

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	Docket No. 05-394 (RBW)
	:	October 26, 2006
Plaintiff,	:	
	:	1:45 p.m.
	:	
v.	:	
	:	
I. LEWIS LIBBY,	:	
	:	
Defendant.	:	
.....	:	

TRANSCRIPT OF MOTION HEARING - P.M. SESSION
BEFORE THE HONORABLE REGGIE B. WALTON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

PATRICK FITZGERALD, ESQ.
Office of the U.S. Attorney
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

PETER ROBERT ZEIDENBERG, ESQ.
KATHLEEN KEDIAN, ESQ.
U.S. Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20005

For the Defendant:

JOHN DeWITT CLINE, ESQ.
Jones Day
555 California Street, 26th Floor
San Francisco, California 94104

(Appearances continued on the next page.)

APPEARANCES (continued):

For the Defendant

WILLIAM H. JEFFRESS, JR., ESQ.

(continued):

Baker Botts, LLP

1299 Pennsylvania Avenue, N.W.

Washington, D.C. 20005

THEODORE V. WELLS, JR., ESQ.

Paul, Weiss, Rifkind, Wharton &

Garrison, LLP

1285 Avenue of the Americas

New York, New York 10019

Court Reporter:

PATTY ARTRIP GELS, RMR

Official Court Reporter

Room 4800-C, U.S. Courthouse

Washington, D.C. 20001

(202) 962-0200

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

2 THE COURT: Good afternoon. We can proceed.

3 (Elizabeth Loftus, witness for the Defendant, resumes
4 the stand.)

5 CROSS-EXAMINATION (RESUMED)

6 BY MR. FITZGERALD:

7 Q. Now, Dr. Loftus, one question on the D.C. study you
8 performed in 2006. And rather than have you pull out that
9 exhibit necessarily, I think it's in your notes to yourself --

10 A. Oh, yes.

11 Q. -- on page 3.

12 A. Yes.

13 Q. But I guess I should, so everyone can follow along -- there
14 is the question about the confident witness versus the less
15 confident witness. And the question was, is the confident
16 witness much more reliable? The confident witness is slightly
17 more reliable. Both witnesses are equally reliable. The less
18 confident witness is much more reliable. Less confident witness
19 is slightly more reliable. Neither would be reliable. Not
20 sure.

21 What is the right answer?

22 A. I think that an answer that does reflect the overall
23 conclusion among experts that -- the relationship is relatively
24 weak, but positive -- would say that the confident witness is
25 slight more reliable might be one that experts would say is a

1 good answer that might reflect that.

2 And, you know, ones that would be equally reliable
3 might not be right, and a certainly less confident witness being
4 more reliable wouldn't be right and --

5 Q. But is it fair to say there is some hesitancy in answering
6 the question as to exactly what the right answer is?

7 A. Well, as I indicated in my notes to myself, that 17 percent
8 gave the best answer, so that's assuming that the confident
9 witness is slight more reliable is the best answer.

10 Q. Now, if we could turn to the topic of -- topic 5 from the
11 Bjork study -- and again, we are in the eyewitness
12 identification context, and we are talking about unconscious
13 transference?

14 A. Yes.

15 Q. Now, is it fair to say that in the Kassin 1992 survey, which
16 I think we should mark Government Exhibit 1, or we can make it
17 Exhibit 9, whatever the Court would prefer. I think I handed
18 that one up before.

19 THE COURT: Here it is.

20 MR. FITZGERALD: If we mark it Government Exhibit 1.

21 (Whereupon, Government's Exhibit No. 1 was marked for
22 identification.)

23 BY MR. FITZGERALD:

24 Q. The results were that there was not a statistically
25 significant difference between experts and jurors on the

1 question of unconscious transference.

2 A. Well, the -- when you compare the 2001 Kassin experts, where
3 81 percent said the statement was reliable, to the jurors in the
4 2006 Benton study where 30 percent of jurors thought the
5 statement was generally true, you did get a significant
6 difference. But you have to go to the Benton paper to see that
7 statistically significant difference.

8 Q. What I am asking you -- if I could ask you to answer my
9 question, which is simply in the Kassin 1992 study --

10 A. Oh, Kassin and Barndollar?

11 Q. The 1992, Kassin.

12 A. Well, that, of course, would compare the old experts'
13 opinions from 1989.

14 Q. To the old laypersons, correct? I mean, they are from the
15 same time frame?

16 A. The 1989 study of experts rather than the recent study of
17 experts.

18 Q. Right. But in 1992, there wasn't a statistically
19 significant difference between experts and laypersons, correct,
20 on that topic --

21 A. Well --

22 Q. -- of unconscious transference?

23 A. I am sorry to interrupt you. I have to look this up. And I
24 see that, by going to table 2 of Kassin and Barndollar, subjects
25 got the right answer 64 percent of the time; experts 84 percent

1 of the time. Although that was a 20 percent difference, it was
2 not statistically significant.

3 Q. Okay. And then in 2001, in the survey -- when Kassin asked
4 the experts whether or not jurors appreciated that, even though
5 there was a prior study showing not a statistically significant
6 difference between experts and jurors, the experts said -- 81
7 percent thought it was reliable, but only 19 percent thought
8 that jurors would find it common sense, correct?

9 A. Right.

10 Q. So clearly the experts, if they were aware of the prior
11 study comparing experts to jurors, that -- the 19 percent seems
12 like an awfully low number, doesn't it?

13 A. It does seem low, given -- if they had known or if they had
14 had on their mind the Kassin and Barndollar study, they might
15 not have -- it might not have been that low. Maybe they were
16 using other information or other observations.

17 Q. And we noticed earlier that -- here, the 81 percent of the
18 experts found this unconscious transference principle, correct?

19 A. In Kassin --

20 Q. In Kassin 2001.

21 A. -- 2001.

22 Q. And later on in your testimony on a different topic you
23 talked about where jurors found something to be true 60 percent
24 of the time by one study or 80 percent of the time by another
25 study. You answered a response to a question from Mr. Cline

1 that that showed a fifth of the jurors were wrong, correct?

2 A. I don't --you will have to point the specifics. I don't
3 remember that.

4 Q. Do you believe, then, in the Kassin study that you have
5 established that a fifth of the experts are wrong when 81
6 percent find unconscious transference which you think is an
7 accurate scientific principal?

8 A. Well, I do believe that unconscious transference is a
9 phenomenon. It has been established by research. There is one
10 study out there in the literature where only one of four studies
11 or so found the result. If people are thinking about that
12 particular study, maybe they have some questions. I mean, I
13 can't tell you really why the expert rate is only 81 percent.

14 Q. But in the interference context when jurors talk about
15 interference and find -- the answers find 80 percent, do you
16 find that defective in the sense that jurors need help because
17 they are scoring 80 percent, but with experts, when they get an
18 81 percent score, you don't seem to have a problem with the
19 experts. Why is that?

20 A. Because if experts are agreeing to something, let's say, 100
21 percent of the time hypothetically, and jurors are not
22 agreeing -- are only agreeing 80 percent, it means their belief
23 is not as strong at the experts. And that's a different
24 situation here than having some disagreement, even among
25 experts. Because in any -- in any field or almost any field of

1 science, you are going to have a little bit of disagreement
2 amongst experts.

3 Q. So let me look at it this way. If you look at your study in
4 D.C., the Benton study showed that the answers on the question
5 of unconscious transference put the juror rate at 30 percent,
6 correct?

7 A. That's -- Yes.

8 Q. And then you did a study in 2006 where your rate for jurors
9 was 73 percent, correct?

10 A. Right.

11 Q. That's a whopping difference, 30 percent versus 73 percent,
12 correct?

13 A. Yes.

14 Q. And even though -- and so which do you stand behind, your
15 study which found 73 percent, or the other study that found 30
16 percent?

17 A. I can't tell you why those two numbers are different. I
18 don't know if it's because of the wording of the question, if
19 it's because of the placement of the question in the context of
20 other questions, if it's because of the different samples. I
21 just can't tell you. But it's not an exact replication of the
22 study. They are similar questions, for sure, but it's not an
23 exact replication of the study.

24 Q. Well, why don't we look at the questions, and we will put
25 them up in a comparison, one under the other on the screen.

1 And the questions -- we have two questions on the
2 sheets? Okay. And the first question we will put at the top is
3 the question from the Kassin study, and it says, "Eyewitnesses
4 sometimes identify as a culprit someone they have seen in
5 another situation or context."

6 Your study says, "Eyewitnesses will sometimes identify
7 a person as the culprit because they have seen that person
8 somewhere before and the face is familiar even though the person
9 was not who they actually saw committing the crime."

10 Those seem familiar?

11 A. Yes, they are very familiar, but they are -- where they are
12 placed in the questionnaire and -- the surrounding questions are
13 different, and that may have some influence on it. I just don't
14 know.

15 Q. We will get to placement in a second. Isn't it fair to say
16 that your question, 11(g), is a lot more concrete for a juror in
17 saying, look, this is what may have happened; people see
18 somebody in one location; they don't see them committing the
19 crime; they get it wrong -- and is it fair to the say that the
20 wording of the question can influence the results?

21 A. Yes.

22 Q. And when you are trying to show a jury that sometimes people
23 identify people as the perpetrators of a crime, they are
24 honestly making a mistake because they saw a person X in a
25 different context, maybe outside the bank, and they place it --

1 when you ask the question concretely the way you did it in your
2 study, the rate goes up to 73 percent, correct?

3 A. Well, that's what we found, the 73 percent said true.

4 Q. Right and the Kassin study in 2001 of what the experts
5 predicted would be common sense, they only put -- only 19
6 percent of them attributed it to common sense, correct?

7 A. That's correct.

8 Q. So they grossly underestimated what a layperson would
9 understand about this very concept, correct?

10 A. If you used those numbers, yes.

11 Q. And you talked about placement. And isn't it fair to say
12 that this question is placed in the same question -- question
13 number 11, if we go to your study in D.C. -- where you placed
14 the question about the videotape recorder that we talked about
15 before?

16 A. Yes.

17 Q. So you go through questions 1, 2, 3, 4, 5, 6, 7, 8, 9 and
18 10, many of which have subparts, and you get to question 11 --
19 and you rely upon the answer to question 11(b) for establishing
20 that jurors don't understand the fundamental workings of memory.
21 But 11(g) you are concerned that the earlier questions may have
22 affected the outcome?

23 A. No. I am just -- I am just speculating about why you get a
24 70 percent figure for one question saying true and then, in a
25 different study, you get 30 percent of jurors to a different

1 wording, but a similar wording, saying generally true.

2 Q. And didn't your study start, in 2006, saying there hadn't
3 been an appropriate study to date; we are doing a large survey;
4 we think this is the best study, and you get a 73 percent
5 result, and yet you want to turn to the 30 percent that a
6 different study got under different circumstances?

7 A. I think both of those numbers are relevant, and they add
8 information about what -- because in no way do I think that the
9 study that I participated in is the perfect study. It has --
10 it's excellent in terms of its sample size and the randomness,
11 but it's -- I don't call it perfect.

12 Q. You agree that a difference in result of 30 percent versus
13 73 percent is a whopping result? You could say with 73 percent
14 a majority of people appreciate something; with 30 percent, you
15 could say a very strong majority doesn't, correct?

16 A. Correct.

17 Q. And nothing in these studies, whatever we talk about with
18 unconscious transference has explicitly addressed source
19 misattribution, correct?

20 A. Well, this is a source misattribution error. It doesn't use
21 those words, but an unconscious transference is a source
22 misattribution error.

23 Q. And let me make it plainer. None of them have addressed the
24 question of whether or not a person, in recalling a
25 conversation, will attribute the conversation to the wrong --

1 what they said to the wrong person innocently versus the
2 question of whether or not a person picking someone out of a
3 lineup may pick the wrong guy out as the bank robber, correct?

4 A. Right. We did not ask -- none of these studies asked about
5 conversations explicitly.

6 Q. And we can agree on that that all of these studies -- none
7 of them addressed people's memory for their own conversations
8 that they participated in, correct?

9 A. Well, they addressed memory in general, and some of that
10 would certainly relate to memory for conversations, but they
11 don't ask -- they use the word "conversation."

12 Q. Would the answer to my question be yes?

13 A. I just don't feel that I could honestly answer yes or no
14 without explanation.

15 Q. Well, did you ask any juror -- did you study any jurors
16 about whether they recall -- did anyone study jurors recalling
17 or witnesses recalling conversations that they themselves
18 participated in and the accuracy of their recollection, yes or
19 no?

20 A. I don't know. To my knowledge, I don't know of a study that
21 asked about conversations.

22 Q. Okay. And to your knowledge, there is no study of any -- of
23 whether or not jurors appreciate how other people can remember
24 their conversations or don't?

25 A. I don't know of a study that does that.

1 Q. And so the fair answer is you are not aware of any studies
2 that address whether or not people can remember conversations
3 they participated in, correct?

4 A. Right.

5 Q. Now, if we turn to point 6 which has to do with whether
6 multiple recalls are likely to repeat earlier errors -- and
7 again, in this case, as you stated before, the studies were
8 certainly not designed, as you testified, with this particular
9 fact situation in mind is what you said this morning, correct?

10 A. Correct.

11 Q. And so we are talking about in a case where a jury is being
12 called upon to determine whether or not if a person misstated
13 who they received information from, as between a Government
14 official and a reporter, and who provided the information,
15 whether the person provided it to a reporter or received it from
16 a reporter, you agree that none of the studies are designed to
17 get at that sort of fact pattern, correct?

18 A. Juror knowledge of exactly that.

19 Q. None of them were designed to get at juror knowledge of
20 conversations like that, correct?

21 A. Right.

22 Q. Instead what we are offering are studies that involve a
23 person who is a subject of a robbery who then has to identify a
24 robber and is then asked to pick them out of a photo. And after
25 they have picked them out of a photo, then they are asked to

1 look at a lineup. And we are trying to see how accurate an
2 eyewitness identification is of a robber in a lineup when the
3 eyewitness has seen a photo spread. That's the analogy we are
4 drawing -- the cousin, if you will, to whether or not a person
5 can remember their conversation, correct?

6 A. Well -- have you moved on to Bjork point 6 and away from
7 point 5?

8 Q. Oh, yes. I am sorry. Yes. I apologize.

9 A. Okay.

10 Q. On point 6, you stated that there are no studies designed to
11 fit this particular fact pattern, but you pointed out that there
12 are studies that would show that jurors don't appreciate how the
13 sort of process works of errors, and the studies are based upon
14 fact patterns where witnesses to robberies are being asked to
15 identify someone in a lineup after they have seen a photograph,
16 correct?

17 A. Correct. That's the item that tries to tap into when an
18 error is made, will people persist in that error later on?

19 Q. And with regard to point 7, you agree with Mr. Bjork that
20 there is -- one, it appears to be common sense and, two, there
21 is no direct evidence of what jurors understand about that
22 principle?

23 A. This was that people remember important things more than
24 unimportant ones?

25 Q. Yes.

1 A. Yes.

2 Q. Turning to point 8 -- and that talks about divided attention
3 at the encoding phase, correct?

4 A. Yes.

5 Q. And you will agree, again, that none of these studies of
6 jurors tested common knowledge about divided attention, correct?

7 A. I don't know of a study that asked jurors about their
8 knowledge of divided attention, and that's why I had to see
9 whether there was any other question that might have related to
10 the issue of diverting attention or dividing attention.

11 Q. And so the answer to my question would be yes?

12 A. Yes.

13 Q. And the cases you have focused on involved weapons focus,
14 correct?

15 A. Well, that's one item that does involve something that
16 diverts attention away from other details.

17 Q. And you have seen that when you have a weapon involved, that
18 it changes a lot of things about memory. The very existence of
19 a potential of violence changes things, correct?

20 A. I am sorry. Would you repeat that?

21 Q. The existence of potential for violence changes an
22 eyewitness's ability to perceive and remember things, correct?

23 A. Well, that -- in a real crime with a weapon, yes.

24 Q. And in addition, in your weapons focus cases, we are talking
25 about simultaneous divided attention, correct?

1 A. Yes.

2 Q. So we're having someone who is learning information while
3 they have a gun at their head, correct?

4 A. Or there is a gun somehow visible.

5 Q. We are not talking about people -- some people who may be
6 very busy before they are robbed and other people who are not
7 very busy before they are robbed; we are focusing on people
8 whose attention is divided by the presence of a weapon at the
9 time they learn the information, correct?

10 A. Yes.

11 Q. Turning to point 9 where we talk about the divided attention
12 at recall -- and, again, you said you could not find anything
13 that would get at this issue, correct?

14 A. Well, I just couldn't find an item that I -- on the common
15 knowledge of jurors that seemed directly on point, or even
16 indirectly.

17 Q. And -- okay. I will move on from there.

18 Let's move to point 10 about interference. And again,
19 the studies you cited go back to the eyewitness identification
20 context again, correct?

21 A. Not necessarily.

22 Q. And -- well, we are talking about proactive interference,
23 memory affected by post-event information?

24 A. That's retroactive interference.

25 Q. Okay. And you cited that there were three studies that

1 talked about whether jurors appreciate retroactive interference.
2 One of them was the Kassin 1992 study, which is Government
3 Exhibit 1. And are you familiar with the fact that in that case
4 75 percent of the jurors seemed to appreciate the effect of
5 retroactive interference?

6 A. Which Kassin study are you referring to?

7 Q. 1992.

8 A. Oh.

9 Q. And the coauthor's name begins with a B, and you know it
10 better than I do. Barn -- Barnhere or something.

11 A. I wasn't relying on that as much because I thought the more
12 recent study was more relevant. So I have to take a look at
13 what's found in the table. And -- well, it looks like experts
14 agreed 87 percent of the time back in the early '90s, and the
15 subjects were 74.7 percent of the time.

16 Q. And the study you did rely upon was Mr. Kassin again in 2001
17 where he surveyed experts who opined as to whether or not it
18 would be common sense. And the experts opined that 19 percent
19 of them thought it would be common sense.

20 And would you agree with me, again, if the experts had
21 actually looked at what Mr. Kassin had studied that showed that
22 75 percent of the jurors appreciated this fact, that the number
23 who thought it was common sense should have been a lot higher
24 than 19 percent?

25 A. If they wanted to rely on the Kassin and Barndollar data,

1 they would have seen that it was higher. They may have been
2 relying on other things.

3 Q. But if they relied upon anything -- the other studies show
4 60 percent, 75 percent, 80 percent. So the experts who are
5 guessing or estimating the common sense at 19 percent were way
6 off from whatever the benchmark is by the other studies,
7 correct?

8 A. Well, I need to verify that the experts were at 19 percent.

9 Q. For common sense.

10 A. For common sense. And -- oh, actually, it's 17 percent.

11 Q. Okay. So they really, really grossly underestimated what
12 people --

13 A. They underestimated -- well, certainly that number is a lot
14 lower than the -- I mean, they are recent expert data, so you
15 would probably want to compare them to the Benton study. But
16 it's a lot lower than what jurors actually did on that item,
17 although jurors still were significantly different from the
18 experts.

19 Q. But would you say that it consistently -- in looking at the
20 Kassin study in 2001, that the experts' appreciation just five
21 years ago from what lay people could appreciate about eyewitness
22 testimony grossly underestimated what lay people could do?

23 A. By these data, yes.

24 Q. Now, if you look at the three studies -- let's forget the
25 1992 Kassin study. Let's -- well, that was 75 percent. Did you

1 verify that? Or 74.7 percent, something to that effect, of how
2 many jurors appreciated the retroactive interference effect?

3 A. Going back to '92 with Kassin and Barndollar?

4 Q. Yes.

5 A. 74.7.

6 Q. And then the Benton study, which was conducted in 2005 and
7 published in 2006 involving Hamilton County in Tennessee, found
8 60 percent, correct?

9 A. Yes.

10 Q. And, actually, that was a very different jury pool in Benton
11 in the Hamilton County, Tennessee, than D.C., correct, from the
12 demographics?

13 A. Yes.

14 Q. And then the study that you performed in D.C. that was
15 published earlier this year, you found 80 percent, correct?

16 A. With a different question, yes. Where they had to say true,
17 false -- or some of them said not sure -- 80 percent said true.

18 Q. Okay. And let's go through that a moment. First of all,
19 that was a question in a survey that you helped design, correct?

20 A. Yes.

21 Q. And you thought the question was good then, correct?

22 A. Yes.

23 Q. And you used the true/false -- the same type of format you
24 used for the tape recorder question you've relied upon --

25 A. Yes.

1 Q. -- whether memory is like a tape recorder?

2 And at the end for the D.C. jury pool, you found that
3 80 percent of the jurors appreciated this retroactive
4 interference effect, correct?

5 A. Given their answer, yes.

6 Q. Well, 80 percent of them got it right?

7 A. Yes.

8 Q. Was there any reason to question their answer?

9 A. No. No. By this question, yes.

10 Q. And again, in your view, wording of questions can make a
11 difference?

12 A. Yes.

13 Q. And you also assumed, while they didn't -- well, strike
14 that.

15 Let's move to point 11. You mentioned that the "forgot
16 it all along" phenomenon was only recently written about,
17 correct?

18 A. That expression coined, yes.

19 Q. It doesn't mean that people weren't aware of the phenomenon
20 before then, correct?

21 A. Well, this was -- I mean, they might have been aware of the
22 fact that you could forget that you remembered something.

23 Q. Right. And people see that in the real world all the time,
24 don't they?

25 A. They may see it. I mean, I just don't know.

1 Q. Okay. Jurors may see it in the courtroom, couldn't they?

2 A. It's possible.

3 Q. If there were a jury sitting here today, do you think it's
4 possible that they could see an honest person testify that they
5 forgot something and that they, you know, hadn't remembered they
6 knew someone or something?

7 A. That could happen.

8 Q. Okay. When we met this morning and Mr. Cline introduced us,
9 did you say, "nice to meet you" to me?

10 A. I can't remember, but I might have. That would be something
11 I would typically say.

12 Q. And did you say "nice to meet you" because you believed we
13 had not met before?

14 A. I don't remember meeting you before.

15 Q. And if you were to find out that you testified in New York
16 in 1992 and I questioned you as a witness and reminded you of
17 that by showing you a transcript, would that show that you had
18 forgotten this and now you remember?

19 A. I just can't get the memory back.

20 Q. Okay. Do you remember a case U.S. versus Yui, Y-U-I, Keung,
21 K-E-U-N-G, Tsoi, T-S-O-I, Timmy Tsoi, before Judge deCarlo in
22 New York -- the defense attorney who retained you was Robert
23 Simels, and it was a case involving a drug trafficking case and
24 cross-racial identifications in lineups and photos?

25 A. I vague -- well, I remember the defense attorney, which is

1 the person I usually have the most contact with, but...

2 Q. But you will see, do you not, in your experience in trials
3 as witnesses -- that witnesses are suddenly reminded of things
4 in the courtroom before the jury? And do you think that jurors
5 have any problem understanding that in the real world and in
6 trials people forget things that they actually knew honestly?

7 A. No. I think people might understand they can forget things
8 that they actually new. The "forgot it all along" effect has a
9 little bit more complexity to it.

10 Q. And -- but there is no showing that jurors don't appreciate
11 it?

12 A. Right. I don't know of any study that's ever asked about
13 that.

14 Q. Okay. And moving to point 12 about verbatim and gist
15 conversations, do you think it's fair that, in the courtroom,
16 jurors themselves will see that people forget verbatim recall of
17 conversations rather quickly?

18 A. I just don't know that people realize that. I actually was
19 surprised when I first started to read the studies that showed
20 that it could decay in as short a time as a few days.

21 Q. If a juror was sitting here and this were a trial, they
22 would have seen you say, I can't remember how you greeted me
23 this morning, whether or not you said "nice to meet you," they
24 would have seen an example of someone who can't remember a
25 conversation verbatim from a couple of hours ago, correct?

1 A. Well, they might have -- if you had done that in front of
2 the jury, they would see an example of that.

3 Q. And jurors see all the time that lawyers and judges and
4 witnesses will say, "could you have the last question read back
5 to me, please," or, "could you read back the last question and
6 answer," correct?

7 A. Yes.

8 Q. And, in fact, jurors sometimes send out notes saying we
9 would like to hear the testimony or read the testimony of
10 witness X from last week when they deliberate, correct?

11 A. People do get testimony read back. I don't know if that's
12 the same thing as the "forgot it all along" effect.

13 Q. But jurors certainly appreciate that we are not talking
14 about verbatim conversation --

15 A. Okay.

16 Q. -- that verbatim conversation, the memory for verbatim
17 conversation deteriorates quickly. Don't you think that if a
18 juror is sitting there watching people say, I can't remember
19 what I said this morning, or watching people ask to have
20 testimony read back, or they themselves sending notes from the
21 jury room to say, could you please read back the testimony of
22 witness X from a week ago -- do you think they are going to then
23 deliberate on the assumption that people can't remember -- that
24 people can remember verbatim conversation indefinitely?

25 A. No. That would be an example for them.

1 Q. Turning to point 13, is it fair to say that when we talk
2 about forgetting is normal, might that -- you would agree that
3 that might just be a very common-sense proposition that people
4 realize people forget things over time?

5 A. Yes.

6 Q. Now, you talked about several examples of propositions for
7 which there has been no studies done, correct?

8 A. I did. There were at least five, I think, that I couldn't
9 find any direct evidence in the studies.

10 Q. And as to those, you offered an inference or intuition as to
11 what might happen if a study were to be done as to what we might
12 find out jurors don't appreciate, correct?

13 A. Correct.

14 Q. In your 250 or 260 experiences testifying as an expert
15 witness, have you ever before testified as an expert on what
16 studies would find if they were conducted?

17 A. I don't know that I ever testified this long on the subject
18 of what people believed to be true about expert testimony.

19 Q. Would the answer be no?

20 A. So no -- I guess I would say no, I don't remember ever
21 testifying about that.

22 Q. And have you ever heard of any expert testifying about what
23 they expect a study would show if it were conducted?

24 A. I am not sure I know of an expert doing that. It's
25 something we do in science all the time.

1 Q. Wait a minute. In science -- I started out by boring you by
2 saying here is how you study things: You do tests, you test
3 context. Science takes hypotheses and tests them, correct?

4 A. Right, and we make predictions about outcomes.

5 Q. When one person thinks the world is flat and one thinks the
6 world is round, we test it; we don't just make an assumption.
7 But science -- you don't get to a solid scientific conclusion
8 unless you take a hypothesis and test it, correct?

9 A. Exactly.

10 Q. So scientists don't -- they may guess, but then they go and
11 check their hypotheses. We don't rely upon a guess as
12 scientific, correct?

13 A. Correct. Absolutely.

14 Q. And by the way, in the 260 times you have testified,
15 about -- approximately how many times would you have testified
16 for the defense and how many for the Government?

17 A. Well, of those -- it's hard to estimate, but many of them
18 are civil cases, so if half of them are criminal cases and half
19 are civil cases -- in the civil cases, it's sometimes for the
20 defense; it's sometimes for the Plaintiff. And in the criminal
21 cases, I have actually consulted with the prosecution five or
22 six times and only actually testified once.

23 Q. And how many times did you testify or consult for the
24 defense in criminal cases?

25 A. Well, if half of those 260 cases are criminal cases, that's

1 130 so -- and this is just an estimate, even though I am not
2 supposed to estimate, according to you. So that would leave 129
3 cases in which the testimony was offered on behalf of the
4 defense.

5 Q. And you talked this morning about identification -- expert
6 identification testimony, and then you talked about memory
7 outside the context of eyewitness identification, correct?

8 A. Right.

9 Q. ~~And~~ is that a concept -- do people define memory "outside the
10 context of eyewitness identification?

11 A. Well, eyewitness identification is the term you usually use
12 when you are talking about identifying the face of someone you
13 may or may not have seen before.

14 Eyewitness testimony is the more general term where you
15 might be talking about, you know, what was the color of the
16 getaway car, or what was the color of the traffic signal, or it
17 was some other aspect of memory.

18 Q. But most of your testimony in the criminal context has been
19 about eyewitness identification or eyewitness visual memory for
20 things they saw as a witness watching someone else do something,
21 correct?

22 A. Correct.

23 Q. And so, for example, you mentioned one of the cases that you
24 testified outside the eyewitness identification context was
25 about eyewitnesses to the plane flying into the gondola,

1 correct?

2 A. Correct.

3 Q. It's about what they saw and whether their memory of what
4 they saw and perceived was accurate, correct?

5 A. Correct.

6 Q. And when you talk about eyewitness reliability, whether it's
7 identification or otherwise visual reliability, you can then
8 determine principles that you can then look for facts in the
9 case that might bear on it, such as, what was the lighting?
10 Were you sitting in a 7-Eleven or were you in a dark alley?
11 Correct?

12 A. Yes.

13 Q. You can look for whether or not there was a gun, whether or
14 not there was a show-up, whether or not there was a lineup,
15 whether or not there was a photo spread, whether or not there
16 was a cross-racial identification, objective facts, correct?

17 A. Yes.

18 Q. Now, is it your view that memory expert testimony should be
19 available in every case where memory is an issue?

20 A. Do I have that view? I think that if people have some
21 misconceptions, it would be good for people to have those
22 misconceptions be corrected so they are making decisions based
23 on accurate information. If we can find other, more efficient
24 ways of educating people, I would be all for it.

25 Expert testimony is just one way to try to correct some

1 of the misconceptions that people in general, and jurors in
2 particular have and are using to make decisions about the
3 outcome of cases. It's not the only way we can make a dent in
4 that problem.

5 Q. And do you think there is a danger in taking statistical
6 studies about certain events removed from the real world at
7 times, removed from the courtroom, and applying these
8 statistical studies in an effort to assess what happened in one
9 particular case?

10 A. Well, it's my opinion that giving people information that
11 helps them make a better decision is a good idea.

12 Q. And do you think taking these statistical studies and trying
13 to apply them to a specific witness' account has any problems
14 with it?

15 A. Well, I mean, to my knowledge, experts don't and shouldn't
16 say whether a particular memory is true or false or whether a
17 particular response is an innocent mistake or a deliberate lie.
18 They only --

19 Q. I am not asking you whether an expert should give the
20 opinion of guilt or innocence. What I am saying is, isn't there
21 a danger in having jurors take statistical studies and apply
22 those statistical studies in directly assessing a particular
23 witness' account?

24 A. Well, you will have to give me an example of what a danger
25 might be, and I will tell you whether I agree with that danger,

1 because I can't think of one as I sit here.

2 Q. You can't think of one as you sit here. Did you write in
3 your book, "Eyewitness Testimony," the following: "It is
4 questionable whether the inherently probabilistic nature of
5 psychological knowledge can ever be validly utilized in directly
6 assessing an eyewitness account of a specific event"?

7 I will give you the page -- 307, I think.

8 MR. FITZGERALD: Do we have it on the screen.

9 THE WITNESS: I am sorry. I have written four books on
10 the subject. Which book is it?

11 BY MR. FITZGERALD:

12 Q. It's, "Eyewitness Testimony: Civil and Criminal."

13 A. Okay.

14 MR. FITZGERALD: I think it's above that. It's the
15 last paragraph -- just highlight the whole last paragraph.

16 BY MR. FITZGERALD:

17 Q. Does it say there, second line, "It is questionable whether
18 the inherently probabilistic nature of psychological knowledge
19 can ever be validly utilized in directly assessing an eyewitness
20 account of a specific event"?

21 A. It says that, but I would like to know the page number so I
22 could see the context, if you could give it to me.

23 Q. Page 307.

24 A. 307. It says that, yes.

25 Q. And that's a book you wrote, correct?

1 A. Co-authored, yes.

2 Q. And co-authored means you wrote it too, correct? I mean,
3 you adopt what's said in there?

4 A. Yes.

5 Q. And let me ask you this: Aren't trials very different than
6 experiments in a lot of different ways? For example, in trials,
7 unlike experiments, you ask voir dire. And when voir dire is
8 conducted, people can ask jurors to be excused who don't
9 appreciate certain things or don't seem sensitive to their
10 concerns, correct? You don't voir dire the people participating
11 in studies, correct?

12 A. That's true. I mean, you may ask them some screening
13 questions and then they come into the study if they are
14 appropriate.

15 Q. And in your understanding of trials, judges tell jurors not
16 to isolate and focus on one single fact to the exclusion of all
17 others. They ask jurors to take all the evidence taken together
18 comprehensively, correct?

19 A. Is that a pattern instruction that's used here? I am not
20 sure that I know that jurors -- that judges do that with jurors.

21 Q. Are you aware that judges tell jurors not to make up their
22 mind until they have heard all the evidence?

23 A. Well, I suppose that may happen in the pattern instructions.

24 Q. You co-wrote a book that has all sorts of instructions to
25 give lawyers as to how to litigate cases involving eyewitness

1 testimony that includes voir dire, instructions, Motions, how to
2 plead it before the Court, correct?

3 A. Right. And sometimes judges will do that.

4 Q. And are you not familiar that judges generally tell jurors
5 not to make up their mind about the case until they hear all the
6 evidence? That's new to you?

7 A. Well, I am not sure it's completely new, but I don't know
8 that they always do that or...

9 Q. And is it also fair to say that, unlike these experiments,
10 when jurors participate in a trial they get to watch
11 Cross-Examination, they get to watch witnesses be challenged by
12 one side at least, if not both sides, and get confronted with
13 facts that don't line up with what they say, correct?

14 A. Yes.

15 Q. And, in fact, they get to see witnesses sometimes change
16 their answers or say now I remember it differently, correct?

17 A. Well, that can happen.

18 Q. And they sometimes see witnesses challenged with prior
19 statements that are inconsistent with what they said before,
20 correct?

21 A. That does happen, yes.

22 Q. And they actually see witnesses have their recollection
23 refreshed on the stand where they testify, I don't remember it,
24 but now that I look at this, this refreshes my recollection,
25 correct?

1 A. That happens too.

2 Q. And they also hear argument from both sides as to how it all
3 fits together, correct?

4 A. Yes.

5 Q. And, in fact, in your book, "Eyewitness Testimony," you give
6 sort of coaching tips on how people ought to approach the entire
7 trial to make these very points about eyewitness reliability,
8 correct?

9 A. Well, this is -- this particular book, the one that you have
10 been questioning me about, is about dealing with eyewitness
11 evidence at all different phases of the litigation.

12 Q. But you walk through trial techniques about how to get
13 across the point about eyewitness reliability, correct?

14 A. Yes.

15 Q. Which is something very different that jurors will
16 experience that people in surveys won't, correct?

17 A. Well, the surveys have a different purpose.

18 Q. Right. But surveys don't study people after they have gone
19 through this whole process of voir dire, watching witnesses
20 testify, watching different witnesses contradict other
21 witnesses, watching witnesses contradict themselves, watching
22 witnesses being confronted with prior inconsistent statements,
23 watching witnesses have their recollection refreshed, having
24 instruction from a judge to take all of this evidence together
25 before they make a decision -- that's very different than a

1 process by which we are estimating how jurors will perform by
2 performing a ten-minute or a ten-question telephone survey,
3 correct?

4 A. Well, you are correct as far as most of these particular
5 studies are concerned except for the one study, which is
6 study 3, the Deffenbacher and Loftus study, which did examine
7 people who had finished their jury service and did not show any
8 appreciable difference in their answers compared to those who
9 weren't selected in that way.

10 So those are the only data I know of that bear on that
11 issue.

12 Q. Okay. Let's come back to that. But in that survey, they
13 were not asked about the facts of the case they sat on as
14 jurors, correct?

15 A. No. In fact, we don't know what kind of case --

16 Q. We don't know if eyewitness identification or reliability
17 was a factor in that case, correct?

18 A. Correct.

19 Q. So we just know they served as jurors and then they are
20 asked this survey. They weren't asked as jurors about
21 eyewitness reliability after they served in a case where that
22 was an issue, correct?

23 A. Right.

24 Q. But, in fact --

25 THE COURT: Do you know if they ever actually sat on a

1 case during that two-week period?

2 THE WITNESS: No, I don't even know that, your Honor,
3 because it wasn't asked of them.

4 BY MR. FITZGERALD:

5 Q. But in addition, isn't it a fact in that 1982 survey --
6 well, one other fact. The other thing that's different about
7 jurors than lay people is jurors make a decision together
8 collectively as 12, correct?

9 A. Yes.

10 Q. And the surveys -- there was one survey that you cited
11 yourself in 1982 where Dr. Wells, a well-known expert, did a
12 survey where he took the questions from the other survey you
13 cite, the Yarmey survey. I have an exhibit list here. You have
14 offered as exhibits today -- Exhibit Number 4 is the 1982
15 article you are talking about, and Exhibit Number 8 is a Yarmey
16 article. And didn't Dr. Wells take the very questions that were
17 asked by Yarmey and split his survey into two groups, and with
18 one group he just asked people the questions and they answered
19 on their own. And then with the other group, he didn't put them
20 into a group of 12; he put them into a group of five and had
21 them discuss things, and then they answered the question,
22 correct?

23 A. I don't know. You would have to show me that study
24 because --

25 Q. Okay. That would be your study from 1982, Exhibit 4. No.

1 Discussing that other study. And that would be at page 25 to
2 26.

3 MR. FITZGERALD: If we could focus on the bottom
4 paragraph. Blow that up.

5 BY MR. FITZGERALD:

6 Q. It says here, "Fortunately, there are some very recent data
7 bearing rather directly on this issue. Wells had half his
8 students" -- sorry. Hold on.

9 A. And what page are you reading from?

10 Q. I think it's page 25.

11 A. Of what?

12 Q. Of your -- sorry, Exhibit 4 today, the 1982 Deffenbacher and
13 Loftus study. And should be the bottom -- is that the bottom of
14 page 25? Bottom of page 25 to the top of page 26.

15 "Fortunately, there are some very recent data bearing
16 rather directly on this issue. Wells had half his 200 student
17 jurors answer Yarmey and Jones' questionnaire individually, as
18 in the present study, and half answered the questions following
19 discussion of them in five-person groups. There was very
20 definite evidence for 'group improvement.'"

21 Then they went to a question about photo biased
22 lineups -- and if you could look at that sentence, "Only 44
23 percent of non-interacting persons answered it correctly, while
24 65 percent of interacting ones did so."

25 So by allowing the subjects to go off in groups of

1 five, the accuracy rate almost went up 50 percent. They were
2 scoring 44 before, and now they are up to 65, correct?

3 A. Yes.

4 Q. Which shows that there may be a substantial difference
5 between the performance of a randomly selected person in a
6 telephone interview as to how they would perform as jurors --
7 and how they will actually perform as jurors when you just add
8 in the one factor of joint consultation, correct?

9 A. Well, from this example, it looks like interacting did --
10 certainly did improve performance, but I am sorry, I just don't
11 know whether Wells ever went on to publish this study. It was a
12 personal communication from 25 years ago, so --

13 Q. But you found it reliable enough to cite in your publication
14 that is offered here in evidence today, correct?

15 A. Well, in the 1982 paper it's cited as a personal
16 communication from 1981. So that means a conversation with
17 Wells, who is reporting this result.

18 But I -- I don't know that I have ever reviewed this
19 study, but it does -- it does look like it's promising for
20 interaction to help the situation a little.

21 Q. And with all the talk about how we might want to improve the
22 situation in the courtroom, as far as you know, no one has
23 followed up and actually studied what happens when you go
24 through the whole jury process and go through deliberations with
25 12, correct?

1 A. Not that I know of. I...

2 Q. And you reported oral conversation. As far as you know,
3 Dr. Wells is both a well-known expert and an honest man?

4 A. Yes.

5 Q. Okay. When witnesses testify, do you think that their view
6 of what the law ought to be or what to get in as evidence
7 sometimes shades their testimony -- when expert witnesses
8 testify?

9 A. Well, it's possible that -- you know, experts are human, and
10 they may have some biases that affect how they report things.

11 Q. Have you ever felt that way when you testified?

12 A. I think sometimes you can't help but feel that way. I mean,
13 I try not to let it affect my scientific judgment, but it's
14 possible that sometimes it does.

15 Q. And did you write a book called, "Eyewitness for the
16 Defense" or "Witness for the Defense"?

17 A. I co-authored a book called "Witness for the Defense," yes.

18 Q. Okay. And so there were two authors, you and somebody else,
19 correct?

20 A. Yes.

21 Q. And it was about you, the book, correct?

22 A. Well, it's about some of the trials that I have been
23 involved in and the science that has been --

24 Q. Is that the cover of your book on the screen?

25 A. Yes.

1 Q. "Witness for the Defense: The Eyewitness and the Expert Who
2 Puts Memory on Trial"?

3 A. Yes.

4 Q. And then your name and then the co-author?

5 A. Yes.

6 Q. And did you describe in that book some of the conflicting
7 feelings you had when you testified -- or if you had testified
8 for John Demjanjuk, D-E-M-J-A-N-J-U-K, the person accused of
9 being Ivan the Terrible?

10 A. Well, I did write about that conflict and personal --
11 personal conflict associated with it, yes.

12 MR. FITZGERALD: If we could pull up page 238, 239. If
13 we could get a little bit more and after -- try and get a whole
14 paragraph. Yes.

15 BY MR. FITZGERALD:

16 Q. "Should psychologists in a court of law act as an advocate
17 for the defense or an impartial educator? My answer to that
18 question, if I am completely honest, is both. If I believe a
19 Defendant is innocent, if I believe in his innocence with all my
20 heart and soul, then I probably can't help but become an
21 advocate of sorts. If I had appeared on the stand in the John
22 Demjanjuk case, I might have become his advocate, using my
23 arsenal of subtle psychological tools in an attempt to get
24 across the point that he might be innocent, a victim of mistaken
25 identification. But I wondered, would my advocacy be generated

1 by a whole-hearted belief in his innocence or the need to
2 convince myself of his innocence order to justify my presence in
3 the courtroom?"

4 And is that a fair statement of how you felt?

5 A. That was part of the anguish and conflict, yes.

6 Q. And you are aware, then, that experts can use subtle
7 psychological tools in the courtroom to make a point with
8 judges, juries and other people?

9 A. It's possible, yes.

10 Q. Now, let me talk about a few other things. In terms of
11 stress, stress on a witness -- that's been studied, correct?

12 A. There have been studies of stress. I don't think we
13 discussed them.

14 Q. And most of the studies focus on acute stress, correct?

15 A. Yes.

16 Q. Like a gun to your head or some traumatic situation,
17 correct?

18 A. Yes.

19 Q. There are very few studies on human beings involving chronic
20 stress, correct?

21 A. There are relatively few of those. I happen to have
22 participated in one of them, but --

23 Q. And did that involve post-traumatic stress disorder?

24 A. No, it involved people who had a lot of life stress. They
25 scored high on something called the Holmes Life Stress Scale

1 which asks you if you have had the death of a loved one or lost
2 a job or had a move -- I mean, if you had a lot of stressful
3 things going on in your life, your memory is not as accurate for
4 things that you are encoding.

5 Q. The few studies on chronic stress, many focused on
6 post-traumatic stress disorder, correct?

7 A. Well, people have studied post-traumatic stress disorder.

8 Q. Okay. Let me ask you this: Is it fair to say that people
9 have better memory in their domain of expertise?

10 A. Yes.

11 Q. So a person who plays chess can remember a remarkable number
12 of settings on a chess board that have greater meaning to the
13 chess player than to someone watching a person play chess,
14 correct?

15 A. Who is not an expert.

16 Q. Who is not an expert chess player?

17 A. Yes.

18 Q. So a chess player can remember a fantastic number of
19 settings on a board, correct?

20 A. Right. If it's mid-game and you have them reproduce 25
21 pieces, they can be accurate maybe with about an average of 20
22 of them.

23 Q. And bridge players can do the same thing, correct?

24 A. Well, I happen to know about the chess study. I don't know
25 if I have actually read the bridge study.

1 Q. And there are reasons having to do with -- for this that
2 don't have to do strictly with intelligence. It has to do with
3 people's familiarity with the field, their comfort level in
4 placing the information in context, correct?

5 A. And chunking.

6 Q. And it's also true that baseball players can -- some,
7 whether they are very bright or not so very bright, can remember
8 sequences of pitches from interactions with batters from well
9 before?

10 A. Well, I don't know -- there may be a study on that. I am
11 just not familiar with it. But the general principle that you
12 can remember things if you have some expertise better than if
13 you don't.

14 Q. And it's easier for people in their field of expertise to
15 integrate information into what they already know than for a
16 person who is not an expert in the field, correct?

17 A. Yes.

18 Q. It's much less taxing on them, correct? Taxing on their
19 memory --

20 A. I don't know about that, but their memory is better.

21 Q. And there are people who can translate simultaneously in the
22 courtroom: Someone can sit there, listen to a conversation,
23 even expert testimony from a psychologist in English in one
24 another, and moments later speak out a translation of that
25 complicated testimony in Spanish or French or whatever else,

1 because that's their field of expertise, and they can do things
2 and process things that the average person couldn't imagine,
3 correct?

4 A. Wet, I have seen that happen. I haven't read studies of it.

5 Q. But you have seen it happen?

6 A. Yes.

7 Q. Okay. And part of that sort of a skilled memory effect that
8 people can sort of -- in their area of expertise, can process
9 things much easier because they can integrate the information
10 into a context, correct?

11 A. And they chunk the information. So what seems like
12 individual bits and pieces to a novice is one meaningful chunk
13 to an expert.

14 Q. Okay. And the other thing that's been demonstrated is an
15 association between intelligence and memory, correct?

16 A. Yes.

17 Q. When neuropsychologists study someone to see if they suffer
18 from memory loss, they give them a memory test, but then they
19 compare it to an intelligence test, correct?

20 A. Well, another way to put it is a memory test is sometimes
21 part of an intelligence test. So if you are good on the memory
22 component, it adds to your intelligence, overall intelligence
23 score.

24 Q. If a person took a memory test, the Wechsler memory test --
25 is a Wechsler memory test a standard test given?

1 A. Well, I don't do -- I don't do testing of that type, but
2 that's a standard test.

3 Q. And is it your understanding that neuropsychologists will
4 not just look at the score of the memory test to see if
5 someone's memory is impaired, but they will also compare it to
6 the Wechsler Adult Intelligence Test, which would measure their
7 intelligence quotient, correct?

8 A. I think you will have to ask your expert that question.
9 That's more up his alley.

10 Q. Do you doubt the proposition that intelligence and memory
11 are correlated?

12 A. No.

13 Q. People of high intelligence have high memory?

14 A. As a general rule, I would agree with that.

15 Q. So the studies that we are talking about here are focused on
16 the average layperson, correct, when they are studying jurors or
17 lay people, not experts, correct?

18 A. Well, if you are doing a randomized sample of a telephone
19 survey, then you may be getting a population that has, you know,
20 an average IQ of near a hundred. But when you are studying
21 potential jurors who -- in the student population, you would be
22 getting, on average, a higher IQ population.

23 Q. Is it fair to say that people who actively participate in
24 events have better memory of the events than people who are
25 spectating?

1 A. There is some research to support that, yes.

2 Q. Okay. Now, at the end of the day -- if you remember, we
3 started out in the beginning by talking about different aspects
4 of eyewitness identification testimony. I talked to you about
5 the studies that looked at lineups versus show-ups versus photo
6 spreads. Do you remember those questions?

7 A. Yes.

8 Q. And isn't it a fact that within the eyewitness reliability
9 context, people want to look at different propositions to see,
10 one, whether those propositions themselves are reliable and,
11 two, whether or not -- more recently, whether juries appreciate
12 those propositions, correct?

13 A. Yes.

14 Q. And the effort by, say, Kassin in 2001, when he went to the
15 experts, was to try to sort out which of those principles are
16 reliable and which of those principles are appreciated by
17 jurors, correct?

18 A. Yes.

19 Q. And those principles -- you used a term before, cousins. In
20 this case when it's eyewitness identification, are those
21 principles sort of siblings of each other, looking at whether or
22 not lineups affect identification, whether show-ups affect
23 identification, all the different processes tested separately,
24 correct?

25 A. Depending on the question that the scientist asks, yes.

1 Q. And after going through that process, the experts surveyed
2 in Kassin were trying to figure out which of these processes was
3 reliable and which ones were needed in expert testimony, and
4 some thought that certain aspects of eyewitness identification
5 testimony should be admitted and certain should not, correct?

6 A. Well, you can decide where you want to put your cutoff.
7 They show which propositions have a lot of agreement and which
8 ones don't.

9 Q. But even in that study, no more than five years ago, no one
10 even thought -- no one even thought to offer expert testimony
11 about the ability of a person to recall a conversation in which
12 he or she participated in; isn't that correct?

13 A. Well, they didn't think to ask that of potential jurors.

14 Q. They didn't think to ask that of themselves, too, correct?
15 The expert asked the experts, and no one thought to say, well,
16 why don't we ask about expert testimony about memory for
17 conversations; isn't that correct?

18 A. I don't know of any study that looked at that.

19 Q. And there are no research findings on that, correct?

20 A. Well, there are research findings on people's ability to
21 remember conversations. That's how we know that they fade away
22 fairly quickly, and especially the verbatim.

23 Q. But none of the experts thought to ask -- to admit testimony
24 about memory for conversations that people participated in,
25 correct?

1 A. Not that I know of.

2 Q. Thank you.

3 MR. FITZGERALD: I have nothing further.

4 THE COURT: How long do you think you are going to be
5 because I need to give her a short break?

6 MR. FITZGERALD:

7 MR. CLINE: Maybe 15 minutes.

8 THE COURT: Okay.

9 REDIRECT EXAMINATION

10 BY MR. CLINE:

11 Q. Dr. Loftus, Mr. Fitzgerald asked you some questions about
12 your 2006 study, which I think is Exhibit 3. And the questions
13 came from page 211 and related to that sequence of questions --
14 I will let you pull that out for a second.

15 (Pause.)

16 THE WITNESS: Okay. I am at page 211.

17 BY MR. CLINE:

18 Q. At page 211. If you look, you will see that question 11(b)
19 is the question about the memory functioning like a tape
20 recorder or a video recorder. Do you see that?

21 A. Yes.

22 Q. Okay. And then question 11(f) has to do with post-event
23 contamination, correct?

24 A. Yes.

25 Q. And I think Mr. Fitzgerald's point was that half the jurors,

1 roughly, or the potential jurors, had the view that the memory
2 functions like a recorder; 80 percent understood post-event
3 contamination, correct?

4 A. Yes, according to these data, yes.

5 Q. And I think his point was that there's inconsistency there,
6 correct?

7 A. Yes.

8 Q. Is it also -- would another way to put it, perhaps, be that
9 jurors and the inconsistency between those questions shows
10 confusion on the part of jurors about how memory works -- or
11 potential jurors, I should say?

12 A. They are potential jurors, and -- if you were to point out
13 that inconsistency to them to say, I see you answered 11(b) by
14 saying it's like a video, and then you also said they can
15 remember things that they learned later from the police -- I
16 don't know what they would say to that. They would probably
17 say, I don't know why I said those two things.

18 Q. They would probably acknowledge that they were confused
19 about how memory works, don't you think?

20 A. Right. Maybe they would have some explanation for how they
21 could agree with both of those propositions, which obviously
22 some did, and what that means to them and -- you know, if you
23 had more time with these people, you could have gone back and
24 asked them about it. But I am sure nobody thought to do that
25 until they were long gone.

1 Q. Now, Mr. Fitzgerald asked you some questions about your 1982
2 study and, in particular, at the end of that study you discuss
3 information you received from Dr. Wells, correct?

4 A. Well, I don't remember whether it would have been
5 Dr. Deffenbacher or me who had the conversation --

6 Q. I understand.

7 A. -- with Dr. Wells since it was so long ago.

8 Q. But the point is that the Wells information found its way
9 into your article, correct?

10 A. Right.

11 Q. And the point of the Wells study was that when you get a
12 bunch of people together, some of whom know how things really
13 work and some of whom don't, sometimes the people who know how
14 it works can educate the others, correct?

15 A. Right. That's what we refer to as group improvement.

16 Q. But if you look at your article there, the group improvement
17 improved thing from 44 percent to 65 percent, correct?

18 A. That was just on one item, the one item that showed
19 impressive improvement.

20 Q. Okay. So the impressive improvement --

21 A. The -- that's probably the most impressive improvement of
22 any item, according to this description of the Wells study.

23 Q. So even on that impressive item and even with group
24 improvement, you still had presumably 35 percent of the jurors
25 who either didn't -- or potential jurors, excuse me -- who

1 either didn't know or were wrong, correct?

2 A. Right.

3 Q. Okay. Mr. Fitzgerald asked you some questions -- basically,
4 a quote from a book of yours where your point was that
5 probabilities can't be used to directly assess a witness -- a
6 specific witness' account, correct?

7 A. Right.

8 Q. And I think you may have answered that question earlier when
9 he was examining you when you said that you would not attempt to
10 opine, nor should any expert, on whether a particular witness is
11 misremembering or deliberately lying, correct?

12 A. Correct.

13 Q. Is it fair to say that the proper role of the expert, in
14 your view, is to provide general principles to jurors and let
15 the jurors apply those general principles to the facts?

16 A. Yes.

17 Q. Now, you have testified many, many times across the country,
18 have you not?

19 A. Yes.

20 Q. And has it generally or perhaps always been your -- the
21 thrust of your testimony to provide those general principles to
22 jurors, for example, about the problems with eyewitness
23 identification?

24 A. Right. I don't, in my typical testimony, say whether -- the
25 factor may be present, the problematic factor, but it doesn't

1 mean that you can say that this person was, therefore, wrong
2 about what they claim. The only time you can do that is when
3 you have independent corroboration.

4 And so there are occasions where I have had
5 psychological, geographic or physical evidence that can say that
6 a memory is false, as when somebody is remembering something
7 that happened to them when they were six months old.

8 Q. But in terms of your testimony, what you do when you testify
9 is offer the general findings of memory research and let the
10 jurors apply those to the facts?

11 A. Except in that case that I was obviously inartfully trying
12 to explain, when somebody is claiming they remember something
13 happening to them in great detail when they were six months old,
14 then I might go so far as to say this is unlikely to be a real
15 memory.

16 Q. All right. To just ask one more question along that line,
17 you have reviewed the -- maybe a couple more questions along
18 that line. You have reviewed the Bjork points, correct, the 13
19 points?

20 A. Yes.

21 Q. Are those the kind of general principles that you have
22 testified about and that you think are appropriate for an expert
23 to testify about in a -- in a trial?

24 A. Well, I have testified about many of them. And a few of
25 them I haven't. I don't know that I have ever testified about

1 divided attention at retrieval, for example.

2 Q. But in terms of the appropriate form and scope of expert
3 testimony, are principles like these the kind of thing that you
4 think are appropriate for experts to testify about?

5 A. I do, yes.

6 Q. Mr. Fitzgerald spent quite of bit of time with you pointing
7 out variations among studies in terms of what they show jurors
8 to understand about particular aspects of memory, correct?

9 A. Right.

10 Q. I believe on an unconscious transfer point, he showed that
11 30 percent understood it in one study and 73 percent in another,
12 correct?

13 A. Correct.

14 Q. And there were other examples that you went through in great
15 detail, right?

16 A. Yes.

17 Q. And what you find is that there are variations in results
18 among the studies depending on how the question is phrased, for
19 example, right?

20 A. Yes.

21 Q. Depending on the geographical population of people who are
22 asked, right?

23 A. That can matter, yes.

24 Q. Possibly depending on where a particular question is placed
25 in a study, right?

1 A. Yes.

2 Q. But is it fair to say that on question after question across
3 all these studies with all their variations, you find that a
4 significant portion of potential jurors do not understand basic
5 functioning of memory?

6 A. I would say this body of research is consistent in that all
7 of these scientists conclude from their work that there are many
8 areas where jurors have misconceptions about the workings of
9 memory, where they believe that things are true that are
10 unsupported by the scientific findings and -- you know, that --
11 that's not just my conclusion; that's the conclusion of these
12 scientists.

13 Q. One final point that, again, goes to this common sense
14 point. Memory is studied now widely at major universities in
15 the United States, correct?

16 A. Well, all over the world, not just in the U.S.

17 Q. Well, let's --

18 A. Stick to the U.S.?

19 Q. -- stick to the U.S. for a minute. There is a significant
20 body of research -- memory research scientists at Harvard?

21 A. Yes.

22 Q. Stanford?

23 A. Yes.

24 Q. Your school, UC Irvine?

25 A. Yes.

1 Q. UCLA where Dr. Bjork is?

2 A. Yes.

3 Q. Other schools -- Yale, correct?

4 A. Yes.

5 Q. Does it make sense to you that all those Ph.D.s and
6 professors at the best learning institutions in the country are
7 studying something that's known as a matter of common sense?

8 A. Well, I think if all we did was write articles about common
9 sense, we wouldn't be in business very long.

10 MR. CLINE: No other questions, your Honor.

11 THE COURT: Let me just ask a couple questions.

12 You seem to be acknowledging that the group process,
13 i.e. deliberations, based upon the minimal research that may
14 have been done in the area, would suggest that the ability to
15 get it right is improved.

16 THE WITNESS: Oh, yes, your Honor. I mean, I am
17 hesitant to rely too much on a brief conversation with a
18 scientist that was held 25 years ago and a report about one item
19 when I haven't seen the whole methodology and don't know that --
20 if Dr. Wells actually published that study.

21 But based on that little bit, it does look that, on the
22 best item, understanding went from 44 to 65 percent, or whatever
23 it was, after the group discussion. So it did improve it.

24 THE COURT: And there having not been any research
25 that's looked at the process after the rigors of the trial

1 process has been completed, are you able to say with any degree
2 of scientific certainty that those entire processes of the trial
3 arena will not put the jury in as good a position as an expert
4 to get it right?

5 THE WITNESS: Well, frankly, I hate to be so
6 presumptuous, but I don't believe that going through the trial
7 process is going to put the jury in a position of knowing what
8 100 years of scientific study of memory has told us about the
9 workings of memory.

10 THE COURT: Are you talking about the mechanics,
11 scientific mechanics of memory, or are you talking about the
12 ability of people to come to an appreciation just based upon
13 common sense as a result of life experience?

14 THE WITNESS: Well, I think that jurors do know some
15 things as a matter of common sense, the idea that, you know,
16 memory can fade. But there are other things that they don't
17 know, and there is proof that they don't know. Many of them
18 don't know that there is a cross-racial identification problem.
19 Many of them think that "they all look alike" is a myth or is
20 just true of people who are prejudiced. That's not true.

21 Many of them don't appreciate that people overestimate
22 the duration of events. They tell you that a 30-second bank
23 robbery took five minutes and that they watched it for five
24 minutes. Jurors don't appreciate that.

25 And I don't know exactly how, in the context of a

1 trial, you would get that information across, or you could
2 guarantee that the accurate information would get across. I
3 mean, maybe a jury instruction. I don't know how many different
4 jury instructions you would need. But when in the trial are
5 they going to be told that people overestimate the duration of
6 events?

7 THE COURT: Within the context of the factual scenario
8 we are involved in in this case, are you able to say without any
9 research having been done, in the context of this factual
10 scenario, that the jury would not be able to get it right as a
11 result of the normal trial processes that we will engage in in
12 this case?

13 THE WITNESS: Well, it depends on -- it depends on
14 which point. I mean, when and how is a jury going to be told
15 that people can have very detailed and confident and even
16 emotional recollections about things that didn't happen or that
17 happened differently? When and how are they going to be told
18 that you can have very rich memories for things that didn't
19 happen and that scores, if not hundreds, of studies have
20 documented this?

21 THE COURT: Very well. Anything else based upon the
22 questions I have asked?

23 MR. FITZGERALD: No Judge.

24 MR. CLINE: No thank you, your Honor.

25 THE COURT: Any other witnesses besides Dr. Loftus.

1 MR. CLINE: No, your Honor.

2 THE COURT: Any from the Government?

3 MR. FITZGERALD: No, Judge.

4 THE COURT: Very well. Does counsel desire to make any
5 remarks before we break?

6 MR. CLINE: No, your Honor. We have already --

7 THE COURT: Then we will take a recess for about 20
8 minutes, I think it's going to take, to set up the courtroom for
9 the continuation of the CIPA proceedings, right?

10 MR. CLINE: Yes.

11 THE COURT: About 20 minutes. Okay. We will take a
12 20-minute recess.

13 (Whereupon, at 2:56 p.m., the proceedings were
14 adjourned.)

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I N D E X

DEFENSE

WITNESS:

DIRECT

CROSS

REDIRECT

RE CROSS

ELIZABETH LOFTUS

By Mr. Fitzgerald

3

By Mr. Cline

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E X H I B I T S

GOVERNMENT'S

EXHIBITS

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CERTIFICATE OF REPORTER

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I, Patty A. Gels, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.


