

THE COURT: DOES EVERYBODY HAVE IT?

MR. FITZGERALD: SUDDENLY I HAVE IT. OKAY. I DON'T KNOW IF THE BIG ONE IS ON OVER THERE.

THE COURT: I DON'T KNOW WHY.

MR. FITZGERALD: JUDGE, YOU CAN SEE IT?

THE COURT: I HAVE IT, YES.

MR. FITZGERALD: AND DEFENSE COUNSEL AND DR. LOFTUS.
BY MR. FITZGERALD:

Q. ON PAGE 192 -- WELL, FIRST OF ALL, THERE IS A STATEMENT 
MADE AND THE CONCLUSION THAT, "MOST IMPORTANTLY, COURTS ALSO 
DO NOT UNDERSTAND WHAT JURORS KNOW ABOUT EYEWITNESS 
RELIABILITY. UNTIL NOW, NO ONE HAS APPROPRIATELY MEASURED 
WHAT JURORS KNOW ABOUT EYEWITNESS RELIABILITY." CORRECT?
A. I SEE THAT SENTENCE, YES.

Q. AND THAT'S A SENTENCE THAT IS IN THE SURVEY OPINION 
REPORT YOU WROTE, CORRECT?
A. I AM A CO-AUTHOR OF THIS PAPER, YES. AND I DON'T KNOW 
HOW I LET THAT LINE SLIP BY IN MY EDITING OF THIS.

Q. WELL, CO-AUTHOR MEANS YOU WROTE IT, TOO, CORRECT?
A. YES, I CO-AUTHORED THIS PAPER. I AM A CO-AUTHOR OF THIS 
RESEARCH PROJECT, YES.

Q. SO THE OTHER SURVEYS THAT YOU'VE PUT BEFORE THE COURT 
TODAY, WHICH PREDATE THE 2006 SURVEY, WERE SURVEYS YOU WERE 
FAMILIAR WITH AT A TIME THAT A REPORT YOU CO-AUTHORED IN 
2006 SAID THAT NO ONE HAD APPROPRIATELY MEASURED WHAT JURORS 
KNEW ABOUT EYEWITNESS RELIABILITY?
A. I HONESTLY CAN'T REMEMBER WHAT WAS THE THINKING BEHIND 
THIS -- WHETHER IT WAS BECAUSE THE CURRENT STUDY INVOLVED 
THE LARGEST AND, YOU KNOW, MOST SCIENTIFICALLY BEST METHOD 
OF GAINING JUROR KNOWLEDGE.

Q. WELL, IF YOU CONTINUE ON IN THE PARAGRAPH, DOES IT SAY, 
FOR EXAMPLE, "EYEWITNESS RESEARCHERS, IN THE COURSE OF
CONDUCTING MORE TARGETED EXPERIMENTS, HAVE REPEATEDLY FOUND THEIR SUBJECTS TO BE UNAWARE OF BASIC SCIENTIFIC FINDINGS OF THE FIELD. THERE ALSO HAVE BEEN SOME SMALL, NONRANDOMIZED SURVEYS ABOUT JUROR UNDERSTANDING OF EYEWITNESS RELIABILITY THAT INDICATED A GENERAL LACK OF KNOWLEDGE. BASED ON THESE SMALL SURVEYS AND THEIR LABORATORY EXPERIENCE, SCIENTISTS STUDYING EYEWITNESS RELIABILITY HAVE COME TO BELIEVE THAT ORDINARY LAY JURORS KNOW LITTLE ABOUT THE SUBJECT AS A MATTER OF COMMON SENSE. THESE RESEARCHERS' OPINIONS ARE IN SHARP CONTRAST TO JUDICIAL OPINIONS."

AND THEN IT CONTINES ON TO SAY BELOW IN THE NEXT PARAGRAPH, ABOUT FIVE LINES DOWN FROM BEING HIGHLIGHTED, "THE RIFT BETWEEN THE COURTS' AND RESEARCHERS' BELIEFS ABOUT WHAT JURORS UNDERSTAND ABOUT EYEWITNESS RELIABILITY HAS BEEN UNRESOLVED BECAUSE NO ONE HAS PERFORMED A LARGE, EMPIRICAL STUDY OF JURORS' KNOWLEDGE. THUS, JUDICIAL RULINGS ABOUT WHAT IS BEYOND THE KEN OF JURORS ARE, AT BEST, SPECULATION BASED SOLELY ON JUDGES' EXPERIENCE AND INTUITION.

AND THEN WE DROP A FOOTNOTE. IF WE LOOK DOWN AT FOOTNOTE 64, "AT WORST, SUCH OPINIONS ARE BEING DISINGENUOUS ABOUT OTHER MOTIVES, SUCH AS KEEPING OUT EVIDENCE THAT ALMOST ALWAYS BENEFITS DEFENDANTS."

IS THE LOGIC HERE THAT THERE HAVEN'T BEEN STUDIES ABOUT JURY RESEARCH BEFORE THIS STUDY AND SO THE EXPERTS HAVE ONE OPINION, AND JUDGES, BASED UPON THEIR EXPERIENCE
AND INTUITION, HAVE ANOTHER OPINION? WE ARE ASSUMING THAT
THE JUDGES ARE WRONG AT BEST, IS THAT CORRECT? IS THAT HOW
IT IS STATED?
A. NO. I THINK WHAT WAS MEANT HERE IS THAT THIS JURIMETRIC
STUDY THAT INVOLVES ONE THOUSAND RANDOMLY SELECTED POTENTIAL
JURORS FROM THE D. C. AREA IS ACTUALLY ONE OF THE
METHODOLOGICALLY BEST STUDIES THAT WAS DONE. IT'S LARGE.
IT'S RANDOMIZED. AND SO IT WAS, WE THOUGHT, AN IMPROVEMENT
OVER THE SMALLER STUDIES THAT HAD BEEN DONE BEFORE.
Q. NOW, DID YOUR REPORT THAT YOU CO-AUTHORED SAY IT WAS AN
IMPROVEMENT, OR DID IT SAY "UP UNTIL NOW, THERE HAS BEEN NO
APPROPRIATE STUDY"? ISN'T THE REPRESENTATION THAT THIS IS
THE ONLY APPROPRIATE STUDY -- THE ONLY LARGE EMPIRICAL
STUDY?
A. I DON'T THINK IT IS REALLY FAIR TO SAY THAT THIS IS THE
ONLY APPROPRIATE ONE AND TO DENIGRATE THE OTHER PEOPLE'S
WORK IN THAT WAY, FRANKLY.
Q. SO WOULD THE SENTENCE IN YOUR REPORT THAT SAID THERE HAD
BEEN NO APPROPRIATE STUDY TO DATE BE AN UNFAIR SENTENCE?
A. YES. I THINK THIS IS A BETTER STUDY, BUT I THINK THOSE
OTHER STUDIES -- THE EARLIER STUDIES DO CONTRIBUTE TO OUR
KNOWLEDGE.
Q. NOW, LET'S LOOK AT PAGE 195 AND 196 OF THE STUDY TO
FOCUS IN ON WHAT IT IS THAT THIS STUDY -- WHICH, BY THE WAY,
WAS CONDUCTED BY A FELLOW ASSIGNED TO THE PUBLIC DEFENDER
SERVICE, TWO ATTORNEYS WITH THE PUBLIC DEFENDER SERVICE, AND
YOURSELF, CORRECT?

A. WELL, THAT'S NOT HOW IT ORIGINATED, NO.

Q. OKAY. HOW DID IT ORIGINATE? IF YOU COULD ANSWER MY
QUESTION FIRST. WERE THOSE THE FOUR PEOPLE WHO PARTICIPATED
IN THE STUDY?

A. THE FIRST ONE PARTICIPATED IN THE WRITE-UP OF THE STUDY,
BUT THE THREE OF US WERE INVOLVED EARLIER IN ACTUALLY
CONTACTING -- DESIGNING THE QUESTIONS AND CONTACTING THE
SURVEY FIRM THAT ACTUALLY WENT OUT AND GATHERED THE DATA
BECAUSE A VERY COMPETENT SURVEY FIRM ACTUALLY DID THE WORK
OF THE TELEPHONE SURVEY.

Q. MAYBE I WILL ASK YOU A BETTER QUESTION. WAS THE STUDY
CONDUCTED AT THE REQUEST OF THE PUBLIC DEFENDER SERVICE?

A. I WAS ASKED TO CONSULT WITH THE PUBLIC DEFENDER SERVICE,
AND THEY HAD ALREADY WANTED TO DO AND WERE PLANNING TO DO
THIS STUDY. SO I CONSULTED WITH THEM ON SOME OF THE
QUESTIONS THEY WERE ASKING AND HOW THEY WERE GOING TO PHRASE
THOSE QUESTIONS. I TRIED TO INTRODUCE A FEW ADDITIONAL
QUESTIONS THAT I THOUGHT WOULD BE IMPORTANT, AND THEN I
PARTICIPATED AFTER THIS WAS ALREADY WRITTEN UP.

Q. AND SO WOULD THE ANSWER TO MY QUESTION ABOUT WHETHER
THIS WAS DONE AT THE REQUEST OF THE PUBLIC DEFENDER SERVICE
BE YES?

A. YES. WELL, THEY CONTACTED ME INITIALLY, YES.
Q. NOW, IN SPEAKING HERE TODAY AND IN WRITING YOUR REPORT, YOU PUT A LOT OF WEIGHT ABOUT WHAT THIS STUDY FOUND ON THE FINDING BY THIS STUDY THAT JURORS THINK MEMORY IS LIKE A TAPE RECORDER. IS THAT A FAIR STATEMENT?
A. WELL, BECAUSE THERE WAS ONE QUESTION IN THIS STUDY THAT ASKED WHETHER PEOPLE BELIEVED THAT TRAUMATIC MEMORY WAS LIKE A TAPE RECORDER, AND THE OTHER STUDIES DIDN'T ASK THAT QUESTION, THIS WAS THE STUDY THAT DID PROVIDE INFORMATION ABOUT THAT POINT.
Q. AND SO THE ANSWER TO MY QUESTION WOULD BE YES? YOU PUT A LOT OF WEIGHT ON THAT SINGLE QUESTION, FROM YOUR STUDY, TO ESTABLISH THAT JURORS THINK THAT MEMORY IS LIKE A TAPE RECORDER?
A. WELL, I CERTAINLY USED THAT STUDY AS AN EXAMPLE.
Q. WELL, IN FACT, IS THAT THE ONLY STUDY THAT'S ESTABLISHED THAT JURORS THINK THAT MEMORY IS LIKE A TAPE RECORDER?
A. WELL, IT'S THE ONLY STUDY THAT ACTUALLY WENT OUT AND GATHERED DATA ON THAT QUESTION THAT I KNOW OF.
Q. NOW, ON PAGE 195 AND 196 -- IF WE CAN BLOW THAT UP, IF IT IS POSSIBLE -- IT STARTS AT THE BOTTOM PARAGRAPH THAT CARRIES OVER -- "P.D.S.'S SURVEY OF POTENTIAL JURORS IN THE DISTRICT OF COLUMBIA SUGGESTS THAT JUROR UNDERSTANDING OF THESE SUBJECTS FAILS AT EVEN THE MOST BASIC LEVEL. SEVERAL SURVEY QUESTIONS, FOR EXAMPLE, WERE DESIGNED TO TEST JURORS' GENERAL UNDERSTANDINGS OF THE WORKINGS OF HUMAN MEMORY. ONE
QUESTION ASKED WHETHER" -- AND WE CARRY OVER TO THE NEXT
PAGE -- "ONE QUESTION ASKED WHETHER" -- AND WE'LL PICK UP ON
WITH 196 IN A MOMENT -- "WHETHER, QUOTE, THE ACT OF
REMEMBERING A TRAUMATIC EVENT WAS LIKE A VIDEO RECORDING IN
THAT ONE CAN RECALL DETAILS AS IF THEY HAD BEEN ImPRINTED OR
BURNED INTO ONE'S BRAIN, END QUOTE. OVER HALF OF THE
RESPONDENTS EITHER THOUGHT THIS STATEMENT WAS TRUE OR DID
NOT KNOW WHETHER IT WAS TRUE."

DO YOU SEE THAT QUESTION? AND THEN IT CONTINUES:
"INDEED, 46 PERCENT OF POTENTIAL JURORS BELIEVE THAT THE
WITNESS ON THE STAND IS EFFECTIVELY NARRATING A VIDEO
RECORDING OF EVENTS THAT SHE CAN SEE IN HER MIND'S EYE FOR
JURORS."

DO YOU SEE THAT?

A. YES.

Q. AND YOU MENTIONED THE HIS/HER DISTINCTION BEFORE. DID
YOU WRITE THE LINE THAT SAYS "IN HER MIND'S EYE"?
A. NO, I DIDN'T.

Q. OKAY. NOW, IN STATING THAT, THE IMPLICATION IS THAT WE
HAVE A SERIOUS FUNDAMENTAL PROBLEM WITH JURORS. IF THEY
THINK MEMORY IS LIKE A TAPE RECORDING, AND THEY THINK YOU
CAN JUST PLAY BACK THE TAPE RECORDING, THEN THEY ARE GOING
to ASSUME THAT THE TAPE RECORDING IS PURE, UNCONTAMINATED BY
OTHER EVENTS, AND THEY'RE GOING TO HAVE A PROBLEM
UNDERSTANDING THAT PEOPLE CAN MAKE MISTAKES. IS THAT FAIR?
A. THAT MAY BE AN IMPLICATION OF BELIEVING IN THE VIDEO
TAPE RECORDER MODEL.

Q. ISN'T THAT THE IMPLICATION THAT YOU ASSERT FROM
BELIEVING IN THE TAPE RECORDER MODEL?

A. WELL, YES.

Q. NOW, IF YOU LOOK AT THE QUESTION AND HOW THE METHODOLOGY
IS, AGAIN THIS WAS NOT A SURVEY OF JURORS WHO PERFORMED JURY
SERVICE, CORRECT?

A. CORRECT.

Q. THIS WAS A TELEPHONE SURVEY?

A. CORRECT.

Q. AND THERE ARE 11 PAGES OF QUESTIONS AT THE END OF THE
EXHIBIT, THAT IS, THE SURVEY THAT YOU CO-AUTHORED?

A. YES.

Q. AND IF WE WERE NOT TO PUT IT ON THE SCREEN, BUT IF I
COULD INVITE THE JUDGE JUST TO LOOK AT THE 11 PAGES -- I
SAID 11 PAGES. THIS WAS QUESTION 11. I AM NOT SURE SURE
HOW MANY PAGES THERE WERE. MAYBE WE CAN FLASH ON THE SCREEN
STARTING AT PAGE 206, WHICH IS APPENDIX "A." AND THOSE ARE
THE FIRST THREE QUESTIONS THAT TALK ABOUT THE JURORS'
BACKGROUND, ET CETERA?

A. YES.

Q. AND THEN WE TURN TO PAGE 2 OF THE SURVEY, WHICH IS PAGE
207 --

A. YES.
Q. -- WHICH HAS QUESTION 3 ON THERE, 4A AND 4B.

A. YES.

Q. DIFFERENT RESPONSES. THEN WE GO TO 5. WE CAN JUST ZOOM
IN ON 5 FOR A SECOND ON PAGE 208. AND WE HAVE A QUESTION
WITH SUBPARTS -- 5 AND THEN BELOW IT 5A, 5B, 5C AND 5D, AND
THERE ARE A NUMBER OF DIFFERENT RESPONSES. AND THEN,
OBVIOUSLY, BELOW THAT WE HAVE 6A AND 6B.

A. YES.

Q. AND THEN WE GO TO PAGE 209, AND WE HAVE 7, 8 AND 9. AND
THEN WE GO TO PAGE 210, AND WE HAVE QUESTIONS 10A AND 10B,
WHICH ARE GIVEN TO HALF OF THE RESPONDENTS EQUALLY, AND EACH
ONE OF THE QUESTIONS HAS MULTIPLE SUBPARTS, CORRECT?

A. YES.

Q. AND THEN, FINALLY, WE GET TO PAGE 211, AND IF YOU LOOK
AT THAT, QUESTION 11 HAS SUBPARTS "A" THROUGH "J." IF MY
MATH IS RIGHT, THAT MEANS THERE ARE TEN SUBPARTS. AND THE
FINDING THAT YOU FEATURED IN THE STUDY AND YOU'RE REFERRING
TO TODAY AND RELYING PRINCIPALLY UPON IS 11B.

WE CAN BLOW UP THE QUESTION FOR 11B.

AND THE PERSONS SURVEYED ON THE TELEPHONE, BY THE
TIME THEY GET TO QUESTION 11B, THEY HAVE BEEN TOLD THEY HAVE
TO GIVE A TRUE OR FALSE ANSWER OVER THE TELEPHONE?

A. YES.

Q. THEY DON'T GIVE AN EXPLANATION, CORRECT? TRUE, FALSE,
OR THEY CAN SAY, "I AM NOT SURE"?
A. YES.

Q. AND THE QUESTION THEY'RE ASKED IS: THE ACT OF REMEMBERING A TRAUMATIC EVENT IS LIKE A VIDEO RECORDING IN THAT ONE CAN RECALL DETAILS AS IF THEY HAD BEEN IMPRINTED OR BURNT INTO ONE'S BRAIN? AND 46 PERCENT ON THE TELEPHONE SAY "YES." FORTY-EIGHT PERCENT SAY "NO." AND SIX PERCENT SAY "NOT SURE," CORRECT?

A. YES.

Q. SO A JUROR DOESN'T NECESSARILY THINK THAT MEMORY IS LIKE A VIDEO RECORDER. THEY KNOW IT IS NOT PLUGGED IN, BUT THEY ARE ASKED: IS IT LIKE A VIDEO RECORDING IN THAT ONE CAN RECALL DETAILS AS IF THEY WERE IMPRINTED? AND BASED UPON THAT ANSWER, 46 PERCENT YESES, WE'RE CONCLUDING THAT JURORS FUNDAMENTALLY DON'T UNDERSTAND PRINCIPLES OF MEMORY?

A. WELL, THAT'S JUST ONE EXAMPLE OF -- THAT'S JUST ONE EXAMPLE OF SOME JURORS NOT DEMONSTRATING THAT THEY UNDERSTAND A PRINCIPLE OF MEMORY.

Q. AND ISN'T IT A FACT THAT IF YOU LOOK DOWN HERE IN THIS VERY SAME QUESTION, QUESTION NUMBER 11F, THE RESPONSES WOULD ACTUALLY SHOW THAT JURORS DON'T UNDERSTAND MEMORY TO BE SO PRISTINE IN A VIDEO RECORDING FORM? EIGHTY PERCENT OF THE JURORS AGREE THAT EYEWITNESSES CAN BELIEVE THEY REMEMBER DETAILS ABOUT A CRIME THAT THEY ACTUALLY LEARNED ABOUT LATER FROM SOMEBODY ELSE, SUCH AS THE POLICE.

SO IF SOMEONE LEARNED ABOUT SOMETHING ELSE, AND IT
WENT BACK INTO THEIR MEMORY, THAT IS NOT LIKE A VIDEO
RECORDER. AND 80 PERCENT OF THE PEOPLE AGREED WITH THAT,
ISN'T THAT TRUE?
A. WELL, I MENTIONED THAT STUDY -- I MENTIONED THAT ITEM,
TOO, IN MY TESTIMONY. AND I AGREE THAT SOMETIMES PEOPLE
BEHAVE IN WAYS THAT LOOK INCONSISTENT.
Q. BUT WHEN YOU MENTION THAT THE 80 PERCENT -- YOU THOUGHT
THAT WASN'T GOOD ENOUGH OR APPRECIATING ANY ERRORS, BUT THE
80 PERCENT ACTUALLY UNDERCUTS THE BELIEF THAT FIFTY PERCENT
THINK OR HALF OF THE PEOPLE THINK THAT MEMORY IS LIKE A TAPE
RECORDER, DOES IT NOT? THAT'S WHY IT'S INCONSISTENT?
A. IT IS JUST MORE -- MANY MORE PEOPLE SEEM TO BE GIVING
THE RIGHT ANSWER TO THE LATTER QUESTION THAN TO THE FORMER
ONE.
Q. WELL, WHEN THEY WERE ASKED WHETHER IT IS LIKE A TAPE
RECORDER, THEY CLEARLY UNDERSTOOD IT IS NOT LIKE A TAPE
RECORDER TO THE EXTENT THAT IT CAN'T BE WRONG. EIGHTY
PERCENT RECOGNIZED IT COULD BE WRONG, CORRECT?
A. ON ITEM 11F, YES.
Q. WITHIN THE SAME QUESTION, YES.
GOING BACK TO 195 AND 196, YOU SAID THAT 46
PERCENT OF POTENTIAL JURORS -- I THINK IT IS 196 AT THE TOP.
I AM SORRY. THAT IS MY FAULT.
THE LAST PART OF THAT SENTENCE SAYS: INDEED, 46
PERCENT OF POTENTIAL JURORS BELIEVE THAT A WITNESS ON THE
STAND IS EFFECTIVELY NARRATING A VIDEO RECORDING OF EVENTS
THAT SHE CAN SEE IN HER MIND'S EYE FOR JURORS. CORRECT?
A. THAT'S WHAT IT SAYS, YES.
Q. AND IS IT A FACT THAT IN THE STUDY, NO ONE WAS ASKED
WHETHER OR NOT THEY BELIEVED THAT THE PERSON WAS NARRATING A
VIDEO RECORDING AND THAT IN THE STUDY, THE QUESTIONNAIRE
NEVER ASKED ANYONE IF THEY THOUGHT THE WITNESS SAW IT IN
THEIR MIND'S EYE?
A. NO, THAT WAS NOT EXPLICITLY ASKED. I BELIEVE THAT THE
AUTHOR WHO WROTE THAT WAS TRYING TO MAKE THE POINT THAT 46
PERCENT IS THE NUMBER WHO SAID "TRUE" TO THE QUESTION ABOUT
THE VIDEO RECORDING.
Q. SO THAT STATEMENT OF 46 PERCENT IS NOT SOMETHING THAT
WAS SURVEYED? THAT IS AN INFERRENCE FOR THE ANSWER TO THE
PRIOR QUESTION?
A. EXACTLY. THAT IS WHAT I BELIEVE WAS BEING MEANT BY THAT
STATEMENT AND WHERE THAT 46 PERCENT FIGURE CAME FROM. SO
THE 52 PERCENT INCLUDES THE 46 PERCENT.
THE COURT: LET ME JUST ASK. THIS PERCEPTION YOU
HAVE BEEN TALKING ABOUT REGARDING THE TAPE RECORDER VIEW
RELATES TO WHAT PEOPLE ARE SAYING REGARDING TRAUMATIC
EVENTS, IS THAT RIGHT?
THE WITNESS: THAT'S A GOOD POINT, YOUR HONOR.
THE COURT: HAVE ANY STUDIES BEEN DONE THAT HAVE
ASSESSED WHETHER JURORS HAVE THE SAME PERCEPTION ABOUT
NONTRAUMATIC EVENTS?

THE WITNESS: WELL, SOMETIME AGO IN 1980, I
CO-AUTHORED A STUDY IN WHICH WE ASKED PEOPLE WHETHER THEY
BELIEVED THAT EVERYTHING THEY EVER EXPERIENCED WAS
PERMANENTLY STORED IN THE BRAIN, EVEN IF THEY COULDN'T
RETRIEVE IT. AND MANY OF OUR RESPONDENTS -- THE MAJORITY OF
THEM SAID THAT, YES, THEY BELIEVED THAT WAS TRUE, IT'S IN
THERE SOMEWHERE, EVEN IF YOU CAN'T RETRIEVE IT.

NOW, THOSE DATA WERE COLLECTED QUITE SOMETIME AGO,
BUT I THINK THEY WOULD HAVE SOME BEARING ON THIS IDEA OF
WHETHER PEOPLE BELIEVE THAT IT'S THERE, EVEN IF IT IS NOT
TRAUMATIC.

BUT YOU ARE ABSOLUTELY RIGHT. THIS PARTICULAR
STUDY OF WASHINGTON, D. C. JURORS DOES ASK ABOUT -- DOES USE
THE WORD "TRAUMATIC."

BY MR. FITZGERALD:
Q. AND, IN ADDITION, IN YOUR BOOK -- YOU HAVE WRITTEN A
BOOK "EYEWITNESS TESTIMONY, CIVIL AND CRIMINAL," CORRECT?
A. WELL, YES. I CO-AUTHORED A BOOK.
Q. WITH MR. DOYLE?
A. YES.
Q. OKAY. IF WE HAVE IT IN HERE, IF WE COULD LOOK AT THE
2005 POCKET PART. WE MAY NOT HAVE PUT IT IN THE 2005 POCKET
PART, BUT I COULD SHOW IT TO COUNSEL AND SHOW YOU ON PAGE
2 -- WHETHER OR NOT YOU WROTE THAT THE SURVEY WE ARE
DISCUSSING, QUOTE, INDICATED THAT THE MAJORITy OF
PROSPECTIVE JURORS ANALOGIZED MEMORY TO THE REPLAY OF A
VIDEOTAPE, CLOSE QUOTE.

IF YOU NEED TO SEE IT, I CAN SHOW IT TO YOU.

A. I WOULD NEED TO SEE IT, YES.

THE COURT: YOU HAVE TO POINT OUT SPECIFICALLY
WHERE IT IS.

BY MR. FITZGERALD:

Q. RIGHT THERE.

A. I SEE THAT, YES.

Q. AND WOULD YOUR STATEMENT IN YOUR BOOK THAT A MAJORITY OF
THE JURORS ANALOGIZED MEMORY TO A VIDEOTAPE BE A REFERENCE
TO THE FACT THAT IN THE TELEPHONE SURVEY, THE PEOPLE CALLED
ON THE PHONE WERE ASKED IF IT WAS LIKE A TAPE RECORDER --
WORDS COMING FROM THE QUESTION -- AND 46 PERCENT SAID,
"YES," CORRECT?

A. YES. I AM NOT SURE. PROBABLY, TO BE PRECISE, IT SHOULD
HAVE SAID 46 PERCENT. THIS MAY BE -- THIS MAJORITY MAY BE
THE RESULT OF COMBINING THOSE WHO SAID "TRUE" AND THOSE WHO
SAID "NOT SURE," WHICH WOULD MOVE IT TO 52 PERCENT. BUT
REALLY IT SHOULD BE 46 PERCENT. AND THANK YOU FOR POINTING
OUT THAT.

Q. SO THE STATEMENT THAT A MAJORITY DID SO IS NOT ACCURATE?

A. I THINK 46 PERCENT IS THE ACCURATE FIGURE.

Q. AND WHEN THEY ANALOGIZED IT, IT WAS A PASSIVE ANALOGY?
They were asked, "Is it like this, true or false?" It wasn't something they spontaneously provided, correct?

A. Correct. They were only answering questions to specific items.

Q. Now, in looking at the other studies, is it fair to say that the studies you referred to were primarily focused on eyewitness identification testimony? Correct?

A. Well, some of the items -- some of the items refer to eyewitness identification and some refer to items that don't involve identification. So many of these studies have items, for example, on people's ability to estimate the duration of events.

Q. It is fair to say that the title of the D.C. study that you wrote was, quote, beyond the ken, testing jurors' understanding of eyewitness reliability evidence, close quote?

A. Right, but eyewitnesses do more than just identify people.

Q. And let's talk about the study of Kassin in 2001, which is Exhibit 6, I believe. And in looking at what jurors understand about eyewitness testimony research, Kassin had asked questions of experts about what they thought was reliable, and what they were willing to testify, and what they thought was common sense. In other words, their prediction of what jurors would understand, correct?
A. CORRECT.

Q. THEY WEREN'T ACTUALLY TESTING JURORS IN THE KASSIN STUDY AS TO WHETHER THEY UNDERSTOOD IT. IT WAS EXPERTS PREDICTING WHAT LAY PEOPLE WOULD UNDERSTAND, CORRECT?

A. CORRECT.

Q. AND YOU ARE USING AN EXPERT'S PREDICTION OF WHAT A LAY PERSON WOULD UNDERSTAND AS COMMON SENSE AS A PROXY FOR WHAT JURORS WOULD UNDERSTAND, OR AN ESTIMATION?

A. WELL, CERTAINLY THAT IS WHAT PEOPLE WERE USING UNTIL THEY HAD ACTUAL DATA FROM JURORS. AND THEN THEY COULD LOOK AT THE JUROR DATA, WHICH WOULD BE BETTER THAN THE PROXY.

Q. AND IS THAT ONE OF THE REASONS WHY IN 2006 IN YOUR D. C. STUDY YOU SAID THERE HAD BEEN NO APPROPRIATE STUDY TO DATE OF WHAT JURORS UNDERSTOOD?

A. WELL, IN FACT, THE BENTON STUDY THAT I RELIED ON HEAVILY IS A 2006 STUDY THAT WE DID NOT KNOW ABOUT.

Q. AND I AM TALKING ABOUT THE KASSIN 2001 STUDY, THE METHODOLOGY FOR FINDING OUT WHAT LAY JURORS KNOW IS NOT TO ASK EXPERTS WHAT THEY THINK COMMON SENSE IS, IS THAT CORRECT?

A. RIGHT. I AGREE WITH YOU COMPLETELY. THAT IS NOT THE BEST WAY TO FIND OUT WHAT JURORS KNOW. IT IS BETTER TO TRY TO FIND OUT FROM THEM DIRECTLY.

Q. AND, IN FACT, KASSIN HAD DONE A STUDY A DECADE BEFORE IN 1992, WHERE HE DID A SURVEY OF NOT JURORS, BUT LAY PEOPLE AS
TO WHAT THEY UNDERSTOOD, CORRECT?

A. KASSIN AND BARNDOLLAR IN 1992, YES.

Q. AND SO THAT STUDY WAS A STUDY OF LAY PEOPLE, ASKING THEM
WHAT THEY UNDERSTOOD, AS OPPOSED TO HIS 2001 STUDY, WHICH
WAS ASKING EXPERTS WHAT THEY THOUGHT LAY PEOPLE UNDERSTOOD,
CORRECT?

A. IN 1992, THEY COMPARED THE 1989 EXPERT STUDY THAT WE
HAVEN'T TALKED ABOUT HERE TO A SAMPLE OF POTENTIAL JURORS.

Q. RIGHT. SO KASSIN STUDIED THE POTENTIAL JURORS IN 1992
AND THEN ASKED THE EXPERTS WHAT THEY THOUGHT JURORS WOULD
THINK IN 2001?

A. RIGHT.

Q. SO WE ARE RELYING UPON THE STUDY NOT OF POTENTIAL
JURORS, BUT OF WHAT EXPERTS THINK IS COMMON SENSE, CORRECT?

A. RIGHT.

Q. AND IN THAT STUDY, KASSIN IN 2001 -- IF WE CAN PULL THAT
UP AT PAGE 414 -- AND IS IT FAIR TO SAY THAT AS REFLECTED IN
THAT STUDY, IT INDICATES THAT -- "TO IDENTIFY OUR
POPULATION" IS THE KEY WORD. IT IS IN THE SECOND COLUMN,
HALFWAY DOWN THE PAGE.

THE COURT: WHAT PAGE ARE WE ON NOW?

MR. FITZGERALD: 414. WE CAN BLOW UP THE MIDDLE
OF THE SECOND COLUMN.

BY MR. FITZGERALD:

Q. AND DOES IT SAY THERE: IT COULD BE ARGUED THAT THE
SAMPLING OF EXPERTS IN THIS SURVEY CONSTITUTES A SECOND
LIMITATION. TO IDENTIFY OUR POPULATION OF RESPONDENTS, WE
SUGHT INDIVIDUALS ACTIVE IN THE EYEWITNESS AREA, WHICH
RAISES AN ISSUE THAT HAS LONG PLAGUED THE FRYE TEST, NAMELY,
THAT INDIVIDUALS WITH THE MOST EXPERTISE IN AN AREA MAY ALSO
HAVE THE GREATEST MOTIVATION TO PRESENT IT IN A FAVORABLE
LIGHT.

IT CONTINUES DOWN BELOW, THE LAST SENTENCE IN THE
PARAGRAPH: THIS POSSIBLE CONFOUNDERING OF EXPERTISE AND
MOTIVATION IMPLIES THAT PERHAPS OUR RESPONDENTS SHOULD HAVE
DRAWN FROM A BROADER POPULATION OF BASIC EXPERIMENTAL
PSYCHOLOGISTS WHO STUDY NON-EYEWITNESS PROCESSES OR DO NOT
TESTIFY IN COURT, CLOSE QUOTE.

DO YOU AGREE THAT THAT IS A FLAW IN THE STUDY?

A. WELL, LET ME JUST SAY THAT IT IS CUSTOMARY AT THE END OF
A SCIENTIFIC PAPER TO TALK ABOUT THE LIMITATIONS. I THINK
THEY ARE RAISING A REASONABLE CONCERN THAT PERHAPS THE 64
EXPERTS THAT THEY SAMPLED, MANY OF WHOM HAVE FREQUENTLY
TESTIFIED, WOULD HAVE SOME MOTIVATION TO RESPOND IN SOME
PARTICULAR WAY, AND THAT TRYING TO ASSESS WHETHER THOSE
MOTIVATIONS AND BIASES HAVE LED TO AN UNFAIR PRESENTATION OF
RESULTS WOULD BE A GOOD THING TO DO.

Q. AND ISN'T IT A FACT THAT --

A. I DON'T KNOW IF THIS IS THE SOLUTION TO THAT PROBLEM,
BUT IT CERTAINLY -- TO WORRY ABOUT IT AND FIND A GOOD WAY TO
ADDRESS THE POTENTIAL CONCERN IS A GOOD IDEA.

Q. AND IS IT FAIR TO SAY THAT WHEN YOU COMPARISON OF
THE BENTON STUDY AND THE D. C. STUDY THAT YOU PARTICIPATED
IN THAT SHOW WHAT JURORS UNDERSTAND, THE EXPERTS GREATLY
UNDERESTIMATE WHAT THE COMMON SENSE OF JURORS IS?

A. WELL, FIRST OF ALL, I DID NOTICE THAT IN SOME CASES THEY
DID. THEY UNDERESTIMATED WHAT THE BENTON RESULTS WOULD BE.
AND IT IS HARD TO KNOW WHY.

Q. BUT IT'S FAIR TO SAY THAT WHEN EXPERTS ARE ASKED WHAT
LAY PEOPLE THINK, THEY UNDERESTIMATE WHAT LAY PEOPLE -- IN
THE STUDY, THEY UNDERESTIMATED WHAT LAY PEOPLE THOUGHT ABOUT
MEMORY?

A. YES. FOR MANY OF THE ITEMS, YES, THEY DID.

Q. AND NOW IF WE LOOK AT THE BENTON STUDY FROM -- I THINK
IN 2006, IT WAS PUBLISHED. IT WENT ONLINE IN 2005. THAT IS
EXHIBIT FIVE.

IS IT FAIR TO SAY THAT IN THE BENTON STUDY --
LET'S LOOK AT PAGE 116 FOR A MOMENT. IN THE FIRST FULL
PARAGRAPH, IT TALKS ABOUT SOME OF THE REASONING OF JUDGES IN
KEEPING TESTIMONY OUT. WE WILL JUST LOOK AT THE FIRST THREE
LINES OF THAT PARAGRAPH.

AND DOES IT SAY: IN DIRECT OPPOSITION TO THIS
KIND OF REASONING, THE RESULTS OF OVER 25 YEARS OF RESEARCH
ON THIS TOPIC SHOW THAT LAY KNOWLEDGE OF EYEWITNESS BEHAVIOR
IS NOT ONLY LIMITED IN SCOPE, BUT ALSO HIGHLY INACCURATE,
CLOSE QUOTE?

ISN'T THERE A FLAT INCONSISTENCY WITH BENTON IN 2006 SAYING: "25 YEARS OF RESEARCH HAS SHOWN THAT LAY KNOWLEDGE OF WITNESSES IS NOT ONLY LIMITED IN SCOPE, BUT HIGHLY INACCURATE," AND YOUR ASSERTION IN THE 2006 PUBLIC DEFENDER SURVEY THAT SAYS, "NO ONE HAS DONE AN APPROPRIATE STUDY. WE JUST DON'T KNOW. NO ONE HAS RATIONALIZED WHAT JUDGES UNDERSTAND WITH WHAT EXPERTS UNDERSTAND"?

A. RIGHT. AND THAT'S WHAT I SAID EARLIER IN MY TESTIMONY I DON'T THINK IT IS REALLY FAIR FOR US TO BE DISPARAGING. I THINK OUR STUDY -- THE 2006 STUDY WITH THE LARGE SAMPLE AND RANDOMIZED DATA COLLECTION WAS AN IMPROVEMENT IN METHODOLOGY, AND I THINK THOSE EARLIER 25 YEARS WORTH OF STUDIES ARE VALUABLE AND CONTRIBUTE TO OUR KNOWLEDGE OF WHAT PEOPLE KNOW.

Q. SO YOU DON'T SEE ANY INCONSISTENCY BETWEEN SAYING THAT IT IS BASICALLY THE RESULTS OF -- STRIKE THAT.

LET ME JUST EXPLAIN WHAT METHODOLOGY IS IN THIS SURVEY. IN LOOKING AT WHAT THE EXPERTS UNDERSTAND, BENTON, ET AL ALSO LOOKED AT WHAT JURORS UNDERSTAND AND WHAT JUDGES UNDERSTAND AND WHETHER THERE WAS A STATISTICALLY SIGNIFICANT DIFFERENCE BETWEEN WHAT THE JUDGES UNDERSTOOD, FROM THEIR EXPERIENCE IN THE COURTROOM AND THEIR INTUITION, AND WHAT THE EXPERTS UNDERSTOOD FROM THEIR EXPERIENCE AND INTUITION, AND IT WAS ASSUMED THAT THE EXPERTS WERE CORRECT, IS THAT
CORRECT?
A. RIGHT.
Q. AND WHEN THERE WAS A STATISTICALLY SIGNIFICANT
DIFFERENCE, IT WAS ASSUMED THEN THAT JUDGES COULD BENEFIT
FROM EXPERTS, OR WHERE THERE WAS A STATISTICALLY SIGNIFICANT
DIFFERENCE, JURORS COULD BENEFIT FROM THE EXPERTISE OF THE
EXPERTS, CORRECT?
A. I THINK THAT'S TRUE, YES.
Q. AND IS IT FAIR TO SAY THAT -- LET ME ASK YOU THIS
QUESTION. IS IT FAIR TO SAY THAT ALCOHOLIC INTOXICATION
ADVERSELY AFFECTS MEMORY?
A. IT DEPENDS ON WHETHER YOU ARE HAVING IT AT THE TIME YOU
ARE ENCODING THE INFORMATION OR AT THE TIME YOU ARE
RETRIEVING BECAUSE ALCOHOL AFFECTS THE FORMATION OF NEW
MEMORIES MORE THAN IT AFFECTS THE RETRIEVAL OF OLD MEMORIES,
WHICH MEANS IF YOU ARE TEACHING STUDENTS, YOU TELL THEM THAT
IT IS A LOT WORSE TO DRINK WHILE YOU ARE STUDYING THAN TO
DRINK WHILE YOU ARE TAKING THE TEST.
Q. WELL, IF I COULD ASK YOU THIS QUESTION. THE QUESTION
THAT WAS ASKED OF THE SURVEY PARTICIPANTS IS, QUOTE,
ALCOHOLIC INTOXICATION IMPAIRS AN EYEWITNESS' LATER ABILITY
TO RECALL PERSONS AND EVENTS.
A. AND WHERE ARE YOU READING FROM, PLEASE?
Q. I'M READING FROM PAGE 129 OF BENTON, QUESTION 20.
A. YES.
Q. AND SO IT IS CLEAR THAT WE ARE TALKING ABOUT INTOXICATION AT THE TIME YOU ARE PERCEIVING EVENTS BECAUSE IT TALKS ABOUT LATER RECALL, CORRECT?
A. YES.
Q. SO AS A FLAT, SIMPLE, SCIENTIFIC PROPOSITION, "ALCOHOLIC INTOXICATION IMPAIRS AN EYE WITNESS' LATER ABILITY TO RECALL PERSONS AND EVENTS" WOULD BE A TRUE STATEMENT, CORRECT?
A. YES.
Q. OKAY. DID THE BENTON SURVEY FIND THAT THERE WAS A STATISTICALLY SIGNIFICANT DIFFERENCE BETWEEN JUDGES' UNDERSTANDING OF THIS THAN EXPERTS?
A. JUDGES AND EXPERTS? WELL, FOR THAT I WOULD HAVE TO GO TO TABLE 3 ON PAGE 122 AND TRY TO ANSWER YOUR QUESTION.
ALCOHOL INTOXICATION --
Q. AND IS IT FAIR TO SAY THAT THE JUDGES ANSWERED THAT QUESTION CORRECTLY ONE HUNDRED PERCENT OF THE TIME?
A. YES.
Q. AND THE EXPERTS GOT THE ANSWER RIGHT NINETY PERCENT OF THE TIME?
A. THAT'S TRUE. THAT'S A VERY GOOD POINT. THE JUDGES WERE --
Q. BUT THIS STUDY ASSUMES WHEN THERE IS A STATISTICALLY SIGNIFICANT DIFFERENCE BETWEEN JUDGES AND EXPERTS, THE JUDGES NEED HELP FROM THE EXPERTS. SO WOULD YOU AGREE THAT WE SHOULD GO AROUND AND EDUCATE JUDGES THAT THEY SHOULDN'T
BE CONSIDERING ALCOHOL INTOXICATION AS AFFECTING MEMORY?

A. NO, I WOULDN'T SAY THAT. ACTUALLY, I DIDN'T EVEN NOTICE
THAT FASCINATING LITTLE DIFFERENCE.

Q. WELL, DOES IT SHOW THE FLAW IN ASSUMING THAT THE EXPERTS
ARE ALWAYS RIGHT AND NOT THE JUDGES OR JURORS? THAT'S THE
BASE ASSUMPTION FROM THE STUDY, CORRECT?

A. WELL, IT'S CERTAINLY POSSIBLE THAT THE EXPERTS ARE
SOMETIMES WRONG. AND YOU CAN SEE THAT THEY DON'T ALWAYS
AGREE ONE HUNDRED PERCENT, PARTICULARLY ON A NUMBER OF THESE
ITEMS. BUT I THINK, IN GENERAL, YOU CAN TAKE A GROUP OF
EXPERTS AND GET SOME CONSENSUS ABOUT WHAT THE SCIENTIFIC
EVIDENCE IS ON A TOPIC. AND YOU CAN DO THAT IN THE AREA OF
MEMORY, AS WELL AS IN MANY OTHER AREAS.

Q. BUT DOESN'T THAT SURVEY SHOW THAT EXPERTS CAN GET IT
WRONG TEN PERCENT OF THE TIME, WHEN JUDGES DON'T, AND THEY
ARE RELYING UPON THAT DISCREPANCY TO SHOW THAT JUDGES ARE
WRONG. CORRECT?

A. WELL, I DON'T KNOW IF THESE INVESTIGATORS ARGUED IN THIS
ARTICLE THAT THE JUDGES WERE WRONG, BUT IT IS CLEAR THAT
THERE IS A STATISTICALLY SIGNIFICANT DIFFERENCE WITH THE
JUDGES GIVING AN ESTIMATE HIGHER THAN THE EXPERTS.

Q. WHY DON'T WE LOOK AT THE FIRST PAGE OF THE STUDY, PAGE
115, AND LOOK AT THE SUMMARY PARAGRAPH AND LOOK AT THE
SECOND HALF OF IT AND BLOW THAT UP.

"PARTICIPANT RESPONSES" -- AND THIS IS ADDRESSING
ALL OF THE RESPONSES, NOT JUST THE ALCOHOL QUESTION -- BUT
THEIR CONCLUSION IS: "PARTICIPANT RESPONSES DIFFERED
SIGNIFICANTLY FROM RESPONSES OF EYEWITNESS EXPERTS. JURORS
DISAGREE WITH THE EXPERTS ON 87 PERCENT OF THE ISSUES, WHILE
JUDGES AND LAW ENFORCEMENT DISAGREED WITH THE EXPERTS ON 60
PERCENT OF THE ISSUES. THE FINDINGS SHOW A LARGE DEFICIENCY
IN KNOWLEDGE OF EYEWITNESS MEMORY AMONGST JURORS, JUDGES AND
LAW ENFORCEMENT PERSONNEL, INDICATING THAT THE LEGAL SYSTEM
MAY BENEFIT FROM EXPERT ASSISTANCE IN THE EVALUATION OF
EYEWITNESS EVIDENCE." CORRECT?
A. THAT'S THEIR CONCLUSION, YES.
Q. NOW, LET'S TALK ABOUT THE 13 POINTS THAT MR. BJORK
OUTLINED. AND THE FIRST POINT -- I THINK WE HAVE TALKED
ABOUT THE TAPE RECORDER, AND THE ISSUE OF THE SUPPORT FOR
THE FACT THAT JURORS THINK THAT MEMORY IS LIKE A TAPE
RECORDER FROM THAT ONE SUBPART OF QUESTION 11 IN THE 2006
D. C. STUDY, CORRECT, WHICH WAS DONE IN THE CONTEXT OF A
TRAUMATIC EVENT? CORRECT?
A. THAT'S TRUE.
Q. AND THAT'S THE ONLY QUESTION YOU COULD FIND IN THE
LITERATURE ABOUT TAPE RECORDER AND ANALOGIZING MEMORY TO
TAPE RECORDER FROM JURORS OR LAY PEOPLE, CORRECT?
A. WELL, EXCEPT FOR THE ONE THAT I MENTIONED EARLIER IN THE
TESTIMONY, UPON QUESTIONING BY THE JUDGE, THE STUDY THAT WE
DID SHOWING THAT LAY PEOPLE BELIEVE THAT EVERYTHING IS
RECORDED AND THAT MEMORY IS PERMANENT.

THE COURT: LET ME ASK YOU THIS ON THAT POINT.

THERE IS NO WAY OF ASSESSING WHETHER THAT'S TRUE OR NOT, THOUGH, IS THERE, BECAUSE THERE IS NO SCIENTIFIC WAY YOU CAN DISSECT THE BRAIN AND MAKE AN ASSESSMENT OF WHAT'S THERE, BUT YET IT CAN'T BE RETRIEVED? SO WE DON'T KNOW IF IT IS THERE OR NOT. ALL WE KNOW IS THAT THEY CAN'T RETRIEVE IT, RIGHT?

THE WITNESS: RIGHT. IT REALLY TELLS YOU ABOUT PEOPLE'S BELIEFS. THAT SOMEHOW IT IS ALL THERE, AND WHEN YOU --

THE COURT: WE KNOW IT'S NOT THERE?

THE WITNESS: WELL, WE CAN'T PROVE IT'S NOT THERE.

THE COURT: RIGHT. THANK YOU.

THE WITNESS: WE CAN'T PROVE IT'S NOT THERE.

BY MR. FITZGERALD:

Q. TURNING TO POINT 2, WHICH AGAIN POINT 2 ARE STUDIES DONE IN THE EYEWITNESS IDENTIFICATION CONTEXT, BUT LET ME ASK YOU THIS. THE QUESTION THAT WAS ASKED, WHAT DOES IT MEAN -- IN THE KASSIN STUDY IT SAID, QUOTE, AN EYEWITNESS PERCEPTION AND MEMORY FOR AN EVENT MAY BE AFFECTED BY HIS OR HER ATTITUDES AND EXPECTATIONS, CLOSE QUOTE.

WHAT ARE THE ATTITUDES AND EXPECTATIONS WE ARE TALKING ABOUT IN THE QUESTION?

A. WELL, IT IS WHATEVER PEOPLE READ INTO THAT QUESTION. WE
DON'T KNOW. THE EXPERTS ARE GIVEN THE ITEM. NINETY-TWO
PERCENT OF THEM SAY THAT THAT IS A RELIABLE FINDING. THEY
AGREE WITH THAT FINDING.

Q. ISN'T IT FAIR, THOUGH, THAT EXPERTS MAY READ SOMETHING
DIFFERENTLY INTO A QUESTION THAN A LAYPERSON? SO AN EXPERT
MAY LOOK AT ATTITUDES AND EXPECTATIONS IN THE CONTEXT OF
THEIR PRIOR EXPERIENCE AND LEARNING, BUT A JUROR IS ASKED:
IS YOUR PERCEPTION AND MEMORY FOR AN EVENT AFFECTED BY
ATTITUDES OR EXPECTATIONS? ARE THEY GIVEN ANY CONCRETE
EXAMPLE OF THAT? THEY ARE NOT GIVEN ANY DESCRIPTION OF IT?
THEY ARE JUST SURVEYED?

A. THAT'S CORRECT.

Q. AND IF THEY DON'T UNDERSTAND THE QUESTION, WE HOLD THAT
AGAINST THE JURORS BECAUSE THEY GET 31 PERCENT AND THE
EXPERTS GET SOMETHING DIFFERENT? WELL, IF THERE IS A
DIFFERENCE BETWEEN THE EXPERTS AND THE JURORS ON HOW THEY
PERCEIVE THE QUESTION, THAT IS HELD AGAINST THE JURORS IN
THIS STUDY, CORRECT?

A. WELL, THE EXPERTS ARE ALSO ASKED: DO YOU THINK THERE IS
A RESEARCH BASIS TO SUPPORT THIS STATEMENT?

THAT IS ONE OF THE OTHER ITEMS THAT THE KASSIN
EXPERTS ARE ASKED. AND IF I LOOK AT TABLE 4 ON PAGE 412,
"ATTITUDES AND EXPECTATIONS," 94 PERCENT SAY THAT THERE IS A
RESEARCH BASIS FOR THIS. SO ONE COULD PRESUME THAT THE
EXPERTS ARE RELYING ON RESEARCH THEY KNOW ABOUT, AND THE
JURORS ARE RELYING ON SOMETHING ELSE.

Q. DOESN'T IT MAKE THE POINT THAT MAYBE THE EXPERTS, WHO
KNOW ABOUT THE RESEARCH BASIS, ARE READING THAT RESEARCH
INTO FRAMING THE CONTEXT OF THE QUESTION? IF THE JURORS
DON'T UNDERSTAND THE QUESTION, THEY CAN'T GET IT RIGHT. AND
YOU ARE ASKING SOMEONE A SIMPLE STATEMENT ABOUT ATTITUDES
AND EXPECTATIONS. DOES THE STUDY ALLOW FOR THE POSSIBILITY
 THAT THE JURORS DON'T KNOW WHAT IS BEING ASKED?

A. WE DON'T KNOW IF THEY KNOW.

Q. AND, IN FACT, IF WE CAN OFFER AS EXHIBIT 9 THE KASSIN
STUDY FROM 1992, AND I CAN GIVE YOU A COPY, IF YOU DON'T
HAVE IT.

A. WELL, IF YOU ARE GOING TO ASK ME ABOUT IT, I WOULD LIKE
TO HAVE A COPY.

Q. AND IF I CAN FIND ANOTHER COPY TO HAND UP TO THE
JUDGE -- IF WE CAN FIND THAT, THEN WE WILL PUT IT ON THE
SCREEN.

A. IT TURNS OUT I HAVE A COPY, MR. FITZGERALD.

Q. AND I HAVE A SINGLE QUESTION ON THE KASSIN 1992 STUDY,
WHICH HAS TO DO WITH -- IF WE CAN TURN TO PAGE 1244, I
BELIEVE -- YES -- ATTITUDES AND EXPECTATIONS, AND WAS THAT
QUESTION ASKED OF LAY PEOPLE IN THAT SURVEY? AND I THINK IF
WE THEN TURN TO PAGE 1245, IN THIS SURVEY, DID IT COME OUT
THAT JURORS AND EXPERTS CAME OUT ON QUESTION 19 ABOUT
DEAD-EVEN -- IN FACT, THE SUBJECTS CAME OUT AHEAD OF THE
EXPERTS? IF THE RIGHT ANSWER IS "YES," THEY GOT IT RIGHT
88.6 PERCENT OF THE TIME, AND THEN THE JURORS GOT IT RIGHT
86.9 PERCENT OF TIME. IS THAT RIGHT?
A. YOU WOULD CALL THAT DEAD-EVEN BECAUSE OF THE
NONSTATISTICAL DIFFERENCE. YES, THE SUBJECTS PERFORMED LIKE
THE EXPERTS IN THE 1992 STUDY.
Q. AND THEN KASSIN HIMSELF, WHO DID THIS STUDY THAT SHOWED
THAT THE EXPERTS AND THE JURORS PERFORMED DEAD-ON, WENT OUT
AND SURVEYED THE EXPERTS WE TALKED ABOUT A FEW MOMENTS AGO
IN 2001, WHERE THERE WAS SOME CONCERN THAT THE EXPERTS HAD A
BIAS, AND THEY FOUND IN THAT SURVEY THAT THE EXPERTS NOW
SAID THAT THEY WERE 92 PERCENT ON THIS QUESTION RELIABLE,
BUT ONLY 31 PERCENT OF THEM THOUGHT IT WAS COMMON SENSE.
AND IS IT FAIR TO SAY THAT THE EXPERTS WHO GAVE IT
A RATING ON COMMON SENSE OF 31 PERCENT SHOULD HAVE HAD
AVAILABLE TO THEM THE VERY STUDY THAT SHOWED THAT EXPERTS
AND JURORS WERE DEAD ON?
A. IF THE EXPERTS HAD BEEN AWARE OF THIS KASSIN AND
BARNDOLLAR STUDY AND HAD IT ON THEIR MIND, THEY MIGHT HAVE
GIVEN A DIFFERENT ANSWER TO THEIR IMPRESSIONS ABOUT WHAT
EXPERTS WOULD THINK ABOUT -- WHAT SUBJECTS WOULD THINK ABOUT
THIS TOPIC.
Q. LET'S TURN TO POINT THREE ABOUT CONFIDENCE AND ACCURACY.
A. BACK WITH KASSIN AND BARNDOLLAR?
Q. NO. I'M SORRY.
A. OH, OKAY.

Q. I THINK YOU CAN PUT THAT AWAY FOR THE MOMENT.
A. OKAY.

Q. I CAN'T TELL YOU WHAT I AM GOING TO POINT TO NEXT. IF I KNEW, I WOULDN'T.
A. OKAY.

Q. ON CONFIDENCE AND ACCURACY, IS IT FAIR TO SAY THERE ARE TWO DIFFERENT CONFIDENCE-ACCURACY RELATIONSHIPS? ONE IS WHEN YOU COMPARE ACROSS SUBJECTS, AND ONE IS WHEN YOU COMPARE WITHIN SUBJECTS? SO IF ONE WITNESS, WITNESS "A" SAYS, "I AM PRETTY DARN CONFIDENT; I'M CERTAIN," AND WITNESS "B" SAYS, "I'M PRETTY SURE, BUT NOT CERTAIN," THERE IS A QUESTION OF WHETHER OR NOT YOU SHOULD PUT MORE STOCK IN WHAT WITNESS "A" SAYS VERSUS WITNESS "B." YOU UNDERSTANDS THAT CONFIDENCE-ACCURACY QUESTION?
A. YES.

Q. THE SECOND QUESTION IS IF YOU GO TO WITNESS "A" AND ASK THEM TO MAKE TWO IDENTIFICATIONS, AND AS TO ONE OF THEM, HE SAYS, "I AM CERTAIN THAT THAT IS THE MAN WHO ROBBED ME," BUT THEN SAYS, "I'M NOT SO SURE THAT THAT IS THE GUY THAT WAS WITH HIM," SO WITHIN THE SAME WITNESS, HE MAY EXPRESS -- HE OR SHE MAY EXPRESS A DIFFERENCE IN CONFIDENCE, CORRECT?
A. YES.

Q. AND IS IT FAIR TO SAY THAT WHETHER OR NOT THE QUESTION IS TRUE: "AN EYEWITNESS' CONFIDENCE IS NOT A GOOD PREDICTOR
OF HIS OR HER IDENTIFICATION ACCURACY?" WOULD DEPEND ON
WHETHER THE PERSON UNDERSTOOD WHETHER YOU WERE ASKING ACROSS
SUBJECTS OR WITHIN SUBJECTS?
A. YOU ARE ABSOLUTELY RIGHT. WHEN YOU LOOK
AT THIS MATTER WITHIN SUBJECTS, YOU DO GET STRONGER
CORRELATIONS. AND SO IT IS PROBABLY THE CASE THAT WHEN THE
KASSIN EXPERTS WERE ANSWERING THE QUESTION, THEY MUST HAVE
BEEN THINKING OF THE OTHER KIND, YOU KNOW, ACROSS-SUBJECT
COMPARISONS.
Q. SO, IN THE END, THE FACT THAT JURORS AND EXPERTS MAY
DISAGREE, AND THE RESULTS OF THIS QUESTION MAY WELL HAVE TO
DO WITH THE FACT THAT JURORS ARE NOT EXPOSED TO THE VARIOUS
STUDIES OF ACROSS-WITNESS IDENTIFICATION, THEY MAY BE
ANSWERING A DIFFERENT QUESTION?
A. THEY COULD BE, YES. I MEAN THERE IS A PRETTY BIG
DIFFERENCE BETWEEN THE EXPERTS AND THE JURORS ON THAT ITEM.
I MEAN EVEN THE EXPERTS ARE POSSIBLY THINKING ABOUT WE HAVE
GOT A SINGLE PERSON EXPRESSING AN OPINION AND GIVING A
CONFIDENCE RATING. IS IT A GOOD PREDICTOR OR ISN'T IT?
Q. BUT ISN'T IT THE TENDENCY OF EXPERTS TO FOCUS ON
CONFIDENCE-ACCURACY OF ACROSS WITNESSES, NOT WITHIN
WITNESSES?
A. YES.
Q. THAT'S THEIR BIAS, CORRECT?
A. YES.
Q. AND IF JURORS DON'T HAVE THAT BIAS OR LAY PEOPLE DON'T
HAVE THAT BIAS, THEY MAY ANSWER THE QUESTION WITHIN A
WITNESS AS OPPOSED TO ACROSS-WITNESSES, CORRECT?
A. OH, THAT'S POSSIBLE. MAYBE THAT'S WHY SO MANY FEWER OF
THEM GAVE THE DIFFERENT ANSWER THAN THE EXPERTS. THAT'S
POSSIBLE.

THE COURT: WE WILL NEED TO RECESS FOR LUNCH --

MR. FITZGERALD: OKAY.

THE COURT: -- AND COME BACK A QUARTER OF 2:00.

MR. FITZGERALD: THANK YOU.

(WHEREUPON, THE ABOVE-ENTITLED MATTER WAS RECEESED
FOR LUNCH.)

CERTIFICATE OF REPORTER

THIS RECORD IS CERTIFIED BY THE UNDERSIGNED REPORTER TO
BE THE OFFICIAL TRANSCRIPT OF THE PROCEEDINGS INDICATED.

[Signature]

PHYLLIS MERANA