

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

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

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

22           IN THIS PARTICULAR STUDY, 60 PERCENT OF THE  
23       WASHINGTON STATE POTENTIAL JURORS GOT THE CORRECT ANSWER.  
24       FIFTY-TWO PERCENT OF THE NEBRASKA SAMPLE GOT THE CORRECT  
25       ANSWER.

1 I THINK AN EVEN BETTER STUDY OF THIS PHENOMENON,  
2 THOUGH, IS THE ONE THAT WAS DONE BY YARMEY AND JONES BECAUSE  
3 THEY WERE ABLE TO COMPARE EXPERTS' OPINIONS TO JURORS'. AND  
4 WE DID NOT DO THAT.

5 Q. ONE QUICK QUESTION ON YOUR ARTICLE WITH DEFFENBACHER.

6 A. YES.

7 Q. I TAKE IT D. C. JURORS, WHO WERE THE THIRD COHORT OF  
8 PERSONS THAT YOU ASKED, WERE NOT ASKED THE QUESTION?

9 A. THAT'S RIGHT. WHEN WE ACTUALLY -- IN THE THIRD STUDY IN  
10 THIS PAPER WHEN WE ACTUALLY LOOKED AT THE D.C. JURORS,  
11 INCLUDING ONES WHO HAD GONE THROUGH THEIR TWO WEEKS OF JURY  
12 SERVICE -- ALTHOUGH WE DON'T KNOW WHAT KIND OF TRIAL THEY  
13 SERVED ON, IF THEY DID -- WE DIDN'T ASK THIS QUESTION OF  
14 THEM.

15 Q. ALL RIGHT. OKAY. YOU WERE ABOUT TO MOVE TO YARMEY AND  
16 JONES I THINK.

17 A. YES. I JUST WANTED TO MENTION YARMEY AND JONES -- THIS  
18 WAS THE 1983 CANADIAN SAMPLE. THEY LOOKED AT EXPERTS AND  
19 COMPARED THEM TO JURORS. AND, BASICALLY, ONE HUNDRED  
20 PERCENT -- THEY GAVE THAT SAME QUESTION THAT DEFFENBACHER  
21 HAD USED TO ALL OF THESE SUBJECTS OR PARTICIPANTS IN CANADA.  
22 SIXTEEN OF THEIR EXPERTS PICKED ANSWER "A." THAT IS WHAT  
23 THE EXPERTS ARE LIKELY TO SAY -- THEY AGREE THAT IS THE  
24 RIGHT ANSWER -- BUT LESS THAN HALF OF THE JURORS GAVE THAT  
25 CORRECT ANSWER.

1 Q. WHAT PERCENTAGE OF THE EXPERTS GAVE THE CORRECT ANSWER?

2 A. ONE HUNDRED PERCENT.

3 Q. ONE HUNDRED PERCENT. AND WHAT PERCENTAGE OF THE JURORS?

4 A. THEY HAD TWO SAMPLES OF JURORS: ONE FROM A STUDENT

5 POPULATION OF POTENTIALS JURORS, AND THE OTHER FROM A

6 BROADER CITIZEN POPULATION. AND THOSE FIGURES WERE 43

7 PERCENT AND 45 PERCENT. SO NOT REALLY DIFFERENT FROM EACH

8 OTHER. SLIGHTLY LESS THAN HALF --

9 Q. ALL RIGHT.

10 A. -- ARE GIVING THE RIGHT ANSWER. SOMEWHAT MORE THAN HALF

11 ARE GIVING THE WRONG ANSWER TO A QUESTION THAT COULD

12 DEMONSTRATE SOME APPRECIATION FOR THE IDEA THAT AN INITIAL

13 RECALL THAT'S IN ERROR MIGHT PERSIST.

14 Q. ALL RIGHT. ANYTHING ELSE ON POINT 6 THAT YOU THINK IS

15 HELPFUL ON THIS ISSUE OF WHETHER JURORS UNDERSTAND THE POINT

16 AS A MATTER OF COMMON SENSE?

17 A. NO, NOT FROM THESE STUDIES.

18 Q. ALL RIGHT. NOW, THE NEXT POINT ON WHICH YOU FOUND THE

19 STUDIES THAT YOU CONSIDERED HELPFUL WAS POINT 8, CORRECT?

20 A. YES.

21 Q. AND THIS HAS TO DO WITH DIVIDED ATTENTION?

22 A. RIGHT. THE ESSENCE OF DR. BJORK'S POINT 8 IS THAT

23 DIVIDED ATTENTION AT THE TIME YOU ARE ENCODING, WHICH MEANS

24 WHEN YOU ARE HAVING THE EXPERIENCE THAT YOU ARE LATER GOING

25 TO TRY TO REMEMBER, WILL HURT YOUR ABILITY TO LATER RECALL

1 THAT.

2 AND I DO HAVE TO SAY THAT NONE OF THESE STUDIES OF  
3 JUROR COMMON KNOWLEDGE THAT I HAVE REVIEWED TALKS ABOUT  
4 DIVIDED ATTENTION AS A PHRASE OR A CONCEPT. SO THE ONLY  
5 THING THAT I COULD FIND THAT I THINK SOMEWHAT RELATES TO  
6 THIS IDEA OF DIVIDED ATTENTION IS THERE ARE SOME SITUATIONS  
7 WHERE YOU HAVE SOMETHING GOING ON DURING THE EVENT THAT IS  
8 SO SIGNIFICANT THAT IT CAPTURES ATTENTION, AND THAT IS A  
9 CRIME SITUATION WITH A WEAPON PRESENT.

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

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

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

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

23 I MEAN WE DON'T EXPECT THEM TO APPRECIATE THE  
24 TECHNICALITIES THAT THE EYE-FIXATION DEVOTED TO THE WEAPON  
25 IS PROBABLY GOING TO -- IS GOING TO BE A LITTLE BIT LONGER,

1 335 MILLISECONDS, INSTEAD OF 250 MILLISECONDS ON A  
2 NON-WEAPON. WE DON'T EXPECT THEM TO APPRECIATE THAT LEVEL  
3 OF SPECIFICITY, BUT DO THEY APPRECIATE THE GENERAL IDEA THAT  
4 THE WEAPON CAN DRAW ATTENTION AWAY AND RESULT IN REDUCED  
5 ABILITY?

6 AND THE KASSIN STUDY OF EXPERTS HAD A QUESTION ON  
7 THIS. IT ASKED THIS QUESTION: DO YOU AGREE THAT THIS  
8 STATEMENT IS RELIABLE: THE PRESENCE OF A WEAPON IMPAIRS AN  
9 EYEWITNESS'S ABILITY TO ACCURATELY IDENTIFY THE  
10 PERPETRATOR'S FACE?

11 EIGHTY-SEVEN PERCENT OF THE EXPERTS THOUGHT THIS  
12 WAS RELIABLE. NINETY-SEVEN PERCENT OF THEM SAID IT HAD A  
13 RESEARCH BASIS. BUT WHEN THOSE FIGURES WERE COMPARED TO  
14 JURORS, DO JURORS UNDERSTAND THIS?

15 WE LOOKED TO THE BENTON TENNESSEE JURORS BECAUSE  
16 THEY ARE ASKED THE SAME ITEM. THE PRESENCE OF A WEAPON  
17 IMPAIRS AN EYEWITNESS'S ABILITY TO ACCURATELY IDENTIFY THE  
18 PERPETRATOR'S FACE? THEY RESPOND EITHER "GENERALLY TRUE,"  
19 "GENERALLY FALSE" OR "DON'T KNOW." AND ONLY 39 PERCENT SAID  
20 THAT THEY THOUGHT THIS WAS GENERALLY TRUE.

21 SO THAT'S QUITE A BIG DIFFERENCE BETWEEN THE  
22 EXPERTS' APPRECIATION OF THIS AND THE POTENTIAL JURORS'.

23 Q. THE EXPERTS BEING IN THE 80'S AND THE JURORS AT 39  
24 PERCENT, CORRECT?

25 A. CORRECT.

1 Q. ALL RIGHT.

2 AND, AGAIN, "WEAPON-FOCUS" IS NOT PRECISELY  
3 ANALOGOUS TO DIVIDED ATTENTION, BUT IT IS RELATED, IN YOUR  
4 VIEW?

5 A. WELL, I THINK IT IS RELATED. THE DIVIDED -- YOU KNOW,  
6 YOU CAN HAVE YOUR ATTENTION DIVIDED BECAUSE YOU ARE MENTALLY  
7 WORRYING ABOUT SOMETHING ELSE, OR YOU CAN HAVE YOUR  
8 ATTENTION DIVIDED BECAUSE SOMETHING IS DRAWING YOUR  
9 ATTENTION AWAY FROM SOMETHING ELSE. THOSE AREN'T EXACTLY  
10 THE SAME THINGS, BUT I THINK THEY ARE KIND OF COUSINS OF  
11 EACH OTHER.

12 Q. ALL RIGHT. ANYTHING ELSE ON POINT 8, THE DIVIDED  
13 ATTENTION?

14 A. WELL, I COULD POINT TO, YOU KNOW, OTHER STUDIES THAT  
15 SHOW LACK OF APPRECIATION OF THIS PHENOMENON OF  
16 "WEAPON-FOCUS," BUT I THINK I HAVE MADE THE POINT FAIRLY  
17 WELL.

18 Q. ALL RIGHT.

19 A. THERE ARE OTHER EXAMPLES OF IT IN THESE STUDIES.

20 Q. ALL RIGHT. LET'S MOVE TO POINT TEN, AND THAT'S THE LAST  
21 OF DR. BJORK'S POINTS FOR WHICH YOU FOUND THE STUDIES THAT  
22 YOU CONCLUDE ARE HELPFUL IN ASSESSING JUROR UNDERSTANDING,  
23 CORRECT?

24 A. CORRECT.

25 Q. ALL RIGHT. POINT TEN HAS TO DO WITH RETROACTIVE

1 INTERFERENCE, RIGHT?

2 A. RIGHT. RETROACTIVE INTERFERENCE -- THE EXTENT TO WHICH  
3 NEW INFORMATION THAT YOU GET AFTER AN EVENT CAN CAUSE A  
4 WEAKENING OF YOUR MEMORY FOR THINGS THAT HAPPEN EARLIER, OR  
5 NEW INFORMATION THAT YOU GET AFTER AN EVENT IS SOMETHING WE  
6 CALL POST-EVENT INFORMATION. IT CAN NOT ONLY LEAD TO A  
7 WEAKENING OF EARLIER INFORMATION, BUT IT CAN ALSO LEAD TO  
8 THE CREATION OF DISTORTED AND SOMETIMES EVEN WHOLLY FALSE  
9 MEMORIES -- DISTORTED OR WHOLLY FALSE MEMORIES THAT YOU CAN  
10 BE VERY DETAILED ABOUT, OR CONFIDENT ABOUT, OR EVEN  
11 EMOTIONAL ABOUT.

12 THAT'S THE SCIENCE. AND, IN FACT, THAT IS THE  
13 AREA WHERE I HAVE DONE HUNDREDS OF STUDIES INVOLVING MAYBE  
14 20,000 PEOPLE OR MORE.

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

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

25 Q. SO, IN OTHER WORDS, JUST TO CLARIFY THAT, YOU HAVE GOT

1 NEAR UNANIMITY ON THE PART OF EXPERTS THAT THAT IS A CORRECT  
2 STATEMENT, RIGHT?

3 A. RIGHT.

4 Q. AND YOU HAVE GOT 40 PERCENT OF JURORS WHO EITHER HAVE IT  
5 WRONG OR DON'T UNDERSTAND?

6 A. CORRECT.

7 Q. ALL RIGHT. ANYTHING ELSE ON RETROACTIVE INTERFERENCE?

8 A. WELL, IN A SOMEWHAT HIGHER FIGURE, BUT WE CAN'T COMPARE  
9 IT TO EXPERTS. THEY WEREN'T EXACTLY ASKED. BUT LET ME GIVE  
10 THIS, TOO, IN THE INTEREST OF COMPLETE DISCLOSURE HERE  
11 BECAUSE IT DOES SHOW A LITTLE BIT BETTER OR SOMEWHAT BETTER  
12 JUROR UNDERSTANDING.

13 THE JURIMETRICS STUDY, THE 2006 POTENTIAL JURORS  
14 FROM D. C. WERE ASKED A QUESTION ABOUT THIS. IT WAS WORDED  
15 DIFFERENTLY, BUT IT DID GET A HIGHER PERCENT OF JURORS  
16 SAYING -- GIVING AN ANSWER THAT REFLECTS THE SCIENCE.

17 AND THE WORDING WAS "EYEWITNESSES CAN BELIEVE THEY  
18 REMEMBER DETAILS ABOUT A CRIME THAT THEY ACTUALLY LEARNED  
19 ABOUT LATER FROM SOMEONE ELSE, SUCH AS THE POLICE?" AND 80  
20 PERCENT THOUGHT THAT WAS TRUE. SIXTEEN PERCENT THOUGHT IT  
21 WAS FALSE. FOUR PERCENT WERE NOT SURE.

22 Q. SO EVEN WORDED THAT WAY, YOU HAVE GOT ROUGHLY A FIFTH OF  
23 THE JURORS WHO EITHER HAD IT WRONG OR DON'T UNDERSTAND,  
24 CORRECT?

25 A. THAT'S CORRECT. ANYHOW, THE DATA SPEAK FOR THEMSELVES.



1 WE COULD TRY TO FIGURE OUT WHY THE ANSWER IS SLIGHTLY  
2 DIFFERENT. I AM NOT SURE.

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

7 A. CORRECT.

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

13 A. CORRECT.

14 Q. NOW, YOU HAVEN'T FOUND ANY STUDIES THAT ADDRESS WHETHER  
15 JURORS KNOW THAT AS A MATTER OF COMMON SENSE, CORRECT?

16 A. I COULD NOT FIND ANY ITEMS THAT ADDRESSED THAT. IT  
17 SEEMS TO ME THAT IT MIGHT BE A MATTER OF COMMON SENSE. I  
18 PROBABLY WOULDN'T HAVE WORDED THE POINT THAT WAY BECAUSE I  
19 WOULD HAVE SAID HIM OR HER, BUT WE'LL LEAVE THAT ASIDE.

20 Q. BUT PUTTING ASIDE THAT POINT, DRAWING ON YOUR KNOWLEDGE  
21 OF THE FIELD AND YOUR WORK IN THE FIELD, THAT IS ONE THAT  
22 YOU BELIEVE IS PROBABLY A MATTER OF COMMON KNOWLEDGE,  
23 CORRECT?

24 A. RIGHT. I THINK THE STATEMENT IS TRUE, BUT I THINK  
25 PROBABLY IF WE WERE TO GO OUT AND ASK POTENTIAL JURORS, THEY

1 WOULD PROBABLY SAY, "THAT MAKES SENSE TO ME."

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

6 A. CORRECT.

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

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

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

21 A. THE "FORGOT IT ALL ALONG" PHENOMENON -- NOW, THIS REFERS  
22 TO A SITUATION WHERE YOU THINK YOU ARE REMEMBERING SOMETHING  
23 FOR THE FIRST TIME AND THAT YOU HAVEN'T REMEMBERED IT FOR AN  
24 AWFUL LONG TIME, OR YOU HAVEN'T KNOWN IT BEFORE. AND THEN  
25 IT LATER TURNS OUT THAT YOU DID REMEMBER IT EARLIER, AND YOU

1 DID THINK ABOUT IT EARLIER, DESPITE THE FACT THAT YOU ARE  
2 FEELING SOME ACTUAL SURPRISE AT THE TIME AT REMEMBERING IT.

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

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

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

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

23 Q. THAT WAS GOING TO BE MY NEXT QUESTION. I TAKE IT SINCE  
24 THIS IS A RECENT DISCOVERY AND A FAIRLY NEW FINDING IN THE  
25 FIELD OF MEMORY RESEARCH, THAT THAT'S THE CASE. THAT

1 EXPERTS IN THE FIELD -- UNTIL RECENTLY, EVEN THE EXPERTS IN  
2 THE FIELD DIDN'T UNDERSTAND THIS PHENOMENON. IS THAT  
3 CORRECT?

4 A. WELL, THEY WEREN'T THINKING ABOUT IT, AND THEY WEREN'T  
5 APPRECIATING IT.

6 Q. OKAY. POINT 12 -- THIS HAS TO DO WITH VERBATIM RECALL  
7 AND JUST RECALL AND, AMONG OTHER POINTS, THAT VERBATIM  
8 RECALL DROPS OFF QUICKLY.

9 A. ITEM 12 REALLY IS ABOUT THE RECALL OF CONVERSATIONS.  
10 AND DR. BJORK IS MAKING AN EXCELLENT POINT HERE, FOR WHICH  
11 THERE IS RESEARCH THAT SHOWS THAT VERBATIM RECALL DROPS OFF  
12 FAIRLY QUICKLY.

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

19 YOU KNOW, I THINK THAT IS KIND OF AN INTERESTING  
20 AND SURPRISING FINDING. THERE IS NO QUESTION IN THE STUDIES  
21 OF JUROR KNOWLEDGE THAT TAPS INTO THAT DIRECTLY, BUT MY  
22 INFERENCE WOULD BE THAT PEOPLE ARE NOT GOING TO APPRECIATE  
23 HOW QUICKLY THE VERBATIM OF A CONVERSATION FADES AWAY.

24 Q. FINALLY, LET'S TURN TO POINT 13. THIS HAS TO DO WITH  
25 THE PROPOSITION THAT FORGETTING IS AN EFFICIENT USE OF

1 MEMORY. IN OTHER WORDS, WITHOUT FORGETTING, MEMORY COULDN'T  
2 FUNCTION.

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

6 A. WELL, I WASN'T FOCUSING ON THAT PART. AS YOU KNOW,  
7 BJORK POINT 13 IS LONG AND SOMEWHAT COMPLICATED, BUT THE  
8 PART OF THAT THAT I WAS FOCUSING ON IS THE PART THAT SAYS  
9 THAT PEOPLE SUPPRESS OR FORGET INFORMATION THAT'S OUT OF  
10 DATE. YOU KNOW, THAT YOU CAN SUPPRESS INFORMATION.

11 Q. RIGHT.

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

16 Q. ALL RIGHT.

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

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

23 A. WELL, IF PEOPLE IN GENERAL UNDERSTAND THAT MEMORIES FADE  
24 AND YOU CAN FORGET THINGS, WHICH I THINK IS SOMETHING OF A  
25 MATTER OF THE COMMON SENSE, THEN, YOU KNOW, YOU MIGHT EXPECT

1 THEM TO AGREE WITH THE IDEA THAT WE SUPPRESS OR FORGET  
2 THINGS THAT ARE OUT-OF-DATE.

3 Q. ALL RIGHT. SO, ALTHOUGH WE DON'T HAVE STUDIES, IT IS  
4 POSSIBLE, IN YOUR VIEW, THAT 13 WOULD GO INTO THE CATEGORY  
5 OF COMMON SENSE PROPOSITION?

6 A. I THINK IT IS SOMETHING OF A MATTER OF COMMON SENSE  
7 SENSE. IT IS SOMEWHAT COMPLICATEDLY WORDED. SO I AM JUST  
8 NOT SURE WHICH LITTLE PIECE OF IT TO FOCUS ON. BUT I DON'T  
9 SEE ANYTHING HERE THAT STRIKES ME AS BEING ANYTHING FOR  
10 WHICH THERE IS SCIENTIFIC WORK AND STRONG EVIDENCE THAT  
11 JURORS DON'T KNOW IT.

12 Q. ALL RIGHT.

13 A. I MEAN THERE ARE PLENTY OF OTHER THINGS THAT JURORS  
14 DON'T KNOW AND DON'T APPRECIATE THAT WE HAVEN'T EVEN TALKED  
15 ABOUT -- THEIR LACK OF APPRECIATION OF TIME ESTIMATION AND  
16 HOW LONG EVENTS LASTED AND SO ON -- BUT ON THIS PARTICULAR  
17 POINT, NO.

18 Q. ALL RIGHT. PUT ASIDE NOW FOR A MOMENT THE QUESTION OF  
19 WHAT JURORS UNDERSTAND AS A MATTER OF COMMON SENSE. I HAVE  
20 NOT ASKED YOU TO EXAMINE THE STUDIES THAT ARE LISTED IN  
21 DR. BJORK'S DISCLOSURE -- THAT'S EXHIBIT 2 -- AS THE BASES  
22 FOR HIS OPINION. AND I HAVEN'T ASKED YOU TO DETERMINE  
23 WHETHER THOSE STUDIES SUPPORT HIS 13 POINTS, CORRECT?

24 A. CORRECT.

25 Q. WITH THAT IN MIND, AND WITH THAT UNDERSTANDING, IS THERE

1 ANYTHING IN THOSE 13 POINTS WITH WHICH YOU, AS AN EXPERT ON  
2 MEMORY, DISAGREE?

3 A. NO. THESE ARE VERY SENSIBLE STATEMENTS FOR WHICH I  
4 BELIEVE THERE IS SCIENTIFIC SUPPORT AND BASIS.

5 Q. ALL RIGHT. THANK YOU VERY MUCH.

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

8 THE COURT: YES.

9 MR. CLINE: THANK YOU, YOUR HONOR.

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

12 (A RECESS WAS TAKEN.)

13 (AFTER RECESS.)

14 THE COURT: CROSS-EXAMINATION?

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

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

18 MR. FITZGERALD: OH, THANK YOU, JUDGE.

19 CROSS-EXAMINATION

20 BY MR. FITZGERALD:

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

22 A. GOOD AFTERNOON.

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

1 CORRECT?

2 A. THAT'S CORRECT.

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

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

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

15 A. YES.

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

19 A. YES, THAT HAS BEEN DONE.

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

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

24 Q. AND YOU CAN TEST WHETHER OR NOT IF THE PERSON TELLS  
25 SOMEONE, "YOU HAVE GOT THE RIGHT ANSWER," OR DOESN'T TELL



1 THEM SOMETHING -- WHETHER THAT AFFECTS AN IDENTIFICATION,  
2 CORRECT?

3 A. YES.

4 Q. AND YOU CAN STUDY WHETHER OR NOT THE FACT THAT A CRIME  
5 IS VIOLENT WILL AFFECT AN EYEWITNESS IDENTIFICATION,  
6 CORRECT?

7 A. YES.

8 Q. AND YOU CAN STUDY WHETHER OR NOT IF THERE IS A  
9 CROSS-RACIAL IDENTIFICATION, WHETHER THAT AFFECTS THE  
10 RELIABILITY OF AN IDENTIFICATION, CORRECT?

11 A. YES.

12 Q. AND YOU CAN STUDY WHETHER OR NOT IF A GUN IS INVOLVED,  
13 IT AFFECTS THE RELIABILITY OF AN IDENTIFICATION, CORRECT?

14 A. YES.

15 Q. AND YOU CAN STUDY WHETHER OR NOT THE AGE OF THE PERSON  
16 MAKING THE IDENTIFICATION IS RELIABLE, CORRECT?

17 A. WHETHER THE AGE MATTERS.

18 Q. YES. AND IN YOUR SCIENCE, YOU TEST THESE --

19 A. YOU SAID WHETHER THE AGE IS RELIABLE. AND THAT'S NOT, I  
20 DON'T THINK, WHAT YOU MEANT.

21 Q. WHETHER THE AGE MATTERS IN MAKING THE IDENTIFICATION  
22 RELIABLE.

23 A. YES. THANK YOU.

24 Q. AND YOU TEST THESE HYPOTHESES BY NOT ASSUMING THAT  
25 SOMETHING WILL HAPPEN OR WHETHER IT WILL HAVE SOME AFFECT

1 OR NO AFFECT BY ACTUALLY TESTING IT TO SEE WHETHER OR NOT --  
2 WHEN YOU PUT THIS TO THE TEST OF EXPERIMENT OR SURVEY,  
3 WHETHER OR NOT THERE IS AN EFFECT, CORRECT?

4 A. YES.

5 Q. AND THAT IS WHAT MAKES IT SCIENTIFIC, CORRECT?

6 A. WELL, THAT IS ONE EXAMPLE OF THE SCIENTIFIC METHOD AT  
7 WORK.

8 Q. NOW, WHEN YOU TESTIFIED TODAY, WE INTRODUCED A NUMBER OF  
9 DIFFERENT STUDIES YOU RELIED UPON TO TALK ABOUT WHAT JURORS  
10 MAY APPRECIATE ABOUT MEMORY AND EYEWITNESS IDENTIFICATION,  
11 CORRECT?

12 A. CORRECT.

13 Q. WHEN THE D. C. STUDY WAS CONDUCTED OR PUBLISHED IN  
14 2006 -- AND I WILL KEEP TRYING TO REFER TO THE EXHIBIT  
15 NUMBERS IF I CAN KEEP THE SHEETS STRAIGHT -- AND THAT WOULD  
16 BE EXHIBIT NUMBER 4 -- I AM SORRY. EXHIBIT NUMBER --

17 A. THREE.

18 Q. THREE. YES. THANK YOU.

19 EXHIBIT NUMBER THREE. THAT IS A STUDY YOU  
20 PARTICIPATED IN WITH THE DISTRICT OF COLUMBIA PUBLIC  
21 DEFENDER SERVICE, CORRECT?

22 A. YES.

23 Q. AND WHEN YOU PUBLISHED THAT SURVEY, YOU INDICATED IN  
24 2006 THAT UNTIL NOW, NO ONE HAS APPROPRIATELY MEASURED WHAT  
25 JURORS KNOW ABOUT EYEWITNESS RELIABILITY, CORRECT?

1 A. YOU WILL HAVE TO POINT ME TO THE PHRASE YOU ARE  
2 REFERRING TO.

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

5 I THINK WE HAVE TO TURN THE SCREENS ON.

6 THE COURT: YES, WE CAN TURN THEM ON.

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

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

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

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

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

16 DO YOU HAVE IT NOW?

17 THE WITNESS: YES.

18 THE COURT: DOES EVERYBODY HAVE IT?

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

21 THE COURT: I DON'T KNOW WHY.

22 MR. FITZGERALD: JUDGE, YOU CAN SEE IT?

23 THE COURT: I HAVE IT, YES.

24 MR. FITZGERALD: AND DEFENSE COUNSEL AND  
25 DR. LOFTUS.

1 BY MR. FITZGERALD:

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

7 A. I SEE THAT SENTENCE, YES.

8 Q. AND THAT'S A SENTENCE THAT IS IN THE SURVEY OPINION  
9 REPORT YOU WROTE, CORRECT?

10 A. I AM A CO-AUTHOR OF THIS PAPER, YES. AND I DON'T KNOW  
11 HOW I LET THAT LINE SLIP BY IN MY EDITING OF THIS.

12 Q. WELL, CO-AUTHOR MEANS YOU WROTE IT, TOO, CORRECT?

13 A. YES, I CO-AUTHORED THIS PAPER. I AM A CO-AUTHOR OF THIS  
14 RESEARCH PROJECT, YES.

15 Q. SO THE OTHER SURVEYS THAT YOU'VE PUT BEFORE THE COURT  
16 TODAY, WHICH PREDATE THE 2006 SURVEY, WERE SURVEYS YOU WERE  
17 FAMILIAR WITH AT A TIME THAT A REPORT YOU CO-AUTHORED IN  
18 2006 SAID THAT NO ONE HAD APPROPRIATELY MEASURED WHAT JURORS  
19 KNEW ABOUT EYEWITNESS RELIABILITY?

20 A. I HONESTLY CAN'T REMEMBER WHAT WAS THE THINKING BEHIND  
21 THIS -- WHETHER IT WAS BECAUSE THE CURRENT STUDY INVOLVED  
22 THE LARGEST AND, YOU KNOW, MOST SCIENTIFICALLY BEST METHOD  
23 OF GAINING JUROR KNOWLEDGE.

24 Q. WELL, IF YOU CONTINUE ON IN THE PARAGRAPH, DOES IT SAY,  
25 FOR EXAMPLE, "EYEWITNESS RESEARCHERS, IN THE COURSE OF

1 CONDUCTING MORE TARGETED EXPERIMENTS, HAVE REPEATEDLY FOUND  
2 THEIR SUBJECTS TO BE UNAWARE OF BASIC SCIENTIFIC FINDINGS OF  
3 THE FIELD. THERE ALSO HAVE BEEN SOME SMALL, NONRANDOMIZED  
4 SURVEYS ABOUT JUROR UNDERSTANDING OF EYEWITNESS RELIABILITY  
5 THAT INDICATED A GENERAL LACK OF KNOWLEDGE. BASED ON THESE  
6 SMALL SURVEYS AND THEIR LABORATORY EXPERIENCE, SCIENTISTS  
7 STUDYING EYEWITNESS RELIABILITY HAVE COME TO BELIEVE THAT  
8 ORDINARY LAY JURORS KNOW LITTLE ABOUT THE SUBJECT AS A  
9 MATTER OF COMMON SENSE. THESE RESEARCHERS' OPINIONS ARE IN  
10 SHARP CONTRAST TO JUDICIAL OPINIONS."

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

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

23 IS THE LOGIC HERE THAT THERE HAVEN'T BEEN STUDIES  
24 ABOUT JURY RESEARCH BEFORE THIS STUDY AND SO THE EXPERTS  
25 HAVE ONE OPINION, AND JUDGES, BASED UPON THEIR EXPERIENCE

1 AND INTUITION, HAVE ANOTHER OPINION? WE ARE ASSUMING THAT  
2 THE JUDGES ARE WRONG AT BEST, IS THAT CORRECT? IS THAT HOW  
3 IT IS STATED?

4 A. NO. I THINK WHAT WAS MEANT HERE IS THAT THIS JURIMETRIC  
5 STUDY THAT INVOLVES ONE THOUSAND RANDOMLY SELECTED POTENTIAL  
6 JURORS FROM THE D. C. AREA IS ACTUALLY ONE OF THE  
7 METHODOLOGICALLY BEST STUDIES THAT WAS DONE. IT'S LARGE.  
8 IT'S RANDOMIZED. AND SO IT WAS, WE THOUGHT, AN IMPROVEMENT  
9 OVER THE SMALLER STUDIES THAT HAD BEEN DONE BEFORE.

10 Q. NOW, DID YOUR REPORT THAT YOU CO-AUTHORED SAY IT WAS AN  
11 IMPROVEMENT, OR DID IT SAY "UP UNTIL NOW, THERE HAS BEEN NO  
12 APPROPRIATE STUDY"? ISN'T THE REPRESENTATION THAT THIS IS  
13 THE ONLY APPROPRIATE STUDY -- THE ONLY LARGE EMPIRICAL  
14 STUDY?

15 A. I DON'T THINK IT IS REALLY FAIR TO SAY THAT THIS IS THE  
16 ONLY APPROPRIATE ONE AND TO DENIGRATE THE OTHER PEOPLE'S  
17 WORK IN THAT WAY, FRANKLY.

18 Q. SO WOULD THE SENTENCE IN YOUR REPORT THAT SAID THERE HAD  
19 BEEN NO APPROPRIATE STUDY TO DATE BE AN UNFAIR SENTENCE?

20 A. YES. I THINK THIS IS A BETTER STUDY, BUT I THINK THOSE  
21 OTHER STUDIES -- THE EARLIER STUDIES DO CONTRIBUTE TO OUR  
22 KNOWLEDGE.

23 Q. NOW, LET'S LOOK AT PAGE 195 AND 196 OF THE STUDY TO  
24 FOCUS IN ON WHAT IT IS THAT THIS STUDY -- WHICH, BY THE WAY,  
25 WAS CONDUCTED BY A FELLOW ASSIGNED TO THE PUBLIC DEFENDER

1 SERVICE, TWO ATTORNEYS WITH THE PUBLIC DEFENDER SERVICE, AND  
2 YOURSELF, CORRECT?

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

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

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

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

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

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

25 A. YES. WELL, THEY CONTACTED ME INITIALLY, YES.

1 Q. NOW, IN SPEAKING HERE TODAY AND IN WRITING YOUR REPORT,  
2 YOU PUT A LOT OF WEIGHT ABOUT WHAT THIS STUDY FOUND ON THE  
3 FINDING BY THIS STUDY THAT JURORS THINK MEMORY IS LIKE A  
4 TAPE RECORDER. IS THAT A FAIR STATEMENT?

5 A. WELL, BECAUSE THERE WAS ONE QUESTION IN THIS STUDY THAT  
6 ASKED WHETHER PEOPLE BELIEVED THAT TRAUMATIC MEMORY WAS LIKE  
7 A TAPE RECORDER, AND THE OTHER STUDIES DIDN'T ASK THAT  
8 QUESTION, THIS WAS THE STUDY THAT DID PROVIDE INFORMATION  
9 ABOUT THAT POINT.

10 Q. AND SO THE ANSWER TO MY QUESTION WOULD BE YES? YOU PUT  
11 A LOT OF WEIGHT ON THAT SINGLE QUESTION, FROM YOUR STUDY, TO  
12 ESTABLISH THAT JURORS THINK THAT MEMORY IS LIKE A TAPE  
13 RECORDER?

14 A. WELL, I CERTAINLY USED THAT STUDY AS AN EXAMPLE.

15 Q. WELL, IN FACT, IS THAT THE ONLY STUDY THAT'S ESTABLISHED  
16 THAT JURORS THINK THAT MEMORY IS LIKE A TAPE RECORDER?

17 A. WELL, IT'S THE ONLY STUDY THAT ACTUALLY WENT OUT AND  
18 GATHERED DATA ON THAT QUESTION THAT I KNOW OF.

19 Q. NOW, ON PAGE 195 AND 196 -- IF WE CAN BLOW THAT UP, IF  
20 IT IS POSSIBLE -- IT STARTS AT THE BOTTOM PARAGRAPH THAT  
21 CARRIES OVER -- "P.D.S.'S SURVEY OF POTENTIAL JURORS IN THE  
22 DISTRICT OF COLUMBIA SUGGESTS THAT JUROR UNDERSTANDING OF  
23 THESE SUBJECTS FAILS AT EVEN THE MOST BASIC LEVEL. SEVERAL  
24 SURVEY QUESTIONS, FOR EXAMPLE, WERE DESIGNED TO TEST JURORS'  
25 GENERAL UNDERSTANDINGS OF THE WORKINGS OF HUMAN MEMORY. ONE



1 QUESTION ASKED WHETHER" -- AND WE CARRY OVER TO THE NEXT  
2 PAGE -- "ONE QUESTION ASKED WHETHER" -- AND WE'LL PICK UP ON  
3 WITH 196 IN A MOMENT -- "WHETHER, QUOTE, THE ACT OF  
4 REMEMBERING A TRAUMATIC EVENT WAS LIKE A VIDEO RECORDING IN  
5 THAT ONE CAN RECALL DETAILS AS IF THEY HAD BEEN IMPRINTED OR  
6 BURNED INTO ONE'S BRAIN, END QUOTE. OVER HALF OF THE  
7 RESPONDENTS EITHER THOUGHT THIS STATEMENT WAS TRUE OR DID  
8 NOT KNOW WHETHER IT WAS TRUE."

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

14 DO YOU SEE THAT?

15 A. YES.

16 Q. AND YOU MENTIONED THE HIS/HER DISTINCTION BEFORE. DID  
17 YOU WRITE THE LINE THAT SAYS "IN HER MIND'S EYE"?

18 A. NO, I DIDN'T.

19 Q. OKAY. NOW, IN STATING THAT, THE IMPLICATION IS THAT WE  
20 HAVE A SERIOUS FUNDAMENTAL PROBLEM WITH JURORS. IF THEY  
21 THINK MEMORY IS LIKE A TAPE RECORDING, AND THEY THINK YOU  
22 CAN JUST PLAY BACK THE TAPE RECORDING, THEN THEY ARE GOING  
23 TO ASSUME THAT THE TAPE RECORDING IS PURE, UNCONTAMINATED BY  
24 OTHER EVENTS, AND THEY'RE GOING TO HAVE A PROBLEM  
25 UNDERSTANDING THAT PEOPLE CAN MAKE MISTAKES. IS THAT FAIR?

1 A. THAT MAY BE AN IMPLICATION OF BELIEVING IN THE VIDEO  
2 TAPE RECORDER MODEL.

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

5 A. WELL, YES.

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

9 A. CORRECT.

10 Q. THIS WAS A TELEPHONE SURVEY?

11 A. CORRECT.

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

14 A. YES.

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

22 A. YES.

23 Q. AND THEN WE TURN TO PAGE 2 OF THE SURVEY, WHICH IS PAGE  
24 207 --

25 A. YES.

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

2 A. YES.

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

8 A. YES.

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

13 A. YES.

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

19 WE CAN BLOW UP THE QUESTION FOR 11B.

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

23 A. YES.

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

1 A. YES.

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

8 A. YES.

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

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

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

25 SO IF SOMEONE LEARNED ABOUT SOMETHING ELSE, AND IT

1 WENT BACK INTO THEIR MEMORY, THAT IS NOT LIKE A VIDEO  
2 RECORDER. AND 80 PERCENT OF THE PEOPLE AGREED WITH THAT,  
3 ISN'T THAT TRUE?

4 A. WELL, I MENTIONED THAT STUDY -- I MENTIONED THAT ITEM,  
5 TOO, IN MY TESTIMONY. AND I AGREE THAT SOMETIMES PEOPLE  
6 BEHAVE IN WAYS THAT LOOK INCONSISTENT.

7 Q. BUT WHEN YOU MENTION THAT THE 80 PERCENT -- YOU THOUGHT  
8 THAT WASN'T GOOD ENOUGH OR APPRECIATING ANY ERRORS, BUT THE  
9 80 PERCENT ACTUALLY UNDERCUTS THE BELIEF THAT FIFTY PERCENT  
10 THINK OR HALF OF THE PEOPLE THINK THAT MEMORY IS LIKE A TAPE  
11 RECORDER, DOES IT NOT? THAT'S WHY IT'S INCONSISTENT?

12 A. IT IS JUST MORE -- MANY MORE PEOPLE SEEM TO BE GIVING  
13 THE RIGHT ANSWER TO THE LATTER QUESTION THAN TO THE FORMER  
14 ONE.

15 Q. WELL, WHEN THEY WERE ASKED WHETHER IT IS LIKE A TAPE  
16 RECORDER, THEY CLEARLY UNDERSTOOD IT IS NOT LIKE A TAPE  
17 RECORDER TO THE EXTENT THAT IT CAN'T BE WRONG. EIGHTY  
18 PERCENT RECOGNIZED IT COULD BE WRONG, CORRECT?

19 A. ON ITEM 11F, YES.

20 Q. WITHIN THE SAME QUESTION, YES.

21 GOING BACK TO 195 AND 196, YOU SAID THAT 46  
22 PERCENT OF POTENTIAL JURORS -- I THINK IT IS 196 AT THE TOP.  
23 I AM SORRY. THAT IS MY FAULT.

24 THE LAST PART OF THAT SENTENCE SAYS: INDEED, 46  
25 PERCENT OF POTENTIAL JURORS BELIEVE THAT A WITNESS ON THE

1 STAND IS EFFECTIVELY NARRATING A VIDEO RECORDING OF EVENTS  
2 THAT SHE CAN SEE IN HER MIND'S EYE FOR JURORS. CORRECT?

3 A. THAT'S WHAT IT SAYS, YES.

4 Q. AND IS IT A FACT THAT IN THE STUDY, NO ONE WAS ASKED  
5 WHETHER OR NOT THEY BELIEVED THAT THE PERSON WAS NARRATING A  
6 VIDEO RECORDING AND THAT IN THE STUDY, THE QUESTIONNAIRE  
7 NEVER ASKED ANYONE IF THEY THOUGHT THE WITNESS SAW IT IN  
8 THEIR MIND'S EYE?

9 A. NO, THAT WAS NOT EXPLICITLY ASKED. I BELIEVE THAT THE  
10 AUTHOR WHO WROTE THAT WAS TRYING TO MAKE THE POINT THAT 46  
11 PERCENT IS THE NUMBER WHO SAID "TRUE" TO THE QUESTION ABOUT  
12 THE VIDEO RECORDING.

13 Q. SO THAT STATEMENT OF 46 PERCENT IS NOT SOMETHING THAT  
14 WAS SURVEYED? THAT IS AN INFERENCE FOR THE ANSWER TO THE  
15 PRIOR QUESTION?

16 A. EXACTLY. THAT IS WHAT I BELIEVE WAS BEING MEANT BY THAT  
17 STATEMENT AND WHERE THAT 46 PERCENT FIGURE CAME FROM. SO  
18 THE 52 PERCENT INCLUDES THE 46 PERCENT.

19 THE COURT: LET ME JUST ASK. THIS PERCEPTION YOU  
20 HAVE BEEN TALKING ABOUT REGARDING THE TAPE RECORDER VIEW  
21 RELATES TO WHAT PEOPLE ARE SAYING REGARDING TRAUMATIC  
22 EVENTS, IS THAT RIGHT?

23 THE WITNESS: THAT'S A GOOD POINT, YOUR HONOR.

24 THE COURT: HAVE ANY STUDIES BEEN DONE THAT HAVE  
25 ASSESSED WHETHER JURORS HAVE THE SAME PERCEPTION ABOUT

1 NONTRAUMATIC EVENTS?

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

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

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

16 BY MR. FITZGERALD:

17 Q. AND, IN ADDITION, IN YOUR BOOK -- YOU HAVE WRITTEN A  
18 BOOK "EYEWITNESS TESTIMONY, CIVIL AND CRIMINAL," CORRECT?

19 A. WELL, YES. I CO-AUTHORED A BOOK.

20 Q. WITH MR. DOYLE?

21 A. YES.

22 Q. OKAY. IF WE HAVE IT IN HERE, IF WE COULD LOOK AT THE  
23 2005 POCKET PART. WE MAY NOT HAVE PUT IT IN THE 2005 POCKET  
24 PART, BUT I COULD SHOW IT TO COUNSEL AND SHOW YOU ON PAGE  
25 2 -- WHETHER OR NOT YOU WROTE THAT THE SURVEY WE ARE

1 DISCUSSING, QUOTE, INDICATED THAT THE MAJORITY OF  
2 PROSPECTIVE JURORS ANALOGIZED MEMORY TO THE REPLAY OF A  
3 VIDEOTAPE, CLOSE QUOTE.

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

5 A. I WOULD NEED TO SEE IT, YES.

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

8 BY MR. FITZGERALD:

9 Q. RIGHT THERE.

10 A. I SEE THAT, YES.

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

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

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

24 A. I THINK 46 PERCENT IS THE ACCURATE FIGURE.

25 Q. AND WHEN THEY ANALOGIZED IT, IT WAS A PASSIVE ANALOGY?



1 THEY WERE ASKED, "IS IT LIKE THIS, TRUE OR FALSE?" IT  
2 WASN'T SOMETHING THEY SPONTANEOUSLY PROVIDED, CORRECT?

3 A. CORRECT. THEY WERE ONLY ANSWERING QUESTIONS TO SPECIFIC  
4 ITEMS.

5 Q. NOW, IN LOOKING AT THE OTHER STUDIES, IS IT FAIR TO SAY  
6 THAT THE STUDIES YOU REFERRED TO WERE PRIMARILY FOCUSED ON  
7 EYEWITNESS IDENTIFICATION TESTIMONY? CORRECT?

8 A. WELL, SOME OF THE ITEMS -- SOME OF THE ITEMS REFER TO  
9 EYEWITNESS IDENTIFICATION AND SOME REFER TO ITEMS THAT DON'T  
10 INVOLVE IDENTIFICATION. SO MANY OF THESE STUDIES HAVE  
11 ITEMS, FOR EXAMPLE, ON PEOPLE'S ABILITY TO ESTIMATE THE  
12 DURATION OF EVENTS.

13 Q. IT IS FAIR TO SAY THAT THE TITLE OF THE D.C. STUDY THAT  
14 YOU WROTE WAS, QUOTE, BEYOND THE KEN, TESTING JURORS'  
15 UNDERSTANDING OF EYEWITNESS RELIABILITY EVIDENCE, CLOSE  
16 QUOTE?

17 A. RIGHT, BUT EYEWITNESSES DO MORE THAN JUST IDENTIFY  
18 PEOPLE.

19 Q. AND LET'S TALK ABOUT THE STUDY OF KASSIN IN 2001, WHICH  
20 IS EXHIBIT 6, I BELIEVE. AND IN LOOKING AT WHAT JURORS  
21 UNDERSTAND ABOUT EYEWITNESS TESTIMONY RESEARCH, KASSIN HAD  
22 ASKED QUESTIONS OF EXPERTS ABOUT WHAT THEY THOUGHT WAS  
23 RELIABLE, AND WHAT THEY WERE WILLING TO TESTIFY, AND WHAT  
24 THEY THOUGHT WAS COMMON SENSE. IN OTHER WORDS, THEIR  
25 PREDICTION OF WHAT JURORS WOULD UNDERSTAND, CORRECT?

1 A. CORRECT.

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

5 A. CORRECT.

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

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

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

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

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

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

24 Q. AND, IN FACT, KASSIN HAD DONE A STUDY A DECADE BEFORE IN  
25 1992, WHERE HE DID A SURVEY OF NOT JURORS, BUT LAY PEOPLE AS

1 TO WHAT THEY UNDERSTOOD, CORRECT?

2 A. KASSIN AND BARNDOLLAR IN 1992, YES.

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

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

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

12 A. RIGHT.

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

15 A. RIGHT.

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

21 THE COURT: WHAT PAGE ARE WE ON NOW?

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

24 BY MR. FITZGERALD:

25 Q. AND DOES IT SAY THERE: IT COULD BE ARGUED THAT THE

1 SAMPLING OF EXPERTS IN THIS SURVEY CONSTITUTES A SECOND  
2 LIMITATION. TO IDENTIFY OUR POPULATION OF RESPONDENTS, WE  
3 SOUGHT INDIVIDUALS ACTIVE IN THE EYEWITNESS AREA, WHICH  
4 RAISES AN ISSUE THAT HAS LONG PLAGUED THE FRYE TEST, NAMELY,  
5 THAT INDIVIDUALS WITH THE MOST EXPERTISE IN AN AREA MAY ALSO  
6 HAVE THE GREATEST MOTIVATION TO PRESENT IT IN A FAVORABLE  
7 LIGHT.

8 IT CONTINUES DOWN BELOW, THE LAST SENTENCE IN THE  
9 PARAGRAPH: THIS POSSIBLE CONFOUNDING OF EXPERTISE AND  
10 MOTIVATION IMPLIES THAT PERHAPS OUR RESPONDENTS SHOULD HAVE  
11 DRAWN FROM A BROADER POPULATION OF BASIC EXPERIMENTAL  
12 PSYCHOLOGISTS WHO STUDY NONEYEWITNESS PROCESSES OR DO NOT  
13 TESTIFY IN COURT, CLOSE QUOTE.

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

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

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

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

1 ADDRESS THE POTENTIAL CONCERN IS A GOOD IDEA.

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

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

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

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

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

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

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

1 CLOSE QUOTE?

2           ISN'T THERE A FLAT INCONSISTENCY WITH BENTON IN  
3 2006 SAYING: "25 YEARS OF RESEARCH HAS SHOWN THAT LAY  
4 KNOWLEDGE OF WITNESSES IS NOT ONLY LIMITED IN SCOPE, BUT  
5 HIGHLY INACCURATE," AND YOUR ASSERTION IN THE 2006 PUBLIC  
6 DEFENDER SURVEY THAT SAYS, "NO ONE HAS DONE AN APPROPRIATE  
7 STUDY. WE JUST DON'T KNOW. NO ONE HAS RATIONALIZED WHAT  
8 JUDGES UNDERSTAND WITH WHAT EXPERTS UNDERSTAND"?

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

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

18           LET ME JUST EXPLAIN WHAT METHODOLOGY IS IN THIS  
19 SURVEY. IN LOOKING AT WHAT THE EXPERTS UNDERSTAND, BENTON,  
20 ET AL ALSO LOOKED AT WHAT JURORS UNDERSTAND AND WHAT JUDGES  
21 UNDERSTAND AND WHETHER THERE WAS A STATISTICALLY SIGNIFICANT  
22 DIFFERENCE BETWEEN WHAT THE JUDGES UNDERSTOOD, FROM THEIR  
23 EXPERIENCE IN THE COURTROOM AND THEIR INTUITION, AND WHAT  
24 THE EXPERTS UNDERSTOOD FROM THEIR EXPERIENCE AND INTUITION,  
25 AND IT WAS ASSUMED THAT THE EXPERTS WERE CORRECT, IS THAT

1 CORRECT?

2 A. RIGHT.

3 Q. AND WHEN THERE WAS A STATISTICALLY SIGNIFICANT  
4 DIFFERENCE, IT WAS ASSUMED THEN THAT JUDGES COULD BENEFIT  
5 FROM EXPERTS, OR WHERE THERE WAS A STATISTICALLY SIGNIFICANT  
6 DIFFERENCE, JURORS COULD BENEFIT FROM THE EXPERTISE OF THE  
7 EXPERTS, CORRECT?

8 A. I THINK THAT'S TRUE, YES.

9 Q. AND IS IT FAIR TO SAY THAT -- LET ME ASK YOU THIS  
10 QUESTION. IS IT FAIR TO SAY THAT ALCOHOLIC INTOXICATION  
11 ADVERSELY AFFECTS MEMORY?

12 A. IT DEPENDS ON WHETHER YOU ARE HAVING IT AT THE TIME YOU  
13 ARE ENCODING THE INFORMATION OR AT THE TIME YOU ARE  
14 RETRIEVING BECAUSE ALCOHOL AFFECTS THE FORMATION OF NEW  
15 MEMORIES MORE THAN IT AFFECTS THE RETRIEVAL OF OLD MEMORIES,  
16 WHICH MEANS IF YOU ARE TEACHING STUDENTS, YOU TELL THEM THAT  
17 IT IS A LOT WORSE TO DRINK WHILE YOU ARE STUDYING THAN TO  
18 DRINK WHILE YOU ARE TAKING THE TEST.

19 Q. WELL, IF I COULD ASK YOU THIS QUESTION. THE QUESTION  
20 THAT WAS ASKED OF THE SURVEY PARTICIPANTS IS, QUOTE,  
21 ALCOHOLIC INTOXICATION IMPAIRS AN EYEWITNESS' LATER ABILITY  
22 TO RECALL PERSONS AND EVENTS.

23 A. AND WHERE ARE YOU READING FROM, PLEASE?

24 Q. I'M READING FROM PAGE 129 OF BENTON, QUESTION 20.

25 A. YES.

1 Q. AND SO IT IS CLEAR THAT WE ARE TALKING ABOUT  
2 INTOXICATION AT THE TIME YOU ARE PERCEIVING EVENTS BECAUSE  
3 IT TALKS ABOUT LATER RECALL, CORRECT?

4 A. YES.

5 Q. SO AS A FLAT, SIMPLE, SCIENTIFIC PROPOSITION, "ALCOHOLIC  
6 INTOXICATION IMPAIRS AN EYE WITNESS' LATER ABILITY TO RECALL  
7 PERSONS AND EVENTS" WOULD BE A TRUE STATEMENT, CORRECT?

8 A. YES.

9 Q. OKAY. DID THE BENTON SURVEY FIND THAT THERE WAS A  
10 STATISTICALLY SIGNIFICANT DIFFERENCE BETWEEN JUDGES'  
11 UNDERSTANDING OF THIS THAN EXPERTS?

12 A. JUDGES AND EXPERTS? WELL, FOR THAT I WOULD HAVE TO GO  
13 TO TABLE 3 ON PAGE 122 AND TRY TO ANSWER YOUR QUESTION.  
14 ALCOHOL INTOXICATION --

15 Q. AND IS IT FAIR TO SAY THAT THE JUDGES ANSWERED THAT  
16 QUESTION CORRECTLY ONE HUNDRED PERCENT OF THE TIME?

17 A. YES.

18 Q. AND THE EXPERTS GOT THE ANSWER RIGHT NINETY PERCENT OF  
19 THE TIME?

20 A. THAT'S TRUE. THAT'S A VERY GOOD POINT. THE JUDGES  
21 WERE --

22 Q. BUT THIS STUDY ASSUMES WHEN THERE IS A STATISTICALLY  
23 SIGNIFICANT DIFFERENCE BETWEEN JUDGES AND EXPERTS, THE  
24 JUDGES NEED HELP FROM THE EXPERTS. SO WOULD YOU AGREE THAT  
25 WE SHOULD GO AROUND AND EDUCATE JUDGES THAT THEY SHOULDN'T



1 BE CONSIDERING ALCOHOL INTOXICATION AS AFFECTING MEMORY?

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

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

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

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

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

22 Q. WHY DON'T WE LOOK AT THE FIRST PAGE OF THE STUDY, PAGE  
23 115, AND LOOK AT THE SUMMARY PARAGRAPH AND LOOK AT THE  
24 SECOND HALF OF IT AND BLOW THAT UP.

25 "PARTICIPANT RESPONSES" -- AND THIS IS ADDRESSING

1 ALL OF THE RESPONSES, NOT JUST THE ALCOHOL QUESTION -- BUT  
 2 THEIR CONCLUSION IS: "PARTICIPANT RESPONSES DIFFERED  
 3 SIGNIFICANTLY FROM RESPONSES OF EYEWITNESS EXPERTS. JURORS  
 4 DISAGREE WITH THE EXPERTS ON 87 PERCENT OF THE ISSUES, WHILE  
 5 JUDGES AND LAW ENFORCEMENT DISAGREED WITH THE EXPERTS ON 60  
 6 PERCENT OF THE ISSUES. THE FINDINGS SHOW A LARGE DEFICIENCY  
 7 IN KNOWLEDGE OF EYEWITNESS MEMORY AMONGST JURORS, JUDGES AND  
 8 LAW ENFORCEMENT PERSONNEL, INDICATING THAT THE LEGAL SYSTEM  
 9 MAY BENEFIT FROM EXPERT ASSISTANCE IN THE EVALUATION OF  
 10 EYEWITNESS EVIDENCE." CORRECT?

11 A. THAT'S THEIR CONCLUSION, YES.

12 Q. NOW, LET'S TALK ABOUT THE 13 POINTS THAT MR. BJORK  
 13 OUTLINED. AND THE FIRST POINT -- I THINK WE HAVE TALKED  
 14 ABOUT THE TAPE RECORDER, AND THE ISSUE OF THE SUPPORT FOR  
 15 THE FACT THAT JURORS THINK THAT MEMORY IS LIKE A TAPE  
 16 RECORDER FROM THAT ONE SUBPART OF QUESTION 11 IN THE 2006  
 17 D. C. STUDY, CORRECT, WHICH WAS DONE IN THE CONTEXT OF A  
 18 TRAUMATIC EVENT? CORRECT?

19 A. THAT'S TRUE.

20 Q. AND THAT'S THE ONLY QUESTION YOU COULD FIND IN THE  
 21 LITERATURE ABOUT TAPE RECORDERS AND ANALOGIZING MEMORY TO  
 22 TAPE RECORDERS FROM JURORS OR LAY PEOPLE, CORRECT?

23 A. WELL, EXCEPT FOR THE ONE THAT I MENTIONED EARLIER IN THE  
 24 TESTIMONY, UPON QUESTIONING BY THE JUDGE, THE STUDY THAT WE  
 25 DID SHOWING THAT LAY PEOPLE BELIEVE THAT EVERYTHING IS

1 RECORDED AND THAT MEMORY IS PERMANENT.

2 THE COURT: LET ME ASK YOU THIS ON THAT POINT.  
3 THERE IS NO WAY OF ASSESSING WHETHER THAT'S TRUE OR NOT,  
4 THOUGH, IS THERE, BECAUSE THERE IS NO SCIENTIFIC WAY YOU CAN  
5 DISSECT THE BRAIN AND MAKE AN ASSESSMENT OF WHAT'S THERE,  
6 BUT YET IT CAN'T BE RETRIEVED? SO WE DON'T KNOW IF IT IS  
7 THERE OR NOT. ALL WE KNOW IS THAT THEY CAN'T RETRIEVE IT,  
8 RIGHT?

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

12 THE COURT: WE KNOW IT'S NOT THERE?

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

14 THE COURT: RIGHT. THANK YOU.

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

16 BY MR. FITZGERALD:

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

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

25 A. WELL, IT IS WHATEVER PEOPLE READ INTO THAT QUESTION. WE

1 DON'T KNOW. THE EXPERTS ARE GIVEN THE ITEM. NINETY-TWO  
2 PERCENT OF THEM SAY THAT THAT IS A RELIABLE FINDING. THEY  
3 AGREE WITH THAT FINDING.

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

12 A. THAT'S CORRECT.

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

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

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

1 JURORS ARE RELYING ON SOMETHING ELSE.

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

9 A. WE DON'T KNOW IF THEY KNOW.

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

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

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

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

19 Q. AND I HAVE A SINGLE QUESTION ON THE KASSIN 1992 STUDY,  
20 WHICH HAS TO DO WITH -- IF WE CAN TURN TO PAGE 1244, I  
21 BELIEVE -- YES -- ATTITUDES AND EXPECTATIONS, AND WAS THAT  
22 QUESTION ASKED OF LAY PEOPLE IN THAT SURVEY? AND I THINK IF  
23 WE THEN TURN TO PAGE 1245, IN THIS SURVEY, DID IT COME OUT  
24 THAT JURORS AND EXPERTS CAME OUT ON QUESTION 19 ABOUT  
25 DEAD-EVEN -- IN FACT, THE SUBJECTS CAME OUT AHEAD OF THE

1 EXPERTS? IF THE RIGHT ANSWER IS "YES," THEY GOT IT RIGHT  
2 88.6 PERCENT OF THE TIME, AND THEN THE JURORS GOT IT RIGHT  
3 86.9 PERCENT OF TIME. IS THAT RIGHT?

4 A. YOU WOULD CALL THAT DEAD-EVEN BECAUSE OF THE  
5 NONSTATISTICAL DIFFERENCE. YES, THE SUBJECTS PERFORMED LIKE  
6 THE EXPERTS IN THE 1992 STUDY.

7 Q. AND THEN KASSIN HIMSELF, WHO DID THIS STUDY THAT SHOWED  
8 THAT THE EXPERTS AND THE JURORS PERFORMED DEAD-ON, WENT OUT  
9 AND SURVEYED THE EXPERTS WE TALKED ABOUT A FEW MOMENTS AGO  
10 IN 2001, WHERE THERE WAS SOME CONCERN THAT THE EXPERTS HAD A  
11 BIAS, AND THEY FOUND IN THAT SURVEY THAT THE EXPERTS NOW  
12 SAID THAT THEY WERE 92 PERCENT ON THIS QUESTION RELIABLE,  
13 BUT ONLY 31 PERCENT OF THEM THOUGHT IT WAS COMMON SENSE.

14 AND IS IT FAIR TO SAY THAT THE EXPERTS WHO GAVE IT  
15 A RATING ON COMMON SENSE OF 31 PERCENT SHOULD HAVE HAD  
16 AVAILABLE TO THEM THE VERY STUDY THAT SHOWED THAT EXPERTS  
17 AND JURORS WERE DEAD ON?

18 A. IF THE EXPERTS HAD BEEN AWARE OF THIS KASSIN AND  
19 BARNDOLLAR STUDY AND HAD IT ON THEIR MIND, THEY MIGHT HAVE  
20 GIVEN A DIFFERENT ANSWER TO THEIR IMPRESSIONS ABOUT WHAT  
21 EXPERTS WOULD THINK ABOUT -- WHAT SUBJECTS WOULD THINK ABOUT  
22 THIS TOPIC.

23 Q. LET'S TURN TO POINT THREE ABOUT CONFIDENCE AND ACCURACY.

24 A. BACK WITH KASSIN AND BARNDOLLAR?

25 Q. NO. I'M SORRY.

1 A. OH, OKAY.

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

3 A. OKAY.

4 Q. I CAN'T TELL YOU WHAT I AM GOING TO POINT TO NEXT. IF I  
5 KNEW, I WOULD.

6 A. OKAY.

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

16 A. YES.

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

23 A. YES.

24 Q. AND IS IT FAIR TO SAY THAT WHETHER OR NOT THE QUESTION  
25 IS TRUE: "AN EYEWITNESS' CONFIDENCE IS NOT A GOOD PREDICTOR

1 OF HIS OR HER IDENTIFICATION ACCURACY?" WOULD DEPEND ON  
2 WHETHER THE PERSON UNDERSTOOD WHETHER YOU WERE ASKING ACROSS  
3 SUBJECTS OR WITHIN SUBJECTS?

4 A. YOU ARE ABSOLUTELY RIGHT. WHEN YOU ASK -- WHEN YOU LOOK  
5 AT THIS MATTER WITHIN SUBJECTS, YOU DO GET STRONGER  
6 CORRELATIONS. AND SO IT IS PROBABLY THE CASE THAT WHEN THE  
7 KASSIN EXPERTS WERE ANSWERING THE QUESTION, THEY MUST HAVE  
8 BEEN THINKING OF THE OTHER KIND, YOU KNOW, ACROSS-SUBJECT  
9 COMPARISONS.

10 Q. SO, IN THE END, THE FACT THAT JURORS AND EXPERTS MAY  
11 DISAGREE, AND THE RESULTS OF THIS QUESTION MAY WELL HAVE TO  
12 DO WITH THE FACT THAT JURORS ARE NOT EXPOSED TO THE VARIOUS  
13 STUDIES OF ACROSS-WITNESS IDENTIFICATION, THEY MAY BE  
14 ANSWERING A DIFFERENT QUESTION?

15 A. THEY COULD BE, YES. I MEAN THERE IS A PRETTY BIG  
16 DIFFERENCE BETWEEN THE EXPERTS AND THE JURORS ON THAT ITEM.  
17 I MEAN EVEN THE EXPERTS ARE POSSIBLY THINKING ABOUT WE HAVE  
18 GOT A SINGLE PERSON EXPRESSING AN OPINION AND GIVING A  
19 CONFIDENCE RATING. IS IT A GOOD PREDICTOR OR ISN'T IT?

20 Q. BUT ISN'T IT THE TENDENCY OF EXPERTS TO FOCUS ON  
21 CONFIDENCE-ACCURACY OF ACROSS WITNESSES, NOT WITHIN  
22 WITNESSES?

23 A. YES.

24 Q. THAT'S THEIR BIAS, CORRECT?

25 A. YES.



1 Q. AND IF JURORS DON'T HAVE THAT BIAS OR LAY PEOPLE DON'T  
2 HAVE THAT BIAS, THEY MAY ANSWER THE QUESTION WITHIN A  
3 WITNESS AS OPPOSED TO ACROSS-WITNESSES, CORRECT?

4 A. OH, THAT'S POSSIBLE. MAYBE THAT'S WHY SO MANY FEWER OF  
5 THEM GAVE THE DIFFERENT ANSWER THAN THE EXPERTS. THAT'S  
6 POSSIBLE.

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

8 MR. FITZGERALD: OKAY.

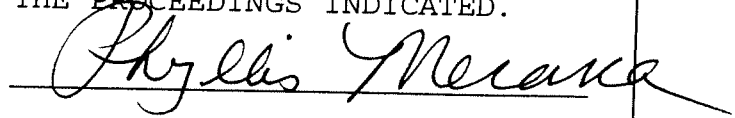
9 THE COURT: -- AND COME BACK A QUARTER OF 2:00.

10 MR. FITZGERALD: THANK YOU.

11 (WHEREUPON, THE ABOVE-ENTITLED MATTER WAS RECESSED  
12 FOR LUNCH.)

13  
14 CERTIFICATE OF REPORTER

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

17 

18 PHYLLIS MERANA  
19  
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22  
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25