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1 THE CLERK: Thank you. Please be seated.

2 THE WITNESS: (Complying.)

3 Thank you.

4 If I just may have a moment, Your Honor.

5 THE COURT: Sure. Get your stuff out.

6 (Brief pause.)

7 THE CLERK: Doctor, will you please state your full
8 name and spell it for the record?

9 THE WITNESS: Richard J. Of she. Richard is
10 R-I-C-H-A-R-D; Ofshe, O-F-S-H-E.

11 THE CLERK: Thank you.

12 VOIR DIRE EXAMINATION

13 MR. GREENBERG: Q. Good morning.

14 A. Good morning.

15 Q. Dr. Ofshe, what is your occupation?

16 A. I'm a professor at the University of California at
17 Berkeley.

18 Q. And in what department?

19 A. In the sociology department.

20 Q. And how long have you been a professor in the
21 Department of Sociology at U.C. Berkeley?

22 A. Since 1967.

23 Q. And how long -- are you currently tenured?

24 A. Yes.

25 Q. And how long have you been tenured?

26 A. Since 1970 or '71.

27 Q. What is your educational background?

28 A. I have a bachelor's degree in psychology from Queens

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1 college at the City University of New York, a master's degree
2 in sociology from the same institution, and then a Ph.D. from
3 the sociology department at Stanford with a specialty
4 essentially in an area called social psychology, which is an
5 area that exists both within psychology and sociology.

6 Q. What is social psychology?

7 A. Well, social psychology, the particular part of it
8 that I deal with, has to do with questions of influence,
9 decision making, a number of other things, but in particular
10 influence and decision making, the effects of groups on
11 individuals, the effects of interpersonal interaction on
12 their decision making.

13 And my particular case, the work that I've always
14 pursued, and particularly so for the last almost 20 years,
15 has to do with influence under extreme conditions, high
16 stress, highly organized groups, pressuring individuals to do
17 certain things, the impact of the use of or misuse of
18 authority, and particularly techniques to get people to see
19 things in a certain way and to act in certain ways.

20 Q. Doctor, so -- come back to what do you mean -- and
21 you may have just explained it -- by the term "influence"?

22 A. Well, influence here means the extent to which a
23 person can be gotten to perceive things, view them in a
24 certain way or act in a particular way when that way is being

25 advocated by another where there's someone who wants them to
26 do something and they are being manipulated, pressured,
27 perhaps threatened into acting in a certain way, agreeing,
28 making certain decisions and so on.

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1 Q. Now have you taught anywhere other than at U.C.
2 Berkeley?

3 A. I taught a summer school class once, or one summer I
4 substituted at Stanford, but that's the only time I've taught
5 except at Berkeley.

6 Q. Have you received any honors in connection with your
7 work?

8 A. Yes. In 1973, I was awarded a Guggenheim Memorial
9 Foundation Fellowship, which is in my business something nice
10 to get.

11 In 1979, I shared in the receipt of a Pulitzer Prize
12 for public service. It was awarded to the Point Reyes Light
13 newspaper for the exposé that we did together, that is
14 together meanin⁴ the two people who published this weekly
15 newspaper and I did, of a group that had become a violent
16 cult group, a group that started out as a drug rehabilitation
17 organization by the name of Synanon which had a presence in
18 Oakland for a number of years.

19 Q. And what in general were those newspaper articles
20 about in connection with Synanon?

21 A. It had to do with essentially the reign of terror
22 that was being visited upon people in areas surrounding
23 Synanon communities, the way in which, within the
24 organization, people were being manipulated and gotten to
25 take part in acts of violence. It's the program, if you
26 will, that culminated with a rattle snake being put in an
27 attorney's mailbox in Southern California on October 10th,
28 1978. And I called into the state attorney's general office

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1 that there was going to be an attempt to kill this attorney
2 about two weeks earlier, and then two weeks later a rattle
3 snake was put in his box.

4 Q. What particular area that you specialized in
5 constituted your involvement in this series of articles?

6 A. Well, I had done research on Synanon as an
7 organization and on the techniques that were used to
8 manipulate people some years earlier before Synanon embarked
9 on this -- moved in the direction of this kind of violence.
10 At the time I studied it, it was a highly structured
11 organization that used exactly the same kinds of influence
12 techniques that they were using three or four years later
13 except now the focus had been shifted and the object was to
14 get people to condone and take part in various criminal acts.
15 And so the same organization now just shifted its focus and

16 was now producing people who had started out seeking to
17 escape drug addiction or people who had started out seeking
18 to find a community that would provide them with a better way
19 to live. Now these very same people were being pressured to
20 take part in acts of assault, attempted murder against people
21 who were said to be enemies of Synanon.

22 Q. So prior influence was originally used by Synanon to
23 get people not to be -- use drugs or alcohol at one point,
24 and then that influence became used for a different purpose.

25 Is that basically what you're saying?

26 A. Correct. It was basically the same mechanisms, the
27 same structure, the same organization had been directed at
28 one way in one point, and then what they wanted to produce or

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1 what the leadership wanted to produce changed, and when that
2 changed what people were gotten to do changed.

3 Q. Do you belong to any professional organizations?

4 A. Yes.

5 Q. Would you tell us about them, please?

6 A. I'm a member of the American Sociological
7 Association, the American Psychological Association, the
8 American Psychological Society, the Sociological Practice
9 Association, and the Pacific Sociological Association.

10 Q. Have you served on the editorial boards of any
11 publications?

12 A. Yes. Starting with the Administrative Science

13 Quarterly, a journal called Sociometry, which is now called
14 Social Psychology, the American Journal of Sociology, the
15 editorial board of a journal called the Cultic Studies
16 Journal.

17 Q. May I interrupt you for a minute?

18 What are cultic studies?

19 A. This really was an organization -- a journal that was
20 focused on studying certain kinds of techniques of
21 organization, extreme pressure and so on, essentially the
22 things that I've been studying for 20 some odd years.

23 Q. Cultic means pertaining to cults?

24 A. Pertaining to high control organizations,
25 organizations that bring a great deal of pressure to bear on
26 individuals in any one of a number of ways. Doesn't
27 necessarily have to be an organization that people would call
28 a cult. It really had to do more with extreme techniques of

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1 influence.

2 Q. Are you on -- currently on any advisory boards?

3 A. Yes.

4 Q. And would you name them or name it, please?

5 A. I'm on the scientific advisory board of an
6 organization called the False Memory Syndrome Foundation,
7 which is an organization that is focused on the misuse of
8 power by psychotherapists and its impact on patients.

9 Q. Is false or -- false memory or repressed memory an
10 area of your specialty?

11 A. Yes, it is.

12 Q. How long have you been interested in that particular
13 field?

14 A. Well, i-t's a topic that is consistent with the kind
15 of work that I've been doing, and my work in that area
16 started -- probably on this particular issue started in 1988
17 or '89 with work that I did on a particular case involving a
18 police officer who was manipulated and coerced into giving a
19 false confession to not just one but a series of crimes that
20 never happened. And in that particular interrogation a
21 clinical psychologist had been brought in, and he used
22 certain techniques that one ordinarily only sees in
23 psychotherapy or sees used badly in psychotherapy, and that
24 brought these two things together. So since 1989 I've done a
25 lot of work on this issue of misuse of influence and in
26 therapy.

27 Q. Have -- do you also specialize in the area of police
28 interrogation procedures and false confessions?

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1 A. That's been my principal area of work for probably a
2 decade.

3 Q. And in connection with that specialization, have you
4 served as consultant to any law enforcement organizations?

5 A. Well, in connection with any specialization in

6 extreme influence or interrogation, it would include the
7 Mann County Sheriff's Department; the Attorney General's
8 Office of the State of California; the Office of the Attorney
9 General of the State of Arizona; the United States Department
10 of Justice, both the tax division and the criminal division;
11 and the prosecuting attorney's office of Jefferson County,
12 West Virginia; the Los Angeles District Attorney's Office.

13 Q. When was that?

14 A. 1984 and '85.

15 The Internal Revenue Service, the Commissioner's
16 Office of the Department of Social and Rehabilitation Service
17 of the State of Vermont; the Thurston County, Washington,
18 Prosecutor's Office; and the State's Attorney's Office in
19 Fort Lauderdale, Florida.

20 Q. The consultation with the State's Attorney's Office
21 in Fort Lauderdale, Florida, what was that in connection
22 with?

23 A. That was in connection with the manner in which a --
24 an individual who had witnessed a home invasion killing was
25 made to keep silent about it even though the actual killers
26 were not arrested. And he became -- he was arrested for the
27 crime, and it took over a year before he could be gotten to
28 tell the truth about what happened. He then became a state's

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1 witness in the case, charges against him were dropped, and I

2 explained on behalf of the state how he had been pressured
3 into silence and had not said anything about the crime even
4 though he himself was indicted for it for well over a year.

5 Q. Have you published any books?

6 A. Yes.

7 Q. Would you tell us about them, please?

8 A. Well, in the earlier part of my career when I was
9 doing work on -- laboratory-based research on decision
10 making, I published a book called Utility and Choice in
11 Social Interaction, which was about certain very technical
12 issues in decision making.

13 Subsequent to that, I published a collection of
14 readings called the Sociology of the Possible, a text on the
15 interpersonal behavior in small groups, and then a book
16 called The Light on Synanon, which was about the exposure that
17 we did of Synanon. And then most recently, in October of
18 last year, a book called Making Monsters Psychotherapy:
19 False Memories and Sexual Hysteria. And I'm currently at
20 work on a book that will be titled Confessions of the
21 Innocent.

22 Q. The book Making Monsters Psychotherapy: False
23 Memories and Sexual Hysteria, what is the general basic topic
24 of that book?

25 A. The topic of that is the way in which
26 psychotherapists can be improperly using certain techniques
27 of influence, get people to sincerely believe that things
28 happened to them, perhaps things that went on for a decade

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1 that simply didn't happen. These are the same kinds of
2 techniques that are used to convince people that they are --
3 used to convince people by psychotherapists that they are
4 being kidnapped and sexually abused by space aliens and
5 didn't know it until they entered psychotherapy or that they
6 were sexually abused in past lives and didn't know it until
7 they entered psychotherapy. And in this case it is
8 convincing people that they were sexually abused for perhaps
9 a decade of their lives by their parents and they didn't know
10 it until they entered psychotherapy.

11 Q. Have you published many articles? Can you give us a
12 ballpark figure of how many articles you've published?

13 A. 25 to 30, I would think.

14 Q. Have any of them been on coerced confessions or --
15 any of them been on coerced confessions?

16 A. Yes.

17 Q. How many of them, and when were they published, and
18 what were the titles?

19 A. At least three, but everything that I've published
20 has to do with the influence techniques that I've been
21 talking about which express themselves in interrogation. But
22 specifically on interrogation, an article called "Coerced
23 Confessions: The Logic of Seemingly Irrelevant Rational
24 Action"; another article called "Coercive Persuasion and
25 Attitude Change"; and then a third article entitled
26 "Inadvertent Hypnosis During Interrogation: False Confession
27 Due to Dissociation State, Mis-Identified Multiple
28 Personality and the Satanic Cult Hypothesis."

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1 Q. A short title.

2 A. I was trying to make it the longest title ever
3 published.

4 Q. Have you presented -- have you made any presentations
5 to scientific associations or organizations in the area of
6 coerced confessions?

7 A. Yes.

8 Q. How many such presentations? When, where, and what
9 are the titles?

10 A. Well, those in particular, a number of presentations
11 at meetings of the American Sociological Association. I was
12 scheduled to do a presentation on this subject to the Royal
13 college of Psychiatrists in London in October of 1991, I
14 think, but I had to skip the trip because my house burned
15 down in the Oakland Hills fire the day before I was supposed
16 to leave.

17 Q. Did you supervise as a professor at Cal -- do you
18 supervise Ph.D. dissertations?

19 A. Yes.

20 Q. Did you ever supervise a Ph.D dissertation on coerced
21 confessions in which the Oakland Police Department was a
22 subject of the dissertation?

23 A. Yes. It was a doctoral dissertation by someone who
24 has been a student of mine, Richard Leo, and he studied
25 police interrogation methods in Oakland, Vallejo, and at

26 least one other jurisdiction were areas in which he
27 studied -- he actually observed or studied videotapes or
28 audio tapes of interrogations.

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1 Q. Was the other police department the Fremont Police
2 Department?

3 A. Sounds about right.

4 Q. Did you make -- have you ever made a presentation to
5 the Florida State Supreme Court Judicial Conference?

6 A. Yes.

7 Q. And when did that occur, and what was it about?

8 A. I believe it was in 1994, and it was the subject of
9 interrogation and false confession, and it was to a sort of
10 continuing education mini college or mini course for judges
11 and appellate judges -- trial judges and appellate judges in
12 Florida on this particular subject.

13 Q. Have you taught at criminal law seminars in the area
14 of coerced confessions?

15 A. Yes.

16 Q. About how many times?

17 A. Three or four times, at least.

18 Q. Have you recently made any television appearances on
19 national programs in which you studied the area of false
20 confessions?

21 A. Yes.

22 Q. Would you tell us about them?

23 A. I was retained by the American Broadcasting Company,
24 ABC, for one of their shows called 20/20. And they were
25 preparing a segment that had to do with a mentally retarded
26 young man by the name of Johnny Lee Wilson in Arkansas, and
27 Mr. Wilson had been interrogated and in my judgment falsely
28 confessed to a murder of an elderly woman. He ended up

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1 entering a guilty plea to avoid the possibility of the death
2 penalty, and now seven years later the real killer has
3 identified himself and admitted that he actually committed
4 the crime and Mr. Wilson had nothing to do with it. And
5 20/20 was doing a segment on that, and so the representatives
6 came to me and asked me if I would analyze then the
7 interrogation and comment on it during the 20/20 segment,
8 which I did.

9 Q. Any other programs?

10 A. Yes, yes. Not recently, but perhaps a year, year and
11 a half ago, I was interviewed on the Ted Koppel show. They
12 did a half hour -- an entire show on a very famous case in
13 Arizona called the Phoenix temple murder case in which nine
14 Buddhists were murdered at a temple just outside of Phoenix
15 in Maricopa County. And I had worked on that case on behalf
16 of two of the four young men who were falsely accused and had
17 confessed to this mass murder. Eventually the charges
18 against them were dropped when the real killer -- killers

19 were caught. That is a very famous case in recent American
20 history, and Koppel did a show on it, and I explained about
21 confessions on that show.

22 And also another show called Eye to Eye did a segment
23 on this, and I was asked to comment there.

24 And then also '86 -- a year ago, perhaps -- about a
25 case that occurred in Oakland in which a Berkeley
26 undergraduate by the name of Bradley Page had been gotten to
27 confess to killing his girlfriend. And that was an
28 interrogation that was recorded in part but not recorded in

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1 part.

2 And I'd been interested in the Page case for a number
3 of years and had studied the interrogation. And a show, I
4 think it was Eye to Eye, decided to do a segment on that
5 since the person who probably did the killings was now
6 identified or did the killing was now identified in
7 Washington State as someone who had been convicted of killing
8 two other women in Washington State. And so I took part in
9 that show, as well.

10 Q. Can you estimate in the last several years how many
11 police interrogations you have been hired to review?

12 A. Since about 1991 -- my records prior to 1991 were
13 destroyed. But since 1991, and probably including a few that
14 I recall that were done before that, I think I've been asked
15 to analyze about 67 separate interrogations.

16 Q. And over the ten years that you have been interested
17 in police interrogation procedures and false confessions and
18 things like that, have you become familiar with the ways that
19 policemen go about eliciting information during questioning
20 and interrogations?

21 A. Yes.

22 Q. And would you describe or tell the jury how you have
23 become familiar with that? Have you reviewed literature, for
24 instance?

25 A. Well, there is a fairly substantial literature on
26 both the social psychology of police interrogation, how the
27 persuasion occurs, on factors that make people vulnerable to
28 interrogation and to giving false confession, which is the

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1 subject I'm particularly interested in, but also why it is
2 that people confess in response to interrogation. There is a
3 league of literature. I've reviewed as much of that as I
4 possibly can, including all of the major text books that have
5 been written to train police in how to do interrogation. So
6 I'm -- to the best of my ability, I've reviewed everything
7 there is to review on the subject.

8 In addition to that, I've studied the particular
9 interrogations I mentioned before, plus many more, and have
10 been working on understanding how it is step by step. And
11 this is usually working with videotapes or audio tapes,

12 transcripts of the entire interrogation, how it is step by
13 step that a person can be gotten to give a confession if they
14 committed the crime and how they can be gotten to give a
15 false confession if they did not commit the crime.

16 Q. And in connection with your studies in this area,
17 have you talked to law enforcement personnel about any
18 particular interrogations and interrogation procedures?

19 A. Yes.

20 Q. Have you talked to people who have, in fact,
21 confessed, whether falsely or truthfully, about interrogation
22 procedures?

23 A. Yes.

24 Q. And have you talked, also, to people who confess
25 about the factors that led them to confess whether the
26 confessions were true or false?

27 A. Yes. Especially when I am doing work on this, one of
28 the things I want to do is -- it depends in part on whether

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1 there is a transcript, a recording of the entire
2 interrogation. If there is a recording of the entire
3 interrogation, then most of the work can be done working with
4 that transcript.

5 When the police fail to tape record the entire
6 interrogation, then it's necessary to try to reconstruct what
7 happened in the interrogation, and then that requires doing
8 certain things, using certain procedures that I've tried to

9 develop over the years that have to do with debriefing the
10 person who has been through the interrogation to try to get
11 as good a picture of what happened step by step as it is
12 possible to do given the fact that the police have chosen not
13 to tape record. And so I've interviewed people about the
14 specifics of what happened to them in interrogation
15 repeatedly.

16 Q. In these 67 or so separate police interrogations,
17 have you ever found that the interrogations led to reliable
18 statements?

19 A. First, the interrogations that are sent to me to look
20 at are not a fair sample, a random sample of police
21 interrogations. This is not typically what goes on in police
22 interrogations at any moment in time.

23 What I get sent are those interrogations in which --
24 for which someone strongly believes that there might be a
25 problem, and they have to believe it strongly enough to go to
26 the trouble to contact me and get me the material and ask me
27 to look at it and so on. But even with that, more than half
28 the time my conclusion is that essentially there was nothing

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1 wrong with the way this interrogation was carried out and/or
2 that I can't tell. But that's more than half the time.

3 Q. Have you ever been contacted by the defense lawyer
4 for someone accused of a crime, been retained by that lawyer,

5 and determined that the particular confession involved was,
6 in fact, a reliable confession?

7 A. Oh, yes.

8 Q. So would it be accurate to say that every time you're
9 contacted by -- well, then is it true that every time you're
10 contacted by the defense to review a confession that you get
11 on the witness stand and say that confession is false or
12 unreliable?

13 A. Hardly. Most of the time I send them back to the
14 attorney and say there's nothing to complain about or it's
15 impossible for me to say anything about this.

16 Q. Now, have you ever testified as an expert in the area
17 of police interrogation procedures and false confessions in
18 court?

19 A. Yes.

20 Q. On how many different occasions?

21 A. 24 occasions.

22 Q. How many states?

23 A. Just a moment.

24 Nine states.

25 Q. And does that include testimony in both state and
26 federal courts?

27 A. I believe it's three federal courts and the rest were
28 state courts. It would be 19 state courts and three federal

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1 courts.

2 MR. GREENBERG: At this time I would offer Dr. Ofshe
3 as an expert in the area of police interrogation procedures
4 and false confessions.

5 THE COURT: You want to voir dire Dr. Ofshe as to his
6 credentials, Mr. Mifsud?

7 MR. MIFSUD: No, Your Honor, not at this time.

8 THE COURT: All right. Then we'll accept Dr. Ofshe
9 as an expert in the field as identified by defense counsel.
10 Go ahead, Mr. Greenberg.

11 DIRECT EXAMINATION

12 MR. GREENBERG: Q. Doctor, do some people confess
13 falsely to crimes they haven't committed?

14 A. Yes.

15 Q. Do some people confess falsely to murders they
16 haven't committed?

17 A. Yes. We know, for instance, for example, that one
18 study of false confession came up with -- one recent study
19 came up with the estimate of approximately 6,000 false
20 confessions being taken a year in the United States. And
21 that's a well-respected study.

22 Q. Who is that study by?

23 A. Huff, Rattner, and someone else. I have it here if
24 you'd like me to read it.

25 Q. Just the title.

26 A. Huff, Rattner, and Sagarin.

27 MR. GREENBERG: Ms. Lee, do you need a spelling?

28 THE COURT REPORTER: Yes, that would be nice.

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1 MR. GREENBERG: S-A-G-A-R-I-N.

2 Q. Have you worked on any cases in which people have --

3 A. Excuse me. I didn't finish.

4 Q. I'm sorry.

5 A. We got sidetracked with the title.

6 The other thing I was intending to say was that that
7 study gives an estimate of how frequently it happens.

8 There's a study that was published in the Stanford
9 Law Review in 1987, and it's a study of miscarriages of
10 justice in capital cases or potentially capital cases, cases
11 in which people could be given the death penalty in American
12 history. And in that study, 350 examples of cases that
13 ultimately turned out to be miscarriages where juries had
14 reached the wrong decision were identified, and of those 350
15 cases, the leading cause of a miscarriage of justice
16 attributable to police conduct was eliciting a false
17 confession.

18 So when it comes to looking at how false confessions
19 come to be where it's attributable to what the police do or
20 how miscarriages of justice come to be, when it's
21 attributable to police conduct eliciting a false confession
22 is the most frequent cause.

23 Q. Just so the jury knows, what is the most frequent
24 cause not attributable to the police?

25 A. Witness -- misidentification by witnesses.

26 Q. Now have you -- what was the title of the Huff
27 article, by the way?

28 A. "Guilty Until Proved Innocent, Wrongful Conviction,

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1 and Public Policy."

2 Q. Have you yourself worked on any cases in which
3 persons have falsely confessed to murders they didn't commit?

4 A. Yes.

5 Q. You mentioned the Phoenix temple murders.

6 How many persons did you represent, or did you
7 represent any of those you've already testified that you did?

8 A. Yeah. That's a case in which I was retained shortly
9 after the confessions were given on behalf of two young men
10 from Tucson who, together with two other individuals, became
11 known as the Tucson four. They --

12 And what makes the Phoenix temple murder case so
13 extraordinary is that it was a case in which there was a
14 great deal of attention given because nine people had been
15 murdered at a Buddhist temple. It was thought to be a race
16 crime because of the fact that these were Thai Buddhists.

17 There was tremendous pressure on the sheriff's
18 department to solve the crime, and they had no idea who did
19 it. They had no strong clues, no evidence leading to anyone
20 in particular. They were completely stymied even though they
21 had about a 65 or 70-person task force working on it.

22 And some number of weeks -- I believe about five
23 weeks into the investigation, they got a phone call -- and
24 this is not surprising -- a phone call from someone who said

25 he knew who did it and he had also been along and he had
26 witnessed it.

27 This happens all the time in high profiles cases.

28 It also happens, as it happened in the Phoenix temple

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1 murder case, that sometimes the person who calls up is giving
2 what's called a voluntary false confession. It's someone who
3 for whatever reason wants to confess to the crime even though
'4 they had nothing to do with it.

5 In this particular case, the fellow who called, his
6 name was Mike McGraw, happened to be a resident of a Tucson
7 psychiatric institute at the time he made the phone call, the
8 classic mentally disturbed false confessor.

9 And even though normally what police will do in order
10 to avoid wasting their time under these circumstances is make
11 the person who wants to confess demonstrate that you know
12 enough about this crime to be taken seriously, tell me
13 something that I don't know, prove that you actually know
14 something about this, give me corroboration essentially is
15 what they ask for.

16 Well, even though Mike McGraw could not get the facts
17 of this case in any way straight -- and I've reviewed his
18 interrogation. It was tape recorded. He named five people
19 who supposedly had to do -- had -- took part in this killing.
20 They were three young Hispanic men from Tucson and two young
21 black men from Tucson.

22 Based on nothing but his identification, the Maricopa
23 county Sheriff's Department descended on Tucson and grabbed
24 these men in the middle of the night. I mean grabbed them.
25 They didn't arrest them. They just broke into their places
26 of residence or simply told them they were coming to Phoenix
27 with them, and then they interrogated them.
28 They elicited -- they got false confessions to mass

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1 murder from three of the five of these young men.

2 Q. How did they do that?

3 A. By pressuring them. By relentless pressure, they got
4 them -- they got the three men who confessed to confess and
5 in great detail even to Leo Bruce, one of the young men
6 describing how he took the rifle and put it at the base of
7 the skull of each of the monks and pulled the trigger,
8 details that one would think should have linked them to the
9 crime or at least a description that -- that sounded good.
10 Even though it didn't prove that he did it, it sounded good.

11 As it turned out, after these men were arrested the
12 police caught the two young men from Phoenix who had, in
13 fact, committed the murder. They had the murder weapon.
14 They had loot from the robbery. They also confessed.

15 And within a week or two after they were arrested,
16 the charges were dropped against the Tucson four. The county
17 prosecutor publicly admitted that a terrible mistake had been
18 made. And -- and that was the Phoenix temple murder case.

19 But what's so exceptional about that case is here are
20 five people picked more or less at random. One of them was a
21 19-year-old college student. The other was someone who had
22 had, I think, one burglary conviction. They ran from hard
23 working, upstanding people to somebody who had had some
24 experience with the criminal justice system. And yet they
25 got false confessions from three of the five of them, and if
26 they had not been taped recorded and the real killers had not
27 been caught, these men very well could have been convicted.

28 THE COURT: All right. Mr. Greenberg, with that

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1 we'll take the noon recess.

2 MR. GREENBERG: Fine. That's a good stopping point.

3 THE COURT: All right. Ladies and Gentlemen of the
4 Jury, we'll take the noon recess.

5 And remember the admonition I have heretofore given
6 you.

7 We'll reconvene at 1:30 and see if we can finish with
8 Dr. Ofshe. See you at 1:30.

9 (Noon recess.)

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1 MONDAY, MARCH 20, 1995 -- P.M. SESSION

2 PROCEEDINGS

3 ---000---

4 THE COURT: All right. This is the case of People

5 versus Traci Foskett.

6 Let the record show that the defendant is present
7 with counsel and the jury is present in the jury box along
8 with the alternates.

9 And Mr. Greenberg.

10 DIRECT EXAMINATION

11 (Resumed)

12 MR. GREENBERG: Q. Dr. Ofshe, I'd like to turn your
13 attention for a moment back to the article that you talked
14 about this morning by Mr. Huff, by Huff, Rattner and Sigarin.

15 You said this morning that that article indicated
16 that there were 6,000 false confessions a year.

17 Is that accurate?

18 A. No. I meant to say 6,000 -- what they estimated in
19 that article is 6,000 false convictions, and that I was then
20 going to go on and talk about the Bedau and Radelat article
21 which talks about how many miscarriages are attributable to
22 police-induced false confessions. And so their estimate is
23 about the number of wrongful convictions, not about wrongful
24 convictions uniquely associated with coerced confessions.

25 Q. So wrongful convictions would include cases of
26 misidentificatiOn, cases of police misconduct, and other
27 factors, as well?

28 A. Correct. Bedau and Radelat break it down as to the

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1 sources of the error.

2 Q. Now i'd like to come back, also, to the Phoenix
3 temple murders that you were discussing.

4 And you testified this morning that I think it was
5 three out of five accused in that case gave false
6 confessions.

7 And what I would like to ask you is whether any of
B those confessors, any of those people who confessed in the
9 Phoenix temple murders, were physically threatened in any
10 way?

11 A. No.

12 Q. Were they beaten?

13 A. No.

14 Q. Can you just describe very briefly what tactics were
15 used by the police to elicit the statements?

16 A. Intense accusatory interrogation, not taking no for
17 an answer, insisting that they knew that they had done it.

18 In one case, they emphasized that the other people
19 were confessing and said that you did certain things.

20 For another one of the young men they just kept
21 pressing him until he started to breakdown and just could no
22 longer resist giving into them.

23 Another young man, the breaking point was that they
24 told him if he didn't confess they were going to have to
25 arrest his brother and they would do that in front of his
26 brother's family.

27 Now all of these young men were interrogated
28 intensely, and for each of them there seemed to be a

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1 A. Yes, there is.

2 Q. And would you tell the jury what that is, please?

3 A. Well, generally it's recognized that one category of
4 false confession is called a voluntary false confession, and
5 that just means essentially someone who, without any one
6 pressuring them, without anyone doing anything improper, is
7 voluntarily giving a false confession for whatever reason.

8 The example of Mike McGraw, the fellow who was in the
9 psychiatric hospital, is an example of a voluntary false
10 confession. He called the police. He said: I know about
11 this, and I was there.

12 Another example might be someone who decides to
13 confess to something to protect someone else, and they make
14 up their mind to do that. That isn't because the police are
15 pressuring them. And I've seen an example of that kind of
16 confession in my own work.

17 The other kinds are called a coerced compliant
18 confession, coerced compliant false confession, and then
19 what's called a coerced internalized false confession.

20 Now a coerced compliant false confession describes a
21 situation in which a person gives a false confession knowing
22 that they're giving a false statement, and that is usually
23 explained by either the intensity of the interrogation
24 overwhelms them and they just can't stand it any more and
25 they begin to comply, to give in to the demands of the
26 interrogated.

27 And one has to understand that the interrogator's
28 demands can be very, very intense. They just will not take

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1 different breaking point. But it's the intensity of the
2 overall interrogation. And then what particularly causes one
3 individual over another one to succumb can be an accident.
4 It can maybe be something that they just happened to fasten
5 on in the interrogation. It doesn't necessarily have to --
6 the issue doesn't have to be all that important. The issue
7 has to be seen as coming up in the course of an interrogation
8 that's already overpowering to the person.

9 Q. Did any of the people in the Phoenix temple murders
10 who confessed falsely have brain damage?

11 A. I don't believe so, no.

12 Q. Did any of them have any significant mental handicap
13 that you know of?

14 A. No. To ~the best of my knowledge, they were pretty
15 ordinary folks, running from one young man who was in junior
16 college, another man who worked as a cabinet maker. They
17 were, you know --

18 Well, only one of them had any involvement with the
19 criminal justice system in any way, and that was I believe
20 for a burglary.

21 Q. And what was their level of intellectual function?

22 A. I'm not sure that I saw any data on that, but I think
23 it would probably be safe to characterize them as average or
24 better.

25 Q. Now I'd like to go -- is there -- talk about false
26 confessions in general.

27 Is there a framework for describing types of false
28 confessions?

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1 no for an answer. And many of the things that happen in
2 interrogation are designed to create a circumstance when the
3 interrogator is powerful and is pressing and is really
4 running a script. They're acting in a certain way, they know
5 what they are doing, and they're intending to produce certain
6 effects.

7 And the intensity of that experience can get people
8 to start just giving up. And usually after that's over, they
9 will say things like: I just -- I had to do something to
10 get -- to get them off my back, to end this; I was willing to
11 tell them anything just so that I would get this over; I'd
12 worry about it later -- which doesn't make a lot of sense,
13 but this is what people say.

14 Sometimes it happens because someone has been
15~ threatened. So, for example, an individual who knows that
16 they're innocent may be told: We've got all this evidence
17 against you. You're going to get convicted. If you don't
18 tell your side of the story now, it's going to be worse for
19 you. This is your one opportunity to do it.

20 And the person is essentially put in a position in
21 which, even though known that they're innocent, the choice
22 before them is essentially you either do this now, the
23 train's leaving the station, you better get on board now, or
24 you're going to get punished much more severely. And so an
25 innocent person under those circumstances might decide to

26 give a false statement thinking it might be the only way to
27 avoid saving their lives or to avoid a lifetime in jail and
28 get a lesser punishment.

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1 Those are called coerced compliant false confessions.

2 The other kind is called -- is labeled a coerced
3 internalized false confession, and I think that's a little
4 too strong a term because internalized usually means that the
5 person has genuinely and completely come to believe
6 something.

7 And my own analysis of this is that I would call
8 these coerced or persuaded false confessions. And these are
9 situations in which the person briefly, usually, comes to
10 believe that they probably did commit a crime that they have
11 no knowledge of having been involved in.

12 And, strange as that sounds, it's not all that
13 difficult to accomplish. The same tactics that can lead to a
14 coerced compliant false confession can produce a coerced
15 internalized false confession if you add to them a direct
16 attack on a person's confidence in their own memory so that
17 in a very intense interrogation, someone might say, I didn't
18 do that. I know I didn't do it.

19 Now the interrogators might turn their attention to
20 undermining the confidence that they have in their own memory
21 by telling them you used to be an alcoholic and you could

22 have had a dry blackout even though you haven't had a drink
23 for 18 months, something that was told to one person whose
24 case I worked on. Or the person might be told that you're
25 mentally ill and it was another personality that did it.
26 That's why you don't remember it. Or the person might be
27 told, well, you felt so guilty about it afterwards that you
28 repressed it. You became ignorant of it as a psychological

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1 mechanism.

2 And what that does is it takes away from the
3 individual their own confidence in their own memory because
4 now, without confidence in one's own memory and the police
5 insisting and often making up evidence that just isn't there,
6 the person can begin to suspect, well, well, if my
7 fingerprints were there and if my pubic hair was found on the
8 dead woman's body, and if maybe I forgot this, I repressed it
9 or I became ignorant of it, as they say I could have, then
10 maybe I did it. And then they give what are called coerced
11 internalized or what I call persuaded false confessions.

12 And those are the categories, the generally
13 recognized categories, of false confession.

14 Q. Are these your categories exclusively, or have they
15 been adopted in the field?

16 A. This is generally what's used in the field except for
17 the fact that I think the -- the use of the word
18 "internalized" is too strong. I would prefer to see that as

19 the person at the moment is more certain than not that they
20 probably committed the crime, and that that state does not
21 stay very long.

22 Q. How long has this framework been around?

23 A. Oh, I think it was probably -- these labels were
24 applied to it in an article by Kasin and Ritsman (phonetic)
25 probably in the mid '80's, and that's just become the
26 accepted terminology since then.

27 Q. Are there any other types of false confessions that
28 you can think of which would fit outside this framework of

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1 three basic categories?

2 A. No. The framework is just a way of dividing up the
3 possibilities. Once you accept the idea that false
4 confessions are possible, these are just the types.

5 Q. Doctor, are ordinary, normal people vulnerable to
6 suggestion?

7 A. Certainly.

8 Q. Are they vulnerable to compliance or conformity?

9 A. Certainly, because it -- ordinary individuals, there
10 are two things one has to consider: Is someone ordinarily
11 vulnerable or exceptionally vulnerable; and the other thing
12 that has to be considered is how sophisticated or intense is
13 the situation that is pressuring them.

14 So you can have ordinary people exposed to very
15 extreme circumstances and get compliance, or you can have
16 more vulnerable people exposed to circumstances that aren't
17 quite as extreme and also get compliance. It's a combination
18 of the two.

19 Q. What is compliance?

20 A. Giving in, doing what someone else wants you to do,
21 giving in to demands.

22 If someone is just constantly telling you, look, you
23 did this, I know you did, I'm not going to take no for an
24 answer, for some people it's simply more difficult to keep
25 saying no, I didn't do it because it's -- it's anxiety
26 provoking. It's very difficult to face someone who seems to
27 be absolutely certain that you did something and they're
28 getting in your face about it and they are letting you know

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1 in no uncertain terms that you did this. And if that process
2 goes on, if the person doesn't stop it, their choices are
3 really only to endure it or to give in. If they don't
4 realize that they can stop it and they don't do anything to
5 stop it -- and the interrogators will continue doing it until
6 the person gives in -- it just goes forward until the person
7 gives in or says, wait a minute, I'm going to call a halt to
8 it. And the person who doesn't really think they can do it,
9 they just let it roll forward.

10 Q. Do most people think they're vulnerable to suggestion

11 or compliance?

12 A. Well, I'm not. I'm not. And most people don't think
13 that they are nearly as vulnerable as they probably would
14 turn out to be.

15 Most people, for example, in all the work that's been
16 done over the years on situations in which people are -- you
17 know, laboratory studies in which people's conformity is
18 being studied, people would not only -- not only would people
19 underestimate their own vulnerability, but professionals
20 would underestimate the vulnerability of people to this kind
21 of persuasion. Because most of the time the kinds of
22 situations to which people are exposed are not situations
23 that the people guessing about how others would react have
24 any experience. You can't guess how you would react to a
25 circumstance until you've had some experience with it. And I
26 don't care what kind of training someone has, they are not
27 going to be able to guess very well about how people are
28 likely to react if they don't really understand the

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1 situations the people are going to be put in. And
2 interrogation, in particular, is a very exceptional
3 situation.

4 Q. Why?

5 A. Because it's built to accomplish compliance. It's
6 designed to do that from the very beginning. Police

7 interrogation tactics are things that have developed over the
8 years because they work. Now usually they work to get
9 someone who knows that they are guilty to admit it; but the
10 tactics, if they are misapplied to someone who in fact is
11 innocent, can also elicit a false confession. So that the
12 logic of what happens in a police interrogation and in a
13 proper interrogation is set up to capitalize on someone's
14 actual knowledge that they really committed the crime.

15 And to get someone who knows that they did it to
16 become convinced that they are not going to be able to talk
17 the interrogator into not believing -- in believing that they
18 are innocent and, therefore, they are going to be arrested
19 and, therefore, they are going to be tried and they are going
20 to be found guilty. And so much of what goes on in an
21 interrogation is designed to convince the suspect that the
22 evidence that they did it is overwhelming.

23 Most of the time what happens is there is good solid
24 evidence pointing to someone, and then often interrogators
25 will create additional evidence to go beyond what's really
26 known so that someone for whom there is good reason to think
27 they were in an apartment at a certain time and that they did
28 something and a lot of reasons why they probably did it might

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1 also be told: And we have an eye witness who saw you leave
2 the apartment.

3 Now the person who knows they committed the crime is

4 vulnerable to that kind of tactic because there could be
5 someone who saw them or they could have left a fingerprint or
6 they could have done something else. And so the object is to
7 convince the person who is being interrogated that they're
8 caught because once you convince them that they're caught,
9 it's fairly easy to get them to now give a confession with
10 relatively little suggestion that there will be a benefit for
11 giving the confession.

12 The problem is if an interrogation starts and is
13 directed at someone for whom there really is no good, strong
14 evidence, then all the interrogator has to work with is
15 either completely fabricated evidence so that the
16 interrogator may say, well, there is evidence that this
17 person was killed in a certain way or the interrogators may
18 say we've got evidence linking you to this crime and just
19 making it up, or the interrogator just may keep pressing and
20 pushing and repeating you did it, you did it, you did it, I'm
21 not going to take no for an answer and keep working on the
22 individual. And that kind of approach can overwhelm people.

23 So often what will happen in interrogation is in
24 order to create an excuse for getting confrontational,
25 interrogators will pick on something and just press the
26 person until they give in, not because it makes a lot of
27 difference whether they give in on this point or not but just
28 to help train them to give in to the interrogators, to prove

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1 to them that the interrogator is not going to lose.

2 So that one often sees interrogators selecting
3 trivial contradictions in what somebody says, not that it
4 makes any difference, but they tell us a story one way the
5 first time and then the second time they leave out an element
6 or they add something else to it. Not that what's left out
7 or added to it is particularly important, but they'll jump on
8 that because that's an excuse to press the person, to let the
9 individual know how powerful the interrogator is and how they
10 are not going to give up.

11 When you keep doing that to someone over and over and
12 over and over again, it can get exhausting and they can be
13 very upset by the whole process, because if they're being
14 accused of a crime that they didn't commit, that's very
15 frightening. It's anxiety provoking. And with these
16 techniques in operation, the person can be just ground on
17 until they can't take it anymore, and that's one way you can
18 get a false confession.

19 Q. Doctor, in determining whether a confession is true
20 or false, are there certain factors about the confessor, the
21 person confessing, that you take into account?

22 A. Well, generally the less self-confidence a person
23 has, the more persuadable they are.

24 Q. Can you expand on that a little bit, please?

25 A. Well, just the idea that if you're accustomed -- you
26 know, if you spend your life in a position in which you have
27 a lot of power and authority and you're accustomed to giving
28 orders and everyone gives you deference in your life and

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1 you're a powerful person, you're going to resist persuasion
2 more than someone who is accustomed to being told that you're
3 wrong all the time, you're not bright, you're -- there's
4 something wrong with you, you're always messing up. Someone
5 who is accustomed to being criticized, someone who is not
6 successful in life is likely to be more persuaded than
7 someone who is very successful in life.

8 Someone who is mentally handicapped is likely to be
9 more persuadable because people who are limited in their
10 abilities often learn to just give in and acquiesce because
11 they don't have the resources to resist, so they just give up
12 earlier. They give up more easily.

13 These are the kinds of things that can -- that we
14 know contribute to persuadability.

15 And then there's been work in the last eight, nine,
16 10 -- probably close to 15 years now on a way of measuring
17 what's called interrogative suggestibility. There's a
18 professor in England, Professor Gudjonson, who has really
19 done most of the work on this, and for well over a decade
20 he's been developing a technique that can be used to assess
21 how suggestible someone is to interrogation itself. It's
22 called interrogative suggestibility, .a particular test for
23 that which is often used all over the world. And he's
24 developed that, and he's probably the person who has done
25 more work on personality -- personal factors relating to

26 influencibility and interrogation than anyone.

27 Q. Is Dr. Gudjonson a psychologist?

28 A. He is a clinical psychologist, yes.

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1 Q. And what did he do before he came a psychologist?

2 A. He was a police officer, and then he got a Ph.D. in
3 psychology, and since then he's been working in forensic
4 psychology and in -- particularly on interrogation issues.

5 Q. Has he written a book?

6 A. Yes.

7 Q. Do you know the name it?

8 A. Yeah. I always get the order wrong. It's called The
9 Psvcholoav of Interrogations. Confessions. and Testimony.

10 Q. Is this generally considered to be the authoritative
11 work before your book comes out about confessions and
12 interrogations?

13 A. Oh, I think this will be the authoritative work after
14 my book comes out.

15 Q. All right. Are you cited in this book anywhere?

16 A. Yes.

17 Q. On -- From when -- for what part of your work?

18 A. Well, partly for reviewing the manuscript and making
19 comments to him about it, and then particularly for my work
20 on false confession. His analysis of false confession builds
21 on my work on false confession.

22 Q. Doctor, is someone who is going through a bereavement
23 process more susceptible or more persuadable in general than
24 someone who isn't?

25 A. I would think so. I would think something as
26 disturbing as -- you know, as having a loved one die is going
27 to make someone emotionally vulnerable, and I think that's
28 common knowledge.

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1 Q. Does Gudjonson talk about that?

2 A. I don't recall.

3 Q. Now what is there, if anything, about the
4 interrogation procedure which a confessor, someone who
5 confesses falsely, might find more intimidating than
6 admitting to a serious crime? What is there about the
7 process that might get a person to that position, that
8 situation?

9 A. Well, either that they see themselves as being
10 railroaded and they have to do something to minimize what is
11 going to happen to them, or they are just not capable of
12 resisting this very intense process any longer and they begin
13 to comply. They just begin to agree and give in and simply
14 find that this is a way out from under the stress. And then
15 as soon as they start doing that, the interrogators no longer
16 attack them. Now they support them for agreeing. Now the

17 stress starts to go away. But they've had the experience of
18 feeling this intense attack, and they want to get it over
19 with and get out of there as quickly as possible, just make
20 this thing end.

21 Q. Do people who confess falsely to serious crimes in
22 general consider the consequences that their confession may
23 have?

24 A. Generally, they say they don't. After it's over,
25 people are often asked why did you do it? Didn't you think
26 about the fact that -- what this will mean?

27 And what they will typically reply is: I just
28 couldn't take it any more.

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1 And that's what the young men who gave the coerced
2 compliant false confessions in Phoenix said, they just
3 couldn't take it anymore. And so they wound up confessing to
4 murdering -- each of them to murdering nine people. And
5 they -- they had to know that if you murder nine people you
6 don't go home after this is over.

7 But that is not what they were thinking about. What
8 they were thinking about was the immediacy of the intensity
9 of the interrogation and the fact that they needed to make it
10 stop and the only way to make it stop is to agree.

11 Maybe after the fact when someone asks them, but
12 didn't you realize what this was going to do, now they're

13 liable to say, well, I was thinking about something else or
14 they are not trying to explain their behavior, and the answer
15 is not that they necessarily made a decision. The answer is
16 that they just couldn't do it any more. They just started
17 giving in.

18 Q. In -- in determining whether a confession might be
19 true or false, do you in general try to look at other
20 statements that the confessor may have made, either just
21 before or just after giving his confession to the police or
22 her confession to the police?

23 A. Well, I mean, that would be helpful. I mean, for
24 example, if someone has been persuaded to confess and they're
25 genuinely remorseful about it, you'd expect them to be more
26 likely to continue. Once having told it and it being true,
27 they would be more likely to repeat it afterwards.

28 Whereas is if someone has been coerced into giving a

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1 statement, you would expect that the moment that the pressure
2 is withdrawn, they are going to say no, I didn't do it. I
3 just couldn't stand it anymore.

4 Q. What is acquiescence?

5 A. Compliance, just giving in, just the -- you know,
6 the -- the -- the agreeing when you don't know the answer to
7 something. Or when you know that no answer other than
8 agreement will be acceptable, you acquiesce. You just give

9 into it.

10 Q. Is there any conclusion between or relation between
11 mentally vulnerable persons and acquiescence?

12 A. Generally, that's why the interrogation of the
13 mentally handicapped is particularly difficult, because they
14 are known to be acquiescent. That's what I referred to
15 before when I talked to -- for how, with someone with limited
16 abilities, they very likely will have learned to get through
17 situations that they really don't comprehend the way you and
18 I might by pretending. The way to pretend when someone else
19 takes a strong position is to agree with them.

20 I, for example, recall reviewing an interrogation in
21 which a mentally handicapped man was asked about -- this
22 was -- he had given a confession -- he was in the process of
23 giving a confession to sexually abusing a child, and the
24 interrogator was pressing him on whether or not he had the
25 child masturbate him. And at first he said no, and then the
26 interrogators said, well, did you have the child masturbate
27 you two times or five times. And so now what the
28 interrogator has done is no longer allowing him to say yes or

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1 no but giving him a choice, both of which are yes choices.
2 But this fellow couldn't -- I mean he just couldn't deal with
3 that, so he picks one of those two numbers.

4 But then he said: What does masturbation mean? So
5 he had just agreed that he did something, and he didn't know
6 what the word meant. That's acquiescence. That's the
7 problem with the mentally handicapped happens. They don't
8 understand what is going on around them, and so it's just
9 easier to give in. It's like taking candy from a baby.

10 Q. What is -- is there a definition for the word
11 "interrogation"?

12 A. It's a process in which an interrogator seeks to
13 elicit from an individual an admission, admitting that they
14 did something wrong, and then a full confession in which they
15 describe what they did wrong.

16 Q. Are there tactics?

17 A. Yes.

18 Q. Are these tactics taught?

19 A. Oh, yes. They are handed down and they are taught.

20 Q. Is there literature which discusses interrogation
21 process?

22 A. Oh, yes.

23 Q. Are -- is this literature taught to police?

24 A. Often it's -- in -- in-service training courses,
25 special courses about interrogation at the FBI Academy, and
26 day in, day out on the job by watching one another and
27 learning how to do it or learning how it's done.

28 Q. You may -- let me ask this. You may have answered it

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1 actually in some of your previous answers.

2 But how does a skilled interrogator go about
3 eliciting a truthful statement?

4 A. A skilled interrogator who is doing it right first
5 does not just start to interrogate someone because they are
6 convenient. They've got a good basis for choosing to do it.
7 They've got evidence that says this person probably did it
8 and now I'm going to convince them that I can prove that they
9 did it and get them to confess.

10 The selection of the individual is vitally important,
11 because if you've got good evidence against someone, then you
12 can make them sure, let them know you've got the evidence and
13 convince them that they are going to get convicted.

14 And that can be done without being obnoxious, without
15 getting in their face, without yelling at them, without
16 insisting. It can be done by revealing to them that they
17 are, in fact, caught, and I've seen that done many times just
18 that way.

19 And a skilled interrogator will reveal that
20 information, will sometimes suggest that the whole thing was
21 an accident, that -- you know, give them the opportunity to
22 admit to the crime and admit to it. in a way that minimizes
23 the significance of it.

24 But then they will continue on. If they -- if the
25 suspect goes for that, they'll continue on and point out,
26 well, wait a minute. That doesn't quite work.

27 But now that the person has admitted that -- that
28 they did it, now you can work with the individual and get a

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1 more accurate story of how it happened.

2 And that's what a skilled interrogator will do, will
3 convince the person that they're caught, will get them to
4 agree with them, and then continue until they get an accurate
5 story of the crime.

6 An interrogator who is making a mistake may overpower
7 an individual through the use mostly now of these
8 high-pressure techniques or by inventing evidence that is
9 just not there and will get someone to make an admission,
10 okay, I did it. At that point, you really can't tell whether
11 the person who is saying I did it is telling the truth or is
12 giving in. The only way you can tell is by looking at the
13 story that is elicited from the individual after they've made
14 the admission, what's call the post-admission narrative of
15 the crime. Because if the person has now decided that they
16 are going to admit to having committed the crime and if they
17 did it, they can give you a narrative of the crime, a
18 description of the crime that's full of details, that
19 explains why they did it, that on its face is very convincing
20 and, most importantly, can usually tell you something about
21 the crime that the police did not know and prove that they
22 did it.

23 The same standard of corroboration the police use to
24 ward off people who call up and say that they committed a

25 crime that is getting a lot of attention makes perfect sense
26 here. The person's got to tell you something that proves
27 that they committed the crime.

28 Now that post-admission narrative is -- has to be

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1 evaluated, and it's doubly important when the police have
2 chosen not to tape record how they got the interrogation.

3 If, for example, an interrogation is elicited in a
4 very straight forward, calm way, someone says, look, we have
5 this evidence, we know you did it, and the person says, okay,
6 you got me, and now you go into the post-admission
7 narrative -- and this is all very low key and makes a lot of
8 sense. And the person now goes into a post-admission
9 narrative and gives a detailed description about their
10 motivations and what they were thinking and how they did it
11 and what they did afterwards and then about the missing piece
12 of clothing or something else that shows, wait a minute, only
13 the person who committed this crime would know where the loot
14 is or where the murder weapon is or whatever, then it makes
15 sense. The whole thing makes sense from start to finish.

16 On the other hand, if we have an interrogation that
17 was not recorded, and let's say someone is saying that this
18 was very intense, that there was a great deal of pressure,
19 and someone else is saying, no, I just asked him if he did it

20 and he said, oh, yeah, I did it, you got me, now you have to
21 look at the narrative afterwards because it's that narrative
22 that will let you -- that one makes their best estimate of
23 whether or not the person who is giving the description of
24 the crime is describing what really happened. Because if
25 they are -- if they didn't do it, either they weren't there
26 or they don't know how the crime occurred or the interrogator
27 has a theory of how the crime occurred and is really forcing
28 that theory on the suspect, then their narrative, their

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1 description of the crime, is liable to be grossly inaccurate,
2 may really be nothing other than what the interrogator has
3 presumed to be what happened.

4 For example, in a case that I worked on at the
5 autopsy -- and one of the interrogators thought that he saw a
6 semen stain on the buttocks of the woman who had been
7 murdered. Believing that, he now began the interrogation of
8 a man named Tom Sawyer. And in the course of the --

9 And this was fully tape recorded so we know exactly
10 what happened.

11 In the course of that interrogation, the interrogator
12 made Sawyer agree that there had been sexual assault, made
13 him agree that there had been anal penetration, that there
14 had been vaginal penetration, that he had ejaculated several

15 times.

16 But then when the medical examiner's report came back
17 and the lab reports were done, it turned out there was no
18 semen in anybody cavity, there was no semen stain on the dead
19 woman's buttocks. And so we know that what was happening
20 there was the interrogator, believing that this happened,
21 using these tools, coerced a statement from Mr. Sawyer that
22 couldn't possibly be true because the facts didn't support
23 it.

24 And that was in a situation in which we had the
25 actual record of what the interrogators did, so there
26 wasnt -- so we knew with certainty what techniques were
27 used, how intense it got, how distressed Mr. Sawyer got, and
28 how he began to comply step by step, and that the

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1 interrogator, believing that there had been a sexual assault,
2 worked into the story.

3 That would be an example of part of a post-admission
4 narrative and a part of it that suggests, if anything else,
5 that Mr. Sawyer doesn't know or didn't know very much about
6 how this crime was committed, because that's what the
7 evidence --

8 THE COURT: Go by question and answer.

9 MR. GREENBERG: Okay.

10 Q. Let me stop for a second.

11 (Brief pause.)

12 Doctor, why don't police officers tape

13 interrogations?

14 A. Many police agencies tape record for reasons of
15 professionalism, that they do it because its the right thing
16 to do, and someone at the top has made the decision that this
17 is the kind of police agency that is going to do things by
18 the book and by the law, and they choose to tape record.

19 Many police agencies resist tape recording, and then
20 many reasons will be given for why they resist tape
21 recording.

22 There's research on this subject, and the research
23 does not support the reasons to object to tape recording
24 which are usually that, oh, when people know they are being
25 taped recorded they clam up and we can't get anything.

26 But that doesn't make a lot of sense because you
27 could bug a tape -- bug an interrogation room, and I know of
28 police agencies that bug interrogation rooms because they

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1 know how important it is to make a record, and if they
2 believe that this is going to disturb the interrogation
3 process, then to do it secretly.

4 I believe that the only reason to resist tape
5 recording is to reserve to the police the right to carry out

6 the interrogation any way they want to do it, whenever they
7 want to do it, and not leave a record of it.

8 Q. Why is that? Why would they want to do that?

9 A. Because sometimes the tactics that have to be used
10 are impermissible. Sometimes the intensity of it is so great
11 that people would understand that it is coerced. There is no
12 valid reason that I know of for failing to tape record if
13 you're doing it properly.

14 Q. Do police prefer to take statements or do
15 interrogations at a police station as opposed to other
16 locations?

17 A. Standard part of interrogation. It has to do with
18 setting the stage for the interrogation. In order to make
19 the interrogation go more effectively, the interrogator wants
20 to maximize his power and his appearance of power.

21 So generally -- and this is what the interrogation
22 textbooks would advise, and it makes perfect sense from an
23 influence point of view -- you want to make sure the
24 interrogation happens, one, on your turf rather than the
25 suspect's.

26 Q. Why is that?

27 A. Because the suspect will feel less at ease in a
28 police station than at home. In a police station, the

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1 suspect is now surrounded with all of these symbols of
2 authority and people carrying guns and they get a real sense
3 for how much power there is and how things are happening
4 because other people choose to let them happen, not because
5 they're in control. They realize that they are not in
6 control.

7 Typically, people will be separated from anyone who
8 might be supportive of them because you want to interrogate
9 people alone. Typically, they will be interrogated in rooms
10 that are bare, uninteresting, pretty institutional. There's
11 nothing comfortable about the room. There will be usually a
12 table and a chair, two chairs, but it will be a pretty bare
13 room.

14 Q. Why is that, by the way?

15 A. According to the -- what the textbooks recommend,
16 they say that you do that so that the person can't divert
17 their attention anywhere else, but it also emphasizes the
18 power relationship between the interrogator and the suspect.
19 All of this is designed to create an aura, a patina, so that
20 the interrogator will seem to be powerful and so that when
21 the interrogator starts using tactics, this will be more
22 effective. This is just -- this is the background music to
23 the interrogation.

24 Q. Do police sometimes use isolation as a tactic, in
25 other words, keeping a witness or a suspect by him or herself
26 for -- before they're interrogated?

27 A. Oh, yes. I mean, that -- that's another way of
28 communicating to someone you're powerful, I'm in charge, and

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1 also just letting someone stew. It's another way of letting
2 them know that they don't have any control over what's going
3 on.

4 Q. This is probably a stupid question, but are police
5 authority figures?

6 A. Yes.

7 Q. And does it make a difference whether someone is
8 interrogated by an authority figure as opposed to someone who
9 is not an authority figure?

10 A. Yes, because if one is an authority figure, it's
11 possible to trade on that authority, to make suggestions
12 about how things will be better for you or worse for you, to
13 demonstrate that they are in control.

14 I mean not all interrogation works because of the use
15 of this power. I mean, there are different interrogation
16 strategies. It can be done without emphasizing authority.
17 It can be done by developing a relationship with someone as a
18 kind of: I'm the ombudsman here. There's this evidence, and
19 you say this, but the evidence says that. And you're a nice
20 guy, and I like you and -- but the evidence says that. And
21 it can be done in a very different way.

22 Or it can be done in a way in which the authority is
23 tremendously important by demonstrating the authority and by
24 letting the person know they are not going to be able to win
25 this dispute, I'm powerful, I'm going to win.

26 Q. In the absence of taping, would you consider it to be

27 important that the persons doing the interrogating take notes
28 of the interrogation?

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1 A. It would be important, but it wouldn't be sufficient.

2 Q. Why not?

3 A. Because the notes are going to be selective.

4 Typically, unless they're stenographic notes that include
5 every word, most of the notes that I see of interrogations
6 will have the answers but not the questions, will have the --
7 won't have anything about the context. And so you don't
8 really know what the meaning is. The person will write
9 something down, and you can't tell whether that's something
10 volunteered by the suspect or something that was actually
11 said by the interrogator that the suspect just agreed to.

12 Sometimes the interrogators will write down what they
13 said if they can get the subject to say, okay. And so the
14 note reflects "you killed John Doe" or "I killed John Doe,"
15 and what that really is referring to is the fact that the
16 interrogator is saying, come on, tell me you killed John Doe,
17 tell me you killed John Doe, and then the person says, okay,
18 and then the interrogator writes down "I killed John Doe."
19 That's the note.

20 Q. In general, or not in general, have there been
21 situations, of course excluding reference to this case, in

22 which you have come across a confessor who has given a series
23 of statements, one or more of which is demonstrably false?

24 A. Yes.

25 Q. And what, if anything, is the significance of a
26 statement, one among many statements, which is demonstrably
27 false?

28 A. Well, sometimes that could be the first approximation

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1 of what turns out to be an accurate story of the crime,
2 because it often happens that one way of getting the first
3 admission is to minimize and say, well, it was kind of an
4 accident or something like that. And the person, feeling
5 that They're trapped and feeling that maybe they're in effect
6 cutting a deal with the interrogators to accept a story
7 that's a lot less serious than the -- what actually happened
8 goes for that. The interrogator then, if they're skilled,
9 peels that away and gets an accurate story. Other times, the
10 person simply is complying and will comply to more or less
11 whatever the interrogator says.

12 Q. Again, you may have -- you've gone part way toward
13 answering this next question.

14 But how do you evaluate the reliability of a
15 statement?

16 A. By looking at the fit between the description of the

17 crime and the facts of the crime. And if there is not a good
18 fit between those, there's some big errors in that as, for
19 example, the Sawyer interrogation I talked about where a big
20 part of that interrogation involved rape and brutalization of
21 this woman when, in fact, there should have been evidence of
22 it and it just wasn't there if it had happened -- that has to
23 be a red flag. That has to tell you, wait, there's something
24 really wrong with this. Maybe this is not a reliable
25 statement because it doesn't fit the facts of the crime.

26 And then if -- if the person cannot contribute
27 something, even a comprehensive story about how I thought
28 about this for weeks and I started to do it once before and

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1 then I stopped and then I went back and this is what I was
2 thinking about afterwards and a really -- you know, a story
3 at least as complicated as how one would think about how --
4 which house to buy or a major event, you've got to wonder,
5 wait a minute, does this story sound like the story of
6 someone who really thought about these things and did this
7 and so on, or does this sound like a story that's just the
8 most shortcut story that I can give because I'm just saying
9 anything that the interrogator wants me to say just to bring
10 this to an end?

11 Those are things that have to be looked at. But the
12 hard evidence is the important -- is the most important

13 stuff.

14 Q. In general, can you say that a statement that is not
15 corroborated in its detail is more likely to be unreliable
16 than a statement that is corroborated in its detail?

17 A. Yes.

18 MR. GREENBERG: I have no further questions at this
19 time.

20 THE COURT: Okay. And then, Mr. Mifsud, you want to
21 cross-examine the doctor tomorrow morning at 9:30; right?

22 MR. MIFSUD: Thank you.

23 THE COURT: So, Dr. Ofshe, we will excuse you now.
24 Thank you very much.

25 We'll see you tomorrow morning at 9:30. Mr. Mifsud
26 will pick up where he left off.

27 All right. Ladies and Gentlemen, we'll take a short
28 recess. This will count as your afternoon recess. I don't

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1 THE COURT: All right. Dr. Ofshe has been waiting,
2 and we'll get him finished this morning.

3 (The following proceedings were had in open court and
4 in the presence of the jury. Defendant and counsel were
5 present.)

6 THE COURT: Okay. This is the case of People versus
7 Traci Foskett.

3 testify that you testified approximately 23 times?
4 A. I believe 24.
5 Q. And how many times in the State of California?
6 A. One moment. 16 times in California and I think nine
7 times on interrogation.
8 Q. The nine times that you've testified on
9 interrogation, obviously those are criminal cases?
10 A. No, that's not true.
11 Q. Some were civil cases?
12 A. Correct.
13 Q. How many of those 16 cases were criminal cases?
14 A. Eight.
15 Q. How many times in California have you testified for
16 the prosecution?
17 A. Never yet.
18 Q. Now you mentioned that you have testified for the
19 prosecution in Florida?
20 A. That's correct.
21 Q. And that was -- what year was that?
22 A. Last year, I believe.
23 Q. And that was a situation where you're testifying that
24 a witness had been silenced by the actual killer in a case?
25 A. That he had been intimidated into silence, and it had
26 to do with pressure techniques and the kinds of threats
27 brought to bear on him so that even though he was indicted
28 for the crime, he couldn't tell the truth.

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1 Q. Okay. Now you have testified in areas obviously
2 other than police interrogation and influence in police
3 interrogations; correct?

4 A. Correct.

5 Q. One area that you mentioned was the recovered memory
6 area?

7 A. That's correct.

8 Q. And how many times have you testified as an expert in
9 terms of recovered memory, the concept behind that?

10 A. Across the board or in California?

11 Q. Across the board.

12 A. Five, I believe.

13 Q. And in each case, you testified for the defense in
14 those cases; correct?

15 A. Yes.

16 Q. You're currently writing a book on your experiences
17 with police interrogations; is that correct?

18 A. No, I wouldn't characterize it that way. I'm writing
19 a book that will be titled Confessions of the Innocent, and
20 it's about the research that I've done and what the
21 literature shows and what's known about the phenomenon of
22 police interrogation, misfiring, and inappropriately applied
23 to people and eliciting false confessions.

24 Q. You have been compiling information for this book for
25 the past eight years; is that correct?

26 A. I started working on this issue eight years ago, and
27 the book will reach back to all the -- some of, you know, the
28 work that I did as much as eight years ago. Not everything

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1 that I did in the eight years will express itself in the
2 book, but it all contributed to my knowledge and research.

3 Q. Okay. And this particular case will probably be
4 included in the book, is that fair to say?

5 A. I haven't made -- I mean it's a possibility, but I
6 can't say that -- that I've decided to include it or not.
7 haven't picked out -- depending on how the book works, it's
8 way out in the actual writing of it -- certain cases will be
9 necessary to illustrate certain points, and I'm not sure if
10 this case will be one of those.

11 Q. This book will be commercially sold?

12 A. How else are books sold?

13 Q. I was wondering whether you were just going to
14 donate --

15 A. I wasn't going to.

16 Q. -- to the university.

17 A. I wasn't going to put it in coffee shops as a give
18 away and take advertising. I was planning to have it
19 published by a press and sold by the press.

20 Q. Okay. Now you are an expert in police interrogation.

21 Have you ever worked as a police officer in your
22 career?

23 A. No.

24 Q. Have you ever received any formal training from any
25 police agency in regards to police work?

26 A. No.

27 Q. Have you ever attended any police academies to learn
28 how detectives and police officers are instructed to conduct

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1 themselves in interview?

2 A. No. But I anticipate in the not too distant future
3 that I will be teaching police officers how to do that.

4 Q. Have you ever personally sat in on and witnessed a
5 murder interrogation?

6 A. On videotape, audio tape, or in the room smelling the
7 tension?

8 Q. Personally being present there.

9 A. A murder interrogation? I did one once. Does that
10 count?

11 Q. Well, tell us about it.

12 A. It was a case in Washington state in which a man had
13 been confessing -- a man, a police officer, in fact, over a
14 period of a number of months, he was actually exposed to
15 in-custody interrogation for approximately five months.

16 Q. This is Paul Ingram (phonetic); correct?

17 A. That's correct. He was third in command of the
18 Thurston County, Washington, Sheriff's Department. He was
19 chairman of the county republican committee. He had been a
20 candidate for the state legislature on a law and order

21 ticket.

22 Q. Okay.

23 A. And in the course of interrogation, which was
24 entirely tape recorded -- or at least the beginning part of
25 it, anyway, the parts that I studied -- he had been made to
26 believe that he was the leader of a group that had been
27 killing babies and sexually abusing children for about 17
28 years.

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1 And this investigation and endless series of
2 interrogations that he was exposed to was going on from end
3 of November through about February of 1989 when the
4 prosecutor's office asked me if I would become involved in
5 the case and help them figure out exactly what had happened
6 and make sense out of all the disparate information that was
7 being accumulated. And in the course of that, I was able to
8 interview Mr. Ingram, and the interview turned into something
9 of interrogation, and I elicited a false confession from him.

10 Q. When you interrogated Mr. Ingram, were other police
11 officers present?

12 A. Yes. Well, police officers were present. I wasn't a
13 police officer at the time.

14 Q. Were police officers present?

15 A. Yes.

16 Q. Do you have personal knowledge of how the Oakland

17 Police Department conducts homicide interrogations?

18 A. Well, only to a certain degree because they don't
19 tape record them in entirety, and so we only know about the
20 parts that they choose to let us know about.

21 Q. I'd like to get to that point a little bit. You keep
22 referring to not tape recording an entire interview.

23 You obviously feel that that is unprofessional; is
24 that correct?

25 A. I think dangerous. I think it shows a low
26 professional standard. I think interrogation would be vastly
27 improved if interrogations were taped recorded. I have
28 reviewed interrogations done in jurisdictions in which tape

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1 recording has been required by the state Supreme Court or
2 because the chief law enforcement officer in the district
3 simply does it that way for reasons of professionalism, and
4 the impact of that is to, in my judgment, improve the skills
5 of interrogators, produce interrogations which are
6 non-coersive in general, in all likelihood are likely to
7 produce reliable information and provide a good basis for
8 anyone looking at what happened and understanding why the
9 person said what they said.

10 Q. So you don't approve of an agency that tapes a
11 portion of the interview, not the entire interview; is that

12 correct?

13 A. I think that that is far less desirable and, in fact,
14 dangerous.

15 Q. Would you consider agencies that don't tape record or
16 video record interrogations to be acting improperly?

17 A. No. Because it depends on what the -- the rules are
18 not -- in the local area or in the state. It's improper if
19 the state Supreme Court says or the legislature says you must
20 tape record and they don't. It's discretionary in other
21 places. And there is variability. Some agencies do. Some
22 don't.

23 I seem to recall a -- a study by the U.S. Department
24 of Justice directed at police agencies that do tape record,
25 and they report great satisfaction with it for essentially
26 all the reasons that I've laid out. It makes for a better
27 finished product, and we can all know what happened.

28 Q. Are you familiar as a police interrogation expert how

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1 the Federal Bureau of Investigation conducts their
2 interviews?

3 A. At the moment, they do not tape record. But that's
4 J. Edgar Hoover's preference.

5 Q. Would you consider)'xad FBI to be a non-professional
6 organization?

7 A. Oh, I would consider on this particular point that
8 this is of the legacy of J. Edgar Hoover, and I wouldn't be
9 surprised if that changes at some point in the future.

10 For example, it wasn't until 1984 that the entire
11 issue of tape recording changed in England, that in England
12 because of a very famous false confession case which caused a
13 great deal of concern about precisely this, there was a royal
14 commission established, a great deal of work was done, and
15 then the law changed and mandated the recording of all police
16 interrogations done in Great Britain, which is now the law,
17 and it works out just fine.

18 So I wouldn't be surprised, since this is happening
19 elsewhere and is also happening in some states in the United
20 States by Supreme Court mandate or Supreme Court order. And
21 some trial judges or at least one trial judge has handed down
22 a ruling that failing to tape record is a violation of due
23 process. I think the realization that every one is better
24 off if things are tape recorded is something that this
25 country will come to in the next five, 10, 15 years,
26 something like that.

27 Q. Thank you, Doctor.

28 * I,
I had like to talk about your consultation with

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1 prosecutors' offices that you've talked about.

2 Now you mentiened four separate times that you've
3 consulted with prosecutors' offices during your career; is
4 that correct?

5 A. I had loaned --

6 Excuse me. I had loaned my CV to, I believe, the
7 court reporter.

8 THE COURT REPORTER: I put it back on top of your
9 file yesterday.

10 THE WITNESS: Oh, then I have it. Let me just get my
11 CV.

12 MR. GREENBERG: Would it help if --

13 THE WITNESS: Thank you. Thanks.

14 MR. MIFSUD: I've forgotten the question.

15 Q. Well, let me ask you.

16 You've consulted with the Los Angeles County District
17 Attorney's office in regards to the Synanon Cult case;
18 correct?

19 A. Correct.

20 Q. And that was during the mid '80's; is that right?

21 A. That's correct.

22 Q. Now the consultation that you provided was directed
23 towards your expertise with that particular cult, this
24 Synanon cult; is that right?

25 A. It was directed towards my expertise about influence
26 and the power of such organizations to manipulate people,
27 Synanon being one of them. I happen to have a lot of
28 knowledge about Synanon in particular.

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1 Q. It was also discussed previously your work with the
2 Fort Lauderdale State Attorney's Office in regards to the
3 witness that had been silenced by the killers; is that --

4 A. That's correct.

5 Q. That's --

6 A. There was another also L.A. D.A.'s office instance.

7 Q. But you're not at liberty to identify the case;
8 correct?

9 A. Yes, I am.

10 Q. Which case is that?

11 A. There are two. There's one that I'm not at liberty
12 to identify, and then there's one that should be listed on my
13 CV or -- well, whatever. There are two. The second would be
14 the McMartin case when the L.A. D.A.'s office contacted me
15 because they needed assistance in figuring out what the
16 debriefers of the children were doing with the children. And
17 I looked at videotapes of the debriefing and designed a
18 method for them that would allow one to come to an object
19 answer to whether or not these children were talking about
20 something that was part of their experience or something that
21 was being suggested to them by the debriefers who were, in
22 fact, acting as interrogators.

23 Q. And these children were what age range, just to
24 review for the jury?

25 A. These were preschool.

26 Q. Now you also worked with the Thurston County,
27 Washington, prosecution's case; that that's in regards to the
28 Ingram case.

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1 Right?

2 A. That's correct.

3 Q. And you also mentioned West Virginia, the
4 prosecutor's office in West Virginia?

5 A. Yes.

6 Q. Can you describe for the jury what you've done in
7 terms of your consultation with them?

8 A. And that's for -- not the United States Attorney's
9 Office, which is also in West Virginia, but for the
10 prosecutor's office in Jefferson County, West Virginia.

11 That was a case in which a woman who ran a small,
12 high-controlled group who had some very extreme notions of
13 how children should be socialized and disciplined induced two
14 of her followers to beat to death their 23-month-old infant.
15 And I helped prosecute that woman.

16 Q. When you say you helped prosecute that woman, did you
17 testify in that case?

18 A. Yes.

19 Q. So this would be a second case that you've testified
20 to that you didn't mention before; correct?

21 A. No. It's on my CV. I think so.

22 Q. I'm talking about testimony in court.

23 A. No, I'm sure it's also listed, unless I --

24 Thank you. I didn't have West Virginia down on my

25 CV. That was a case that happened before my house burned
26 down, and there's a lot of stuff that I'm lacking. So we
27 have to add that as another state in which I've testified.

28 Q. Let me ask you a little bit about the Bradley Page

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1 case because you brought that up yesterday.

2 Is that correct?

3 A. Correc~ts.

4 Q. And isn't it true that I believe you testified that
5 in your opinion the statement taken in the Bradley Page case
6 was unreliable?

7 A. Absolutely.

8 Q. Okay. And you were hired by the family; is that
9 correct?

10 A. I was hired by no one in that case. I studied -- I
11 studied the transcripts of that case because I was interested
12 in what had happened, and during the appeal I volunteered my
13 time to help the appellate attorneys frame their appeal in
14 the case.

15 Q. And you know that that case was tried before a jury
16 at the Oakland Superior Court; isn't that correct?

17 A. That's correct.

18 Q. And you also know that a jury found him guilty of
19 killing his girlfriend, Bibi Lee; isn't that correct?

20 A. And I also know that the jury was not allowed --

21 Q. Is that correct?

22 A. Yes. And --

23 THE COURT: You've just got to answer the question.

24 MR. MIFSUD: Q. That's a yes or no question, sir.

25 A. Yes. But I also know other things such as --

26 Q. Well --

27 A. Such as that the jury was not allowed to hear anyone

28 analyze what had happened to Mr. Page during I think the

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1 seven hours that he was being interrogated when the
2 interrogators turned off the tape recorder and changed him
3 from someone who was confident he had nothing to do with this
4 killing to someone who had become confused and was
5 confabulating, making up, guessing details about the crime.

6 Q. Did you also testify yesterday that it's your belief
7 that a man in Washington did the killing?

8 A. There's every reason to believe that there's a man
9 named Michael Ihde who is currently in prison in Washington
10 State convicted for killing two women who was living in the
11 Bay Area at the time that Bibi Lee disappeared and two other
12 unsolved murders were open in Alameda County. And because
13 Mr. Ihde said the wrong thing to the right snitch in prison
14 in Washington, it got back to the Alameda County Sheriff's
15 Department that he was claiming that he killed several women
16 in the Bay Area. They then got a blood sample from him and
17 showed that his sperm matched DNA analysis, matched -- his

18 DNA matched DNA found in the body -- semen sample in the body
19 of a woman who was killed, I believe, within a few weeks of
20 Bibi Lee's disappearance in the same general area. And
21 Mr. Ihde had been bragging in Washington State that he killed
22 several women in the Bay Area. One of them was not white,
23 and Bibi Lee was Asian.

24 Q. Isn't it true that police investigated that lead and,
25 in fact, that man did not even come close to the description
26 that was given of the perpetrator?

27 A. Really?

28 My understanding is that Mr. Ihde had a van. My

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1 understanding is that --

2 Q. I'm not asking you about his car. I'm asking about
3 his physical description.

4 THE COURT: You're not answering the question,
5 Doctor.

6 MR. MIFSUD: Q. Yes or no.

7 THE COURT: Wait.

8 THE WITNESS: Was this investigated after --

9 THE COURT: Wait. Let's go back.

10 What was the question that was proposed to the
11 doctor?

12 MR. MIFSUD: Q. Isn't it true that the description
13 of this man from Washington, Ihde, didn't come close to the
14 description of --

15 MR. GREENBERG: I'm going to object to the question
16 as vague.

17 THE COURT: Well, it is vague.

18 MR. GREENBERG: It also calls --

19 MR. MIFSUD: He is talking about the basis for his
20 feeling or opinion that --

21 THE COURT: First of all, it is vague. Maybe you can
22 be a little more specific.

23 MR. MIFSUD: Q. Well, isn't it true that you've
24 learned through your investigation that the identity of that
25 man in Washington didn't come close to the identity of the
26 individual in the Bibi Lee case that was cited?

27 MR. GREENBERG: Objection. The question is vague.

28 THE COURT: Overruled.

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1 You can answer that. Can you answer that, Doctor?

2 THE WITNESS: Oh, I could answer that.

3 I presume we are talking about the investigation of
4 Mr. Ihde that would have been carried out by the same police
5 department that contributed to the arrest and prosecution of
6 Bradley Page after Mr. Ihde was identified, and that if
7 you're telling me accurately that they came to the conclusion
8 that they hadn't made a mistake --

9 MR. MIFSUD: Q. I'm asking you whether or not you

10 know whether or not the description matched? Do you know?

11 THE COURT: You mean the description of the killer of
12 Bibi Lee matched the description of Mr. Ihde?

13 MR. MIFSUD: Correct.

14 THE COURT: Do you know whether or not the
15 description of the killer of Bibi Lee, Doctor, matched the
16 description of Mr. Ihde?

17 THE WITNESS: Well, I saw a drawing of the person who
18 was seen by someone at the time hustling an Asian woman into
19 a van where the police dogs had followed Bibi Lee's scent and
20 then lost it at that very point; and I've also seen
21 photographs of Michael Ihde, and I would say that in my
22 opinion there was a strong resemblance between those two.

23 MR. MIFSUD: Q. Well, let me ask you this:

24 You testified yesterday about the potential narrative
25 admission --

26 Correct?

27 A. Correct.

28 Q. -- in a confession.

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1 Isn't it true that Bradley Page gave very specific
2 details that only the killer would know -- such as the
3 location of the body, injuries, and the method of the burial?
4 Isn't that true?

5 A. That's absolutely incorrect.

6 Q. You disagree then with the California Appellate
7 decision in that case; is that correct?

8 MR. GREENBERG: Objection. The question is
9 argumentative.

10 THE COURT: Overruled.

11 Have you read the California Appellate decision?

12 MR. GREENBERG: No.

13 The question is vague. The legal rulings, or are we
14 talking about is there something in the appellate decision
15 about the content of the statement?

16 THE COURT: All right. On that basis, then, I'll
17 sustain the objection.

18 Maybe you can be more specific.

19 MR. MIFSUD: I'll withdraw the question. He's
20 already answered.

21 Thank you.

22 Q. Let's talk about this case, Doctor.

23 You received the notes of the detectives; correct?

24 A. Correct.

25 Q. And transcripts of both interviews of Ms. Foskett;
26 correct?

27 A. Correct.

28 Q. And you received the audio tapes; correct?

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1 A. Correct.

2 Q. Did you personally contact Sergeant Wallace or Dan

3 Voznick regarding their interview of Ms. Foskett?
4 A. No.
5 Q. Did you receive copies of a statement given by the
6 defendant to Officer Harris in this case?
7 A. I don't believe so.
8 Q. Did you receive copies of a statement given to Fire
9 Captain Ken Norris by the defendant in this case?
10 A. Not to my knowledge.
11 Q. Did you receive a copy of a statement given by
12 Ms. Foskett to the Oakland Police Department in December of
13 1989?
14 A. Not to my knowledge.
15 Q. Now did you write a report regarding your findings in
16 this case?
17 A. No.
18 Q. This case was referred to you by Mr. Greenberg;
19 correct?
20 A. Correct.
21 Q. Now when a matter is referred to you by a professional,
22 is it your habit and custom not to produce a
23 report of your findings?
24 A. I don't understand what you mean by another
25 professional. Mr. Greenberg was the defense attorney.
26 Q. Is he a professional?
27 A. When you said another professional, I thought perhaps
28 you had in mind some idea that some other --

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1 Q. I'm sorry.

2 A. -- non-attorney.

3 Q. All right. I didn't mean to mislead you.

4 But in general when you're referred a case by a
5 professional, is it your habit not to put together notes or a
6 report in regards to an investigation that you've conducted
7 regarding false confession?

8 A. If I'm asked to put together a report, I'll write a
9 report. I've written many reports. I don't generally do it
10 unless I'm asked to do it.

11 Q. You know because you've testified in the past if, in
12 fact, you had put together a report it could be used by the
13 prosecution during cross-examination; correct?

14 A. Sure. I'd be happy to give you my report about my
15 analysis of what happened in the interrogation.

16 MR. MIFSUD: I'm not asking. I think you've answered
17 the question.

18 I'd admonish the witness to answer the question.

19 THE COURT: You just have to answer the question, and
20 if you think it requires an explanation, you can.

21 All right. Next question.

22 MR. MIFSUD: Thank you.

23 Q. I'd like to talk about the false confession model
24 that you've described for the jury if you can.

25 Tell me if I'm correct. You describe basically two
26 types of confession -- true and reliable confessions and
27 false confessions; is that correct?

28 A. I described two types of false confessions.

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1 Obviously, there are both reliable and unreliable
2 confessions.

3 For the unreliable confessions, there would be three
4 different kinds of false confessions.

5 Q. I'd like to get to that now.

6 My question is whether did you describe two types of
7 confessions, that is that people can actually confess
8 truthfully or they can falsely confess?

9 A. Certainly.

10 Q. And there are three categories of false confessions.

11 The voluntary false confession; correct?

12 A. Correct.

13 Q. The coerced internalized confession?

14 A. Correct.

15 Q. And then the coerced compliant confession?

16 A. Correct.

17 Q. Okay. I understand the voluntary false confession is
18 someone who might be crazy or somebody will read about a case
19 and call the police department, for example, and admit to
20 committing the crime.

21 Would that be a fair example?

22 A. There's something odd about the person that they want
23 attention and --

24 Q. Something bizarre.

25 And then there's the internalized false confession

26 where the person during the confession actually believes that
2,7 they committed the crime and, in fact, then confesses to it
28 in that manner?

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1 A. I think what I tried to explain was that the person
2 can become more certain than not that they committed the
3 crime, an immediate reaction created by the interrogation and
4 confused in that way. But believing that they probably did
5 it, they will give a confession that is categorized as a
6 coerced internalized or what I would prefer to call a
7 persuaded false confession.

8 Q. All right. Sometimes people may actually believe
9 they committed the crime, but more often than not you believe
10 that they think that they probably committed it?

11 A. Well, it's not a matter of actually or not. They --
12 they're more certain than not. They believe, for example, "I
13 probably did this," and probably just means 51 percent up to
14 a hundred percent or up to 99 percent. So it depends on how
15 confident they are in that. But the idea that they believe
16 it, really you need to add to that believe it at the moment
17 or believe it in some firmer sense, a belief that will hold
18 itself, that will sustain itself over a long period of time.

19 And these responses to interrogation tend to be very
20 fragile, and they tend to fall apart very quickly because
21 they are held in place by what goes on in the interrogation.

22 They are created and stabilized by what goes on in the
23 interrogation.

24 Q. But in essence they probably believe they committed
25 the act while they're confessing during the confession; is
26 that correct?

27 A. Yeah. And one of the things that they do is they
28 tend to answer questions in the subjunctive and the

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1 conditional. They'll say things like, well, I guess I must
2 have done, I probably did that, and I would have done that,
3 indicating that they are speaking about -- they are speaking
4 about what they have agreed to, not necessarily about what
5 they have a clear memory of.

6 Q. The coerced compliant confessor knows he didn't
7 commit the crime, right, but still admits it?

8 A. Yes.

9 Q. And the reason why the person is confessing is
10 because he or she needs to remove him or herself from a
11 situation. The person's panicked, they fear the inherent
12 structure of the situation, and they want to just get rid of
13 the -- get themselves removed from the situation, get the
14 interview finished.

15 Is that correct?

16 A. That's the kind of reason that's offered by people
17 who have done this in some cases.

18 In other cases, they explain what they did by having

19 actually made the decision that the only way they could
20 probably save their life was by cooperating, and that will
21 usually happen when they are -- and this happens often --
22 they are threatened with more severe punishment. If you
23 don't confess -- even the death penalty if you don't confess.
24 And faced with that choice, a person who is innocent, if they
25 have come to believe that their lives hang in the balance,
26 may decide to give a false confession, thinking that's the
27 only way to avoid the death penalty.
28 Q. Now it is true, isn't it, that coerced confessions

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1 can be actually true and reliable confessions? Isn't that
2 true?
3 A. Can be, correct.
4 Q. Now yesterday you started to talk about the basis in
5 your opinion for why you believe false confessions actually
6 occur commonly in the United States; correct?
7 A. I don't recall that question in that form, but --
8 Q. Well, in essence you were asked whether false
9 confessions are frequent.
10 Weren't you asked that question yesterday?
11 A. Could be. Probably.
12 Q. And you started off -- you misspoke and said that,
13 yes, in fact there's a recent study where there's been noted

14 to be 6,000 false confession per year.

15 But that was a mistake; correct?

16 A. Absolutely a mistake.

17 Q. And we took a lunch break, and when you came back you
18 acknowledged the mistake that you had made; correct?

19 A. Right.

20 Q. And in fact -- in fact, the article indicates that it
21 is estimated that there might be 6,000 wrongful convictions
22 in the United States per year; is that correct?

23 A. That's correct.

24 Q. And we're talking about the article titled "Guilty
25 Until Proven Innocent; Wrongful Conviction and Public Policy"
26 by Huff, Rattner, and Sigarin; is that right?

27 A. Correct, correct.

28 Q. Now isn't it true that the authors don't say that, in

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1 fact, every year or yearly there are 6,000 wrongful
2 convictions. They're merely saying that it's -- it's their
3 belief and estimate -- of 6,000 is reasonable.

4 Isn't that correct?

5 A. I have to go back and look at that, but I think
6 they're talking about an annual basis.

7 Q. Correct.

8 A. So they're estimating annually about 6,000, and that
9 was in the mid 1980's when the study was done.

10 Q. Right. And it is merely an estimate. They are not
11 saying that actually every year 6,000 crimes occur when a
12 person is wrongfully convicted; correct?

13 A. That's true. There is no way to know that. There
14 are only estimates, and these were estimates that were
15 developed out of the opinions of prosecutors, judges, and
16 defense attorneys.

17 Q. And, in fact, the authors admit there is no known
18 method of determining how many wrongful convictions occur per
19 year; correct? Isn't that what they noted?

20 A. They may very well have, and if they've noticed
21 anything else, I'd be surprised.

22 Q. Well, isn't it true that the way they came up with
23 this number -- and it actually wasn't 6,000, it was 5700 --
24 was based on a mailing survey of the people you just
25 mentioned?

26 A. Correct.

27 Q. Prosecutors, attorney generals, defense attorneys,
28 sheriffs.

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1 Isn't it true that there was a questionnaire that was
2 compiled, and one of the questions in dealing with frequency
3 was give your estimate in terms of a percentage of the number
4 of wrongful convictions that occur annually; is that correct?

5 A. Correct.

6 Q. And isn't it true that 72 percent or three quarters
7 of the respondents indicated they believed that there were
8 less than one percent of all cases resulted in wrongful
9 convictions per year?

10 A. Yeah. I think the average came out that produced the
11 6,000 figure was one half of one percent.

12 Q. Correct. And isn't true that there were six percent
13 of the people that responded that believed it never happens;
14 isn't that correct?

15 A. Look at the table. I assume -- yes, it looks that
16 way.

17 Q. Doctor, is it fair to say that this really isn't a
18 scientific study; it's merely the belief of the authors based
19 on the opinions of people in the law enforcement world? Is
20 that fair to say?

21 A. That's a scientific study of what the opinions are
22 out there, but it doesn't go beyond the best estimate given
23 by people who are involved with the criminal justice system
24 all the time. The study is scientific insofar as they
25 conduct -- the methodology of it is fine and they don't
26 overstate their conclusions. They say: This is an estimate,
27 it's based on what we did by asking these people, and this is
28 the average that we come up with.

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1 Q. But it can never be actually proven, can it, how many

2 wrongful convictions occur in the United States annually; is
3 that correct?

4 A. To do that, we would have to know in truth whether
5 each and every conviction is a valid or wrongful conviction,
6 and since we can't do that for practical reasons, then it's
7 always going to be an estimate.

8 Q. Correct.

9 Now they do discuss a number of factors that they
10 believe may, in fact, result in a wrongful conviction; isn't
11 that correct?

12 A. Yes.

13 Q. And they also mention in the article that in their
14 belief it's never just one reason which might lead to a
15 wrongful conviction; it's normally more than one reason, some
16 breakdown in the system, more than one breakdown in the
17 system.

18 Isn't that correct?

19 A. Probably.

20 Q. Isn't it true that they cite a data base of about 500
21 cases of alleged false confession -- I'm sorry -- alleged
22 wrongful felony convictions that they gathered from newspaper
23 articles, legal documents, and the literature; is that
24 correct?

25 A. Correct.

26 Q. But in that article they only name the facts or only
27 described the facts of 12 of those cases; isn't that correct?

28 A. Yes.

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1 Q. Isn't it true that none of those 12 cases in which
2 they described wrongful convictions, none of those 12 cases
3 even deal with false confession; isn't that true?

4 A. It might very well be, but it was the Bedau and
5 Radelat study that I was talking about when it came to the
6 significance of false confession.

7 Q. We'll get to that next.

8 A. Good.

9 Q. We're talking about the Sigarin study for now.

10 Now they do believe -- these authors believe that the
11 leading cause of wrongful conviction is, in fact,
12 misidentification; correct?

13 A. Right. Everyone finds that, both in the United
14 States and in England.

15 Q. And in this particular study, it's their belief that
16 60 percent of the wrongful convictions are a result of that;
17 correct?

18 A. That's what the number is.

19 Q. Now they did mention an order of the other factors or
20 categories in which they believe result in wrongful
21 convictions, and they name the following in this order:

22 Errors or unprofessional conduct by police or
23 prosecutors; plea bargaining; community pressure for a
24 conviction; inadequacy of defense counsel; false accusation;
25 and knowledge of criminal record of the defendant by a jury;
26 and, finally, a final category that they listed as other
27 factors.

28 Isn't that true that they listed that order for the

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1 other reasons?

2 A. Yes.

3 Q. And isn't it true that false confessions in this
4 article are not even mentioned until this final paragraph
5 dealing with other factors? Isn't that true?

6 A. Yes.

7 Q. And, in fact, in that paragraph the author states
8 other factors that are either less prevalent or about which
9 less is known including judicial errors; bias or neglect of
10 duty; errors by criminalists, medical examiners, and forensic
11 science experts; errors in criminal record keeping and
12 computerized information systems; voluntary and deliberate
13 false confessions; and mental incompetency of the accused.

14 Isn't that what they say are the other factors?

15 A. Yes.

16 Q. Now by placing false confessions in this category,
17 this miscellaneous category of other factors, isn't it fair
18 to say that at least these authors don't believe that false
19 confessions are a significant reason why people are
20 wrongfully convicted?

21 A. No, because all they're doing is telling you what
22 they find in the data base that they've collected, and that
23 data base consists of articles and so on, and it's a pretty
24 hit or miss data base. And so they're just reporting what's

25 in that. And I don't know that -- what they would have
26 reported if they were asked what do they think, what might
27 also be significant, and they point out that no one knows
28 very much. And it wasn't until the Bedau and Radelat study

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1 where we learned a --

2 Q. But you do agree -- in fact, you just testified that
3 you agree with the authors, and they indicate that the
4 leading reason is misidentification; correct?

5 A. That's what everyone finds.

6 Q. And then they then listed the next categories, and
7 the second one was errors or unprofessional conduct by police
8 prosecutors.

9 And isn't it true that they only talk about witnesses
10 who lie on the stand as a result of prompting by prosecutors
11 or witnesses who are being interviewed that are being
12 suggested the facts of the case in order to incriminate a
13 defendant by police officers? Isn't that true?

14 A. They're reporting what's in the reports that they've
15 gotten from these cases, and they're limited by that.

16 Q. So you would then testify it's your position that
17 this study is severely flawed and really should not be
18 considered; is that right?

19 A. I'm not saying that at all. I'm saying that this
20 study is what it appears to be, and to go beyond that in just
21 enumerating what they found in these 500 cases may be

22 inflating what's in the case, because you then have to look
23 at where did they get that information, how thoroughly did
24 they look into each case. They had a data base that
25 collected information about 500 cases, but it's hit or miss,
26 and they really don't know, and they say that they don't
27 know.

28 Q. Isn't it true then that this study doesn't help the

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1 jury at all understand the frequency in which a false
2 confession may lead to a wrongful conviction?

3 A. That's true.

4 Q. And it clearly doesn't say that 6,000 people in the
5 United States annually falsely confess; isn't that true?

6 A. That's right. I was misled about the study.

7 Q. Who were you misled by?

8 A. I was misled by a woman by the name of Laura Hoffman
9 Ropp~, R-O-P-P-E, accent aigu, who made a mistake. And
10 that's where I discovered the study. She made a mistake.

11 It concerned me that I had made a mistake yesterday,
12 so since I had only recently run across this study, or at
13 least this reference to it, and the study happened to be in
14 my library at home, I had pulled it and I had looked at the
15 methodology and the table but hadn't paid a lot of attention
16 to the study beyond that because I was working on this.

17 That appears in the law review article she published
18 in late 1994, I believe, which says, in fact, this
19 influential 1986 study of wrongful conviction felony cases
20 estimated that there were nearly 6,000 false confessions
21 annually in the United States. I was misled by her error in
22 that law review article.

23 So that since I happened to have the article at home,
24 when I grabbed the article and I flipped to the method
25 section and looked at how the survey was done, I wasn't
26 paying any more attention to it than that, and I just looked
27 at the fact that it was an opinion study so I would know
28 where it came from. But I had not inspected it with

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1 sufficient care, and that's why I came back after lunch when
2 I took another look at the article and realized that a
3 mistake had been made. I thought it was my mistake at first,
4 and it wasn't until last night when I got home that I pulled
5 this article and found that I had been biased by the mistake
6 that's in this law review article.

7 Q. Well, had you read the article before you testified
8 yesterday?

9 A. I said what I had done after reading this --

10 Q. Yesterday had you read the article?

11 A. Not in its entirety. I'd looked at the methodology.

12 MR. GREENBERG: I'm going to object to the question
13 as vague.

14 Which article is he talking about, the law review --

15 THE COURT: It seems to me that it would be the
16 article that is the subject matter, the 6,000 wrongful
17 convictions. That's the article he is referring to.

18 MR. MIFSUD: Right.

19 Q. Well, you hadn't read the article completely, and
20 yesterday you cited it when asked about the frequency of
21 false confession; isn't that true?

22 A. Right. I cited it for that particular proposition.
23 And I had checked what the methodology was that gave rise to
24 that 6,000 number, and the methodology I now understood, and
25 the numbers were appropriate for the methodology. Except I
26 started with a bias.

27 For example, if someone is given information that is
28 wrong and it biases them, they can then engage in subsequent

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1 actions predicated by that bias. For example, if I were
2 given wrong information about the cause of a death, I
3 might -- that might now infect what I do subsequent to that
4 and make the kind of mistake that I just made here.

5 Q. It sounds like you're trying to analogize this
6 mistake that you made to this case; aren't you?

7 A. I was talking about the Sawyer case, for example, in
8 which, as I testified yesterday, the detective believed he

9 saw a semen stain.

10 I believed that this article was about that subject
11 because I read this in this law review; and, therefore, when
12 I checked the specific things that I checked, I didn't go
13 back and check the entire article. All I did was check so
14 that I would understand where that number came from. That's
15 why I read the method section where they questioned
16 prosecutors and defense attorneys and judges and law
17 enforcement personnel. Then I felt I understood where the
18 number came from. I was mistaken about the number.

19 Q. Were there any other propositions that you testified
20 about yesterday that came from articles that you hadn't read
21 completely?

22 A. No.

23 Q. Isn't it true that in that same article by Sigarin,
24 Huff, there is no mention of the coerced compliant
25 confession, is there?

26 A. No.

27 Q. And obviously there is no data suggesting its
28 frequency in that article; correct?

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1 A. Correct.

2 Q. Now let's talk about the next study that you
3 mentioned on direct examination, and that is the Stanford Law

4 Review article; correct?

5 A. Correct.

6 Q. And that Stanford Law Review article was written in
7 1987; correct?

8 A. That's right, the year after the Huff study was
9 published.

10 Q. Okay. I appreciate that. A little context.
11 And the name of the article was "Miscarriages of
12 Justice in Potentially Capital Cases"; is that right?

13 A. Correct.

14 Q. This study reviewed 350 cases starting from the year
15 1900 up till 1987; is that correct?

16 A. Correct.

17 No, that is not quite the right way to state it.
18 What the study consisted of was the identification of
19 350 cases in which the researchers examined cases wherever
20 they could find them and identified 350 cases where it
21 appeared that miscarriages had occurred. So we don't know
22 how frequent that is. All we can possibly know about this is
23 here are 350 examples. May not tell us what percentage of
24 anything else that number 350 is, but it's 350 examples, and
25 they are going to look internally to this collection --

26 Q. But you do agree these cases took place between the
27 years 1900 and 1987 in the United States?

28 A. Correct.

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1 Q. Okay. And isn't it true that the conclusions that
2 are reached by the authors in that article are simply their
3 subjective beliefs as to whether the individuals were
4 wrongfully convicted of capital punishment? Isn't that true?

5 A. No. I think the standard that they used often
6 involved things such as the person being pardoned, such as
7 the actual killer being identified. Sometimes the actual
8 killer was caught after the person was executed. Sometimes
9 before. My recollection is that they use fairly restrictive
10 standards in judging a case to be likely a miscarriage.

11 Q. Well, let me ask you.

12 You say that, for example, they used data from
13 individuals being pardon by the state; correct?

14 Isn't it true that people can be pardoned when
15 they're still guilty but for some other ulterior reason the
16 state may grant a pardon or clemency? Isn't that true?

17 A. I have to go back and see exactly what they said
18 about the basis for the pardon, but given the standards that
19 they were using, I think if someone had simply bought a
20 pardon, they would not want to have included that, and I
21 suspect that they probably had some reason to think that the
22 pardon was because the person was thought to be innocent.

23 Q. Let's use your other example of where someone else
24 they decided wasn't, in fact, the killer.

25 Now very often throughout the study, isn't it true,
26 that other people confessed to being the killer years later?

27 A. Sometimes that happened, true.

28 Q. Is there any way to prove that these people weren't

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1 simply voluntarily confessing?

2 A. Well--

3 Q. Voluntarily falsely confessing?

4 A. It depends on how thoroughly one looks at it. For
5 example, the work that I've done with the governor's office
6 of Missouri about the issue of whether or not to pardon
7 Johnnie Lee Wilson, there's a man who is confessing. He is
8 able to describe things about the crime that have never been
9 published. He is able to show -- he is able to contribute a
10 detailed post-admission narrative that -- and identify who
11 was with him. And they stage a phone conversation where the
12 person who he says was his accomplice is tricked into
13 implicating himself. All of this is going into the decision
14 which will be made by the governor as to whether or not to
15 pardon Mr. Wilson. It's not being lightly done.

16 And that's my experience with what really happens
17 before someone who has been convicted of a heinous crime is
18 pardoned, that it's given great scrutiny, and no one wants to
19 make a mistake.

20 Q. But, Doctor, isn't it true that the authors in this
21 case are really inferring from a number of circumstances that
22 the individual was actually innocent? Isn't that correct?

23 A. They are doing the best they can based on the
24 criteria, the standards that they say they are using.

25 If someone else confesses to a crime and there's

26 every reason to believe that person did it, at some point you
27 have to say that's the limit of what we know and based on
28 this, the quality of the evidence associated with it, I'm

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1 going to reach this decision.

2 Q. Isn't it true the authors in that article state the
3 following:

4 That "...no quantity or quality of evidence that
5 could be produced that would definitively prove innocence" in
6 this study.

7 Isn't that true they they quote those words?

8 A. That's the problem that everyone who has to make this
9 kind of decision has to make, also.

10 Q. So that's true?

11 A. It's always going to be a best.

12 Q. Is that what they said?

13 A. And that goes for them, as well.

14 Q. My question is: Is that what they said in the
15 article?

16 A. If you want me to verify --

17 Q. You don't recall from the article?

18 A. This article which is --

19 If you want to refer me to the page, I'll verify.

20 I'll take your word if you say that's what it says.

21 Q. You've read the article?

22 A. Yeah, I've read the article. It also happens to be
.23 about a hundred and 55 pages or a -- 158 pages long. And I
24 know I'm a professor at Berkeley, but I have to admit to you
25 that I can't remember every sentence in this article.

26 Q. But doesn't this go to the very essence of how they
27 can justify to people that this is a reliable and accurate
28 study? Isn't that something that you would remember?

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1 A. No one can say anything more than with diligence and
2 care I assessed the evidence and I came to the best
3 conclusion I could. And beyond that no one can ever say
4 anything with absolute certainty about almost anything. So
5 they are saying what any fair person would say: I did the
6 best job I could, here is what the evidence is I looked at, I
7 reached this conclusion, and I can't guarantee to you that
8 this is right.

9 Q. So they did in this study the same thing that this
10 jury is going to do in this case; is that fair to say?

11 A. No, because I think this jury in this case has a much
12 more difficult job than they did because they are looking at
13 records. This jury is looking at someone's life. I don't
14 think it's the same thing. I think the jury has a much more
15 difficult job than they did.

16 Q. Okay. Now isn't it true that also in that article
17 the authors note "those in which we believe a majority of
18 neutral observers, given the evidence at our disposal, would
19 judge the defendant in question to be innocent."

20 Isn't that part of the standard that they are using?

21 A. Would you direct me to the page, please?

22 Q. Sure. Let me just -- page 47.

23 THE COURT: Can you identify it on the page,

24 Mr. Mifsud?

25 M~R. MIFSUD: Midway through the first paragraph.

26 Let me start over again.

27 Q. Isn't it true that they state, "Consensus can be
28 measured in degrees, and the cases that we have included in

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1 our catalog are those in which we believe a majority of
2 neutral observers, given the evidence at our disposal, would
3 judge the defendant in question to be innocent"?

4 Isn't that what they say in that article?

5 A. That's what they say.

6 Q. Don't they go on to -- on the same page (that "the
7 evidence that suffices to convince us may not convince
8 others; indeed, as we will illustrate below, our decision to
9 include rather than to exclude a few borderline cases may
10 look to other investigators to be not only debatable but even
11 incorrect?"

12 Isn't it true that that's what they say?

13 A. Yes. They're saying they made the best judgment that
14 they could, and other equally fair-minded serious people
15 might disagree with them on particular points.

16 Q. Well, bottom line, it boils down to their subjective
17 belief based on the evidence and the reports they reviewed as
18 to whether that person was wrongfully convicted; isn't that
19 correct?

20 A. It boils down to the standards that they are using
21 and the fairness with which they apply them. Like all human
22 decisions, it takes honesty, it takes diligence, and there
23 still may be error.

24 Q. Isn't it fair to say that the cases from the early
25 part of this century, they probably didn't have as much
26 information as the cases that they reviewed during the latter
27 half, in the 1980's?

28 A. I don't know that that's true. It depends on what

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1 files they looked at. It depends on how much of the records
2 of each and every case they were able to obtain.

3 They searched for years to get this material
4 together, and in fact even after this article was published
5 they found a number of other cases. And in the book version
6 of this article, the number of cases goes up beyond this.

7 Q. - Isn't it true that most of the witnesses between 1900

8 and 1940 were probably deceased?

9 A. I don't think that would matter because I doubt that
10 they went out and interviewed any of the witnesses. I don't
11 recall. But I suspect they did not reinvestigate each one of
12 these cases because to reinvestigate 350 murder cases would
13 take more than seven lifetimes even if the people were
14 around.

15 Q. Well, that's a weakness in the study, isn't it?

16 A. No. It's a condition of the study. They did the
17 best they could.

18 Q. Well, they did the best they could, but it's a
19 weakness in the study because, for example, it may change
20 their scenario after a period of time, after they talked to
21 the police; isn't that correct?

22 A. We are talking about what people testified to, what
23 the record showed after the conclusion of the trial.

24 Q. Correct.

25 A. So the fact that they didn't go back and reinterview
26 each and every one of these witnesses is not anything that
27 they suggest that they were going to do. They looked at the
28 records, they looked at those factors that suggest that an

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1 innocent person was convicted, and they're honest about what
2 they found and how they looked.

3 Q. Now isn't it true they talk about the 49 cases of

4 false confessions? Isn't that correct?
5 A. Correct.
6 Q. Isn't it true that 17 of these false confessions they
7 categorize as voluntary confessions? Correct?
8 A. Correct.
9 Page please?
io Q. You're not aware of that --
11 THE COURT: He needs a page.
12 MR. MIFSUD: Q. Are you aware of those facts that
13 I've just described?
14 A. It's all part of this. You're asking me for very
15 specific information. I would just like to have the page.
16 I'm willing to accept your representation, but if you want me
17 to say that's correct --
18 Q. Well, no, no. If you don't know the answer, then say
19 you don't know. I think you just admitted that 49 false
20 confessions --
21 A. Without looking at the document -- number 49 is a
22 number that I know very well.
23 Q. You quoted that yesterday; correct?
24 A. Correct. Maybe. You've got me to agree to that,
25 that's for sure.
26 O. Well, wait. Did you -- did you testify to that
27 yesterday that 49 of the cases were, in fact, deemed false
28 confessions?

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1 A. I don't recall whether I said 49 because I suspect
2 you may be thinking about the testimony of mine from another
3 case that you've probably read. I don't remember whether I
4 said 49 yesterday or not.

5 Q. Well, that is not true. I'm talking about yesterday.
6 I was here in court, and I'm asking you, do you remember
7 saying 49?

8 A. No, I don't remember whether I said 49 or not because
9 I could have explained it without saying 49 or I could have
10 explained it with saying 49. It's a subject about which I
11 talk from time to time, and I can't tell you what I said word
12 for word yesterday.

13 Q. Okay.

14 A. But you could lead me into agreeing to almost
15 anything as long as I don't think it's wrong.

16 Q. Are you suggestible?

17 A. Absolutely. Because I'm uncertain as to what
18 happened yesterday because this is a subject about which I
19 talk a lot and it is a subject that I could easily have said
20 it one way or the other way or another way, still made the
21 same point. And you can easily mislead me and get me to
22 agree I said it one particular way yesterday when I really
23 don't remember. And that's the truth.

24 Q. Didn't you testify yesterday that people that are
25 more intelligent, sophisticated, educated are much less
26 susceptible to being suggestible than people who are
27 compromised in this way intellectually? Didn't you testify
28 to that?

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1 A. Oh, sure. But being misled on a minor point like
2 this where it's possible I could have done it one way or
3 another way is one thing. Being manipulated into agreeing to
4 something that simply didn't happen --

5 Q. Are you suggesting that I misled you moments ago?

6 A. You may have. I don't know. You may have made a
7 mistake. You may have been thinking about some testimony
8 that you read of mine from another case in which I did say
9 that. I don't remember.

10 Do you?

11 Q. Your testimony today is that you don't remember
12 testifying yesterday that, in fact, in this study there were
13 49 false confessions?

14 THE COURT: He said he doesn't remember.

15 MR. MIFSUD: Okay. Thank you, Judge.

16 Q. Let me ask you this.

17 THE COURT: Is that a fair response?

18 THE WITNESS: I don't remember whether I used that
19 phrase or not. I remember what I intended to say about this
20 study.

21 THE COURT: Do you remember the number 49?

22 THE WITNESS: I remember the number 49. Whether or
23 not I said it yesterday, I don't remember.

24 MR. MIFSUD: Q. Well, let me ask you now.

25 If you don't remember, just say you don't remember or
26 don't know.

27 Isn't it true in this article they indicated that 17
28 of those 49 false confessions were of the voluntary nature?

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1 A. Could you direct me to the page, please?

2 Q. So you don't remember that; isn't that correct?

3 A. Can you direct me to the page so I could refresh my
4 recollection.

5 THE COURT: Well, I think we've gone through this.
6 The doctor is trying to explain where he is coming from so we
7 don't --

8 MR. MIFSUD: I understand --

9 THE COURT: I understand. But I think he's already
10 testified that he can't without referring to the page. He
11 can't be definite without referring to the page.

12 MR. MIFSUD: Q. Okay. One moment, Doctor. I'll
13 refer you to the page.

14 How about page 62, bottom of the page?

15 A. 62?

16 Q. Yes.

17 A. 62?

18 Q. Yes.

19 A. Can you give me the beginning of the paragraph?

20 Q. "In an equally small but no less disturbing number of
21 cases."

22 A. Yes, I see that.

23 Q. All right. So they do indicate that 17 were
24 voluntary confessions; correct?

25 A. Yes.

26 Q. And one of the confessions, the defendant falsely
27 confessed to police as a joke; correct?

28 A. Let's see. It says, "The false confession was, in

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1 some cases, a result of mental illness. In other cases, the
2 defendant appears to have falsely confessed and pleaded
3 guilty to avoid the risk of a death sentence. In two
4 instances the defendant was too intoxicated to remember what
5 he did and readily confessed under the inquiries of the
6 police. In a few cases, the explanations are almost too
7 bizarre to believe: One defendant falsely confessed to the
8 police as a joke," and there's a citation; "another falsely
9 confessed to murder because she did not want to be known as a
10 fornicator; and another falsely confessed to impress his
11 girlfriend and then, after having been convicted for the
12 murder, falsely confessed to another murder just to prove
13 that a person's false confession could get him convicted -
14 which it did -- for the second time!"

15 Is that the paragraph you're referring to?
16 Q. You remember that now; is that right?
17 A. I've just read it. I don't know that I could recall
18 it word for word even now.
19 Q. Doctor, isn't it true that the 32 other confessions
20 that they talk about in this study they describe as coerced
21 confessions? Isn't that true?
22 A. You want to refer me to the page?
23 Q. There is no reference.
24 A. So it's 49 minus 17 is what you're saying?
25 Q. Well, you've read the article; correct?
26 A. Yes.
27 Q. And isn't it your understanding that the 32 other
28 confessions were considered to be coerced confessions?

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1 A. Well, unless they identify a new category, it would
2 have to be logically.
3 Q. Okay. So you deduce from that that, in fact, they
4 considered the others to be coerced; correct?
5 A. Well, if no other explanation is offered, there is
6 only coercion or voluntary, then it would have to be,
7 wouldn't it?
8 Q. Now isn't it true there is no discussion in this
9 study whatsoever about a coerced compliant confession; isn't

10 that true?

11 A. That's correct.

12 Q. As far as you can deduce then from this article,
13 those 32 other confessions could have been of the coerced
14 internalized confession nature; isn't that true?

15 A. It's possible but very unlikely.

16 Q. Because coerced internalized false confessions are
17 generally considered to be far rarer than coerced compliant
18 confessions.

19 Q. Now --

20 A. That squares with my own experience.

21 Q. Once again the authors are talking about 32 coerced
22 confessions over a period of 87 years; isn't that right?

23 A. They are talking about 32 cases in the set of
24 potential miscarriages that they are able to identify. They
25 make no representations about saying these 350 cases
26 represent 100th of one percent of the cases in which
27 miscarriage may have occurred or a hundred percent of them.
28 They don't know. They just say we found these cases and here

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1 we are going to tell you what was true about these cases that
2 we found as far as we can determine.

3 Q. Now isn't it true that of these 49 cases of alleged

4 false confession that there is no actual genuine reliable way
5 to determine whether, in fact, they were true false
6 confessions; isn't that true?

7 A. Well -- but if their standard is that there was
8 evidence indicating a powerful evidence from their point of
9 view that the person was wrongfully convicted, that someone
10 else committed the crime, then that would make all of these
11 false confessions because they've already said these are
12 cases in which we believe based on these reasons that these
13 were wrongful convictions.

14 Q. So it's your opinion that through this study it can
15 be proven or it has been proved, at least in this study, that
16 these 49 confessions were, in fact, false; is that your
17 position?

18 A. I'm saying that this is the result of the research
19 that they did, and because they initially identified the
20 cases as cases in which for a litany of reasons they think
21 these were wrongful convictions, then these would not be
22 coerced true confessions because they've already eliminated
23 in their minds the idea that this person could have committed
24 the crime.

25 Q. Once again you said "they think."

26 It's their subjective belief; isn't that true?

27 A. No. It's their conclusion based on the research that
28 they did.

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1 Q. Their subjective conclusion?

2 A. It is the conclusion based on the research that they
3 did. They tried to be very forthright about what they did,
4 the standards that they used, and they say essentially doing
5 this, using these standards, using these decision rules, this
6 is what our research revealed. Obviously, they think the
7 research is reliable. Otherwise, they wouldn't have done it
8 this way. But it's not just a subjective decision. It's
9 applying these rules of analysis. This is the conclusion
10 that we come to.

11 Q. Doctor, you mentioned yesterday that Gisli
12 Gudjonson -- I think I'm pronouncing his name properly -- of
13 Great Britain is the leading authority in the world on false
14 confessions; isn't that true?

15 A. I think he is the leading authority in the world on
16 vulnerability to interrogation. That's really where his work
17 has been mostly directed.

18 Q. So he is not the leading authority in regards to
19 false confessions?

20 A. I don't know who the leading authority on that
21 subject would be. I know that my friend Gudjonsson uses my
22 work to organize his thinking about false confession and is
23 using my work to organize his current research about it, but
24 that is just because we are colleagues.

25 Q. So you may be the leading authority?

26 A. You may be the leading authority. I said I don't
27 know who is the leading authority. I know I work in the area
28 and I know some people pay attention to what I do.

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1 Q. In any event, Mr. Gudjonson is one of the leading
2 authors; is that fair to say?

3 A. He's done a tremendous amount of work on the subject
4 of interrogation and vulnerability to interrogation.

5 Q. And false confession; correct?

6 A. And false confession.

7 Q. And you are familiar with his article entitled
8 "Retracted Confessions, Legal, Psychological, and Psychiatric
9 Aspects"?

10 A. Yes, I've read it.

11 Q. Okay. Isn't it true in that article Gudjonson says
12 that no systematic study has ever been carried out which
13 provides a method to distinguish reliably between genuine
14 false confessions and genuine true confessions? Isn't that
15 true that he says that in that article?

16 A. I'll accept your representation that he says it.

17 I understand full well what he is saying. What he is
18 saying is there's no way to guarantee it. There is no method
19 that you can define that will absolutely produce this answer.
20 People try to do it, they try to do it in different ways, but
21 no one has claimed I have the definitive method for doing
22 this.

23 Q. Isn't it also true in that article, by the way, that
24 was written in 1988 after the Stanford Law Review article --

25 didn't he say, "It is common in criminal proceedings for
26 defendants to retract confessions made during police
27 interviews, but how many of them are true false confessions
28 is not known? It would be my belief that all or even most

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1 retracted confessions were true false confessions."

2 Didn't he say that in that article?

3 A. He may very well have. And I know for a fact that he
4 hadn't read the Stanford Law Review article at the time that
5 he wrote that because I sent him the Stanford Law Review
6 article in roughly 1990. And we had discussed it, and he had
7 never seen it before. So given your comment about that, I
8 thought I'd help clarify things.

9 Q. Sure.

10 A. But of course merely because someone retracts a
11 confession, says it isn't true what I said, that is no reason
12 to absolutely accept it. It would be very foolish. And it's
13 also no reason to assume that the confession was true.

14 MR. MIFSUD: Your Honor, is this a good time?

15 THE COURT: Well, I'd like to finish with Dr. Ofshe
16 if we can.

17 MR. GREENBERG: We are not going to finish with him.

18 MR. MIFSUD: I wish I could say we would.

19 THE COURT: Okay. Just give me a ballpark figure.

20 MR. MIFSUD: I've got another 45 minutes.
21 THE COURT: Okay.
22 And then we've got redirect?
23 MR. GREENBERG: Yes.
24 THE COURT: Okay. Then we might as well have lunch
25 then.
26 THE WITNESS: Unfortunately, I have a class at 2:00
27 o'clock.
28 THE COURT: You'll have to cancel it, I'm afraid.

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1 THE WITNESS: On your order, I'm happy to do it.
2 THE COURT: Just tell them.
3 THE WITNESS: This is much more interesting than the
4 class.
5 THE COURT: Yeah. Tell them they can come back.
6 Ladies and Gentlemen, we'll take the recess then
7 until 1:30.
8 Remember the admonition I have heretofore given you.
9 We'll see if we can finish with Dr. Ofshe today.
10 (Noon recess.)

11 ---000---

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1 TUESDAY, MARCH 21, 1995 -- P.M. SESSION

2 PROCEEDINGS

3 ---000---

4 THE COURT: Welcome back, everybody.

5 This is the case of People versus Traci Foskett.

6 Let the record show that the defendant is present

7 with counsel. The jury is present in the jury box along with

8 the alternates.

9 And, Mr. Mifsud, you remember where you left of f
10 before lunch?

11 MR. MIFSUD: Yes, Your Honor. Thank you.

12 THE COURT: Go ahead.

13

CROSS-EXAMINATION

14

(Resumed)

15

MR. MIFSUD: Q. Good afternoon, Doctor.

16 A.

Good afternoon.

17 Q.

I'd like to revisit just for a few minutes the

18

Bradley Page issue we were talking about earlier.

19

Did you attend any portion of the two trials of

20

Bradley Page?

21 A.

No.

22 Q.

The second trial was four months in length; is that

23

correct?

24 A.

If you say so.

25 Q.

You don't know; is that correct?

26 A.

No. I've read portions of the transcript and worked

27

on aspects of the appeal.

28 Q.

Can you tell us what the actual source of your

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1 information in regards to the evidence in this case is or

2 was?

3 A.

The account he gave in that part of the interrogation

4

that was recorded.

5

You will recall that on the day of his interrogation,

6

which I believe was the day after Bibi Lee's body was

7

discovered, he comes into the police station fairly early in

8

the day. There's a four-hour period where he describes the

9 events of the day of Bibi Lee's disappearance, and the tape
10 recorders are turned off, and seven hours later they are
11 turned back on.

12 Then the portion in which he gives the description of
13 the crime, which is filled with speculative statements --

14 Q. I'm not asking you what you're testifying about.

15 My question is --

16 A. -- that's recorded.

17 Q. My question is rather directed. My question is if.

18 you can please list for us what you actually reviewed in
19 terms of the information for this case, the Bradley Page
20 case, without giving us an explanation as to all the details?

21 MR. GREENBERG: Could you keep your voice up, please?

22 MR. MIFSUD: Yes.

23 THE WITNESS: I don't think this microphone is
24 working.

25 MR. MIFSUD: Q. You reviewed the tapes; correct?

26 A. I reviewed the transcript, and then I -- on a series
27 of points that came up, the factual statements that came up
28 in the transcript. I reviewed those with the appellate

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1 attorney who was working on the case to find out what the
2 factual status was of a variety of statements that he made,
3 whether or not these things could be determined, which points
4 it was possible to evaluate the accuracy of. And it became

5 clear, not only from that review but also from the reports I
6 received of what the detectives admitted on the witness
7 stand, that Bradley Page could not accurately describe the
8 facts of the case.

9 MR. MIFSUD: Objection; nonresponsive, move to
10 strike.

11 I asked him what sources of his information --

12 THE COURT: You're giving too long of a answer. He
13 wants to know --

14 First of all, the answer may be stricken as being
15 nonresponsive.

16 He wants to know exactly what were those items that
17 you reviewed. Did you listen to the tape of the confession?
18 Did you review the trial transcript? Those are the things
19 that he is referring to.

20 THE WITNESS: I listened to the tape, I reviewed the
21 transcript, and then I checked on certain points that came up
22 based on reviewing the tape and the transcript.

23 MR. MIFSUD: Q. Did you review all of the
24 transcripts of the trial?

25 A. No.

26 Q. And, in fact, weren't there 30 or 40 transcripts?

27 MR. GREENBERG: Objection. The question is vague.

28 THE COURT: Transcripts of the trial, the Bradley

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1 Page trial.

2 MR. GREENBERG: I understand. But I don't know what
3 30 or 40 transcripts.
4 You mean volumes?
5 THE COURT: Yeah, I guess you mean --
6 MR. MIFSUD: Q. Well, 30 or 40 transcripts --
7 A. I said I didn't review them.
8 Q. How many did you review?
9 A. Of the trial testimony?
10 Q. How many of the trial transcript volumes do you
11 recall reviewing?
12 A. I didn't review any of those. I told you I reviewed
13 the tape and the transcript of the interrogation, which was
14 the part that was of interest to me.
15 Q. So the only thing you reviewed were the actual tape
16 and, as you say, the transcription of that tape; correct?
17 A. And then ascertained the answers to questions that
18 arose based on what was contained in those materials.
19 Q. I'm confused. I'm not sure what you mean by that.
20 A. Well, questions arose. For example, at one point he
21 is asked how he dug the grave, and I have recollection --
22 maybe I looked at the trial transcript on this point. I have
23 recollection of his -- no, maybe this was in the tape -- of
24 his first starting to say he scooped out the hole with his
25 hands. And then he is told, no, it couldn't have happened
26 that way. How did you do it? He said, well, there's a
27 hubcap in the trunk of my car. I must have used that to dig
28 the hole.

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1 And then with that point having been raised, I then
2 sought information about what the forensic analysis of the
3 dirt and leaf matter in the hubcap was, and I was informed
4 that it was tested and the result was that that hubcap did
5 not contain dirt from that area or leaf matter from that
6 area. In fact, the material found in the hubcap indicated
7 that it couldn't have been used to dig the hole as he
8 described it.

9 Q. So you didn't -- you didn't actually review the
10 criminalist's reports.

11 You were informed of these facts by someone; is that
12 correct?

13 A. That's correct.

14 Q. Who informed you of those facts?

15 A. The appellate attorney who was working on the case.

16 Q. Did you review any of the police reports in that
17 case?

18 A. I don't believe so.

19 Q. Did you review any of the autopsy reports in that
20 case?

21 A. No.

22 Q. Did you view any of the photographs taken by the
23 criminalist at the scene or any other thing that was relevant
24 to the case?

25 A. No. I only reviewed those points that arose in the
26 course of the interrogation that could lead to a
27 determination in my mind of whether or not the narrative that
28 he was giving was accurate or inaccurate.

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1 Q. Did you review the cross-examination transcripts from
2 the trial, the editions, the volumes of the defendant Bradley
3 Page at all?

4 A. As I said, I don't believe I reviewed any of the
5 trial transcript. I focused on the events of the
6 interrogation.

7 Q. So if Bradley Page changed his story on the stand
8 over and over, you weren't aware of that; correct?

9 A. That's correct, because I was asked to work -- to
10 comment and give advice about the interrogation, what arose
11 in the interrogation and its relation to the facts and how I
12 would have evaluated that interrogation and in order to
13 assist the appellate attorneys in framing their appeal.

14 Q. I understand.

15 Now you talked about -- we talked about a sketch that
16 you looked at in terms of matching or trying to distinguish
17 whether the person from Washington resembled the person who
18 they referred to as the van man in the Bradley Page case.

19 You looked at some kind of a sketch; is that correct?

20 A. There was a composite sketch developed of what the
21 van man supposedly looked like.

22 Q. Describe for the jury how the van man appeared to
23 you?

24 A. I believe he had longish hair, and I believe -- and I

25 believe he had a beard. But I haven't looked at that
26 rendition in quite a while.

27 Q. Isn't it true that the van man was described as six
28 foot, 250 pounds, a round face, brown hair, and a scraggly

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1 beard?

2 A. I looked only at the composite drawing.

3 Q. Isn't it true the man from Washington named Ihde that
4 you've testified about that you believe did the killing was
5 thin and about 150 pounds?

6 A. I don't know.

7 Q. You don't know?

8 A. No. The main thing I know about Ihde is he bragged
9 about killing a dark-skinned woman in the Oakland area, and
10 his DNA matched DNA found in the body of another woman who
11 was killed at about the same point in time, and I understand
12 he had access to a van.

13 Q. Am I mistaken that you testified earlier today that
14 you saw a striking resemblance between the man in the
15 composite and Mr. Ihde?

16 A. I saw a head and shoulder.

17 There's a head and shoulders composite, and there's a
18 head and shoulders view of Mr. Ihde that bears a resemblance.
19 I don't think I used the word "striking." I think you're
20 misremembering.

21 Q. I apologize if, in fact, I did.

22 I think you used the word resemblance, didn't you,
23 however?

24 A. But I don't think I used the word "striking." I
25 think you suggested that.

26 Q. Do you know what color hair the man from Washington
27 had?

28 A. I think brown or dirty brown, I believe.

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1 Q. How about red? Does that...edTTh~r (sic) your
2 memory?

3 A. No, I don't remember.

4 Q. Could it have been red?

5 A. I don't know. I didn't prepare to testify about the
6 Bradley Page case.

7 Q. I understand. But you brought it up, didn't you?

8 MR. GREENBERG: Actually, that's inaccurate. The
9 D.A. brought it up.

10 MR. MIFSUD: On direct examination he brought it up.

11 THE COURT: Okay. Skip that. Let's go on to the
12 next question.

13 MR. MIFSUD: Q. In fact, you were asked on direct
14 examination, isn't it true, about the television shows you've
15 been on and you volunteered the Bradley Page case to this
16 jury; isn't that true?

17 A. That's correct.

18 Q. And you talked about your opinion that that statement
19 was unreliable, and you also said that in your belief the man
20 from Washington had killed Bibi Lee.

21 Didn't you testify to that on direct examination
22 yesterday?

23 A. I certainly testified that it's my opinion that it's
24 an unreliable statement, and that was based on the analysis
25 of the interrogation and based on how Mr. Page was led and
26 suggestions were given to him, all of which -- that part of
27 the case is recorded.

28 It's also based on the fact that -- my understanding

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1 of the trial testimony includes -- although I didn't read it,
2 but this is how it was represented to me -- includes the fact
3 that he was taken and given a polygraph and told that he
4 failed the polygraph, that he was told that the reason he
5 didn't remember committing this crime was because he felt so
6 guilty that he had repressed it.

7 And then I also reviewed Mr. Page's account later
8 that evening, within an hour or so after he had given the
9 confession when a deputy district attorney came down to
10 interview him in which he tried to explain to them how he had
11 become upset and confused and panicked because he thought he
12 was going to spend the rest of his life in jail and began
13 confabulating this story.

14 And then I also recall the police coming down after

15 that and also in another recorded statement explaining how,
16 yes, they had lied to him and, yes, they had told him these
17 things and, no, they weren't true. And they simply could not
18 consider the possibility from their point of view that they
19 had elicited a false confession. That's what I focused on.

20 Q. You didn't have all the evidence that the jury heard
21 in that trial; isn't that true?

22 A. That's true.

23 Q. Yet you concluded today that the man from Washington
24 probably did the murder; isn't that true?

25 A. No. I probably said the man from Washington probably
26 did the murder. I think he did the murder. Given the
27 evidence available to me, that's what I would think about it,
28 especially since in my opinion Bradley Pagets confession

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1 isn't worth a tinker's dam, that it's an unreliable
2 statement, that there is no corroboration in the statement,
3 that everything that Bradley Page says factually about the
4 crime that was capable of being evaluated is disproven.

5 And I know how easy it is to elicit false confessions
6 in the face of intense interrogation. And we don't,
7 unfortunately, have the seven hours when Mr. Page was
8 manipulated because the police chose not to record. They
9 recorded before and they recorded after, not while they were
10 doing their job.

11 Q. So it's your conclusion that the police manipulated
12 Bradley Page?
13 A. Oh, absolutely.
14 Q. It wasn't the jury's conclusion, though, was it?
15 A. I never spoke to any of the jurors.
16 Q. Let me ask you this:
17 About the man from Washington, didn't you testify
18 earlier today that he bragged about killing two women down in
19 the Bay Area? Didn't you testify to that?
20 A. That's correct.
21 Q. And one of the women, isn't it, in fact, true that
22 he's been charged with the murder of that woman?
23 A. Lisa Monza (phonetic), I believe her name is.
24 Q. Right. He is currently charged with that case; isn't
25 that right?
26 A. Yes.
27 Q. And the other woman you said was -- I believe you
28 said -- correct me if I'm wrong -- was a minority and --

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1 A. I believe the phrase he used was dark skinned or dark
2 woman.
3 Q. Okay. Isn't it true that that woman is, in fact, a
4 black woman from a different county? Are you aware of that?
5 A. I don't know. Has he admitted to that?
6 Q. I'm asking you whether --
7 THE COURT: But he gets to ask you the questions,

8 Doctor.

9 Are you aware of that, yes or no?

10 THE WITNESS: No, that is not my understanding.

11 MR. MIFSUD: Q. So he never indicated to anyone, as
12 far as you know, that this other woman was, in fact, a black
13 female from a different county, not Alameda County; that's
14 not something you ever heard?

15 A. That's not anything that I've ever heard, no.

16 Q. Now you've published three articles pertaining to, in
17 essence, the theory of false confessions, is that correct, or
18 am I mistaken?

19 A. That's correct.

20 Q. Two of them --

21 A. Aspects of false confession. There is no -- the
22 theory of false confession.

23 Q. Okay. Two of them deal with the model of the coerced
24 internalized confession; correct?

25 A. Yes.

26 Q. And what about the third article in the Encyclopedia
27 of Sociolocrv, what does that deal with?

28 A. It's an article that reviews a body of literature

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1 about what's called coercive persuasion, and I draw analogy
2 between some of these techniques of what's called coercive
3 persuasion, which arise out of police interrogation methods

4 to begin with, to the fact that this sort of thing can still
5 be going on in -- in intense police interrogations in the
6 U.s.

7 Q. I'd like to talk to you just a little bit about the
8 coerced confessions, the logic of seemingly irrational as
9 published in 1989.

10 What was it published in?

11 A. Journal called the Cultic Studies Journal.

12 Q. And what kind of journal is that?

13 A. It's a journal about -- deals with subjects of
14 certain kinds of influence.

15 Q. Now isn't it true that this article doesn't so much
16 deal with research data but rather anecdotal case studies?
17 Is that fair to say?

18 A. Case studies are research materials. It all depends
19 on what you use them for.

20 Q. But they are considered to be anecdotal?

21 You describe four separate stories basically in your
22 paper; correct?

23 A. Well, I describe the facts of those cases in the
24 paper.

25 Q. Now in the article there is no discussion of the
26 coerced compliant confession model; correct?

27 A. Correct.

28 Q. And in this article you're talking about basically

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1 individuals that were brain washed; is that fair to say?

2 A. If one understands what brain washing really means.
3 It's a term that gets misused most of the time.

4 But these are people who were persuaded to believe
5 that they had committed crimes that after the interrogation
6 was over they realized they had not committed.

7 Q. In the article in one particular case, you
8 concentrated on a confession that was itself thrown out of
9 the court; isn't that correct?

10 A. The Sawyer case, is that what you're referring to?

11 Q. No, within the same -- I'm sorry.

12 Within that same article you're dealing with a
13 confession that itself had been thrown out of court; isn't
14 that correct?

15 A. I believe that you're referring to --

16 Q. The Sawyer case; correct?

17 A. The Sawyer case.

18 Q. I'm sorry. Wasn't the confession thrown out of
19 court?

20 A. Well, the statement was suppressed --

21 Q. In other words, the jury didn't hear the statement;
22 is that correct?

23 A. That's correct. And then the case was dismissed
24 following that.

25 Q. Well, the case was still pending, though, wasn't it?
26 It wasn't dismissed?

27 A. Oh, it was dismissed. It was never tried. It was
28 dismissed as soon as the appeal of the suppression of the

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1 confession was upheld by the Appellate Court because there
2 was no evidence against Mr. Sawyer except the statement, and
3 the statement had been thrown out.

4 Q. Now you're saying that it was thrown out at some
5 point after the judge in the trial court had made its
6 decision, in other words?

7 A. Well, the judge suppressed it, and then that was
8 appealed. And the case was not tried, was never tried
9 because after the decision to suppress, it was upheld. The
10 prosecution dismissed the charges against Mr. Sawyer, I
11 suppose because there was no evidence against him other than
12 his statement.

13 Q. There is no supporting data in this article that
14 established that Mr. Sawyer was, in fact, innocent; is that
15 fair to say?

16 A. No. There is -- my understanding is that generally
17 one has to prove that someone is guilty. Proving that
18 someone is innocent is infinitely more difficult than proving
19 that someone is guilty.

20 Q. Right. But you don't cite any data that he was, in
21 fact, innocent.

22 Is that fair to say?

23 A. The fact of his confession itself has to be looked at
24 as information on which one can make a judgment or use as

25 evidence as to whether or not the person is likely guilty or
26 likely innocent.

27 If an individual gives a post-admission narrative
28 that is accurate, that includes information that was unknown

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1 to the police, if they show that they have a real knowledge
2 of the circumstances leading up to the crime, the crime
3 itself, they can accurately describe how it happened, they
4 can contribute information known only to the killer, that's
5 powerful evidence that this person, why ever they are giving
6 the confession, is a person who really committed this crime.

7 On the other hand, if we take the same statements and
8 we say this is a person who can't tell us about the crime,
9 even though they may have been broken, even though they are
10 willing to say I did it, but they still can't describe to us
11 why I did it, how I did it, they can't accurately describe
12 the details of the crime, they can't accurately describe the
13 weapon that was used, the way in which the person died, any
14 of that, well, then we have to look at those statements and
15 say, well, that's evidence, as well, and what does that
16 evidence suggest.

17 And the answer is that evidence like that suggests
18 that this person doesn't know anything about this crime, and
19 if -- that it's reasonable to think if they don't know
20 anything about it, they probably didn't do it.

21 Q. Well, that's assuming they were telling the truth
22 during the confession.

23 Isn't that fair to say?

24 A. Well, it takes a certain kind of twisted genius to
25 decide that one should confess to a crime as a way of
26 avoiding prosecution, whereas if you were even sharp enough
27 to even think about it, you might simply say that I decline
28 to talk to you, sir, and just call it quits when there is no

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1 evidence against the person.

2 What kind of a Machiavellian criminal genius or fool
3 do you have to have who will give a confession that is
4 deliberately wrong as a way of avoiding prosecution when they
5 don't have to speak at all?

6 Q. Doctor, your second article dealing with inadvertent
7 hypnosis, that was a coerced internalized confession profile,
8 isn't that fair to say, Paul Ingram?

9 A. Oh, yes.

10 Q. And that doesn't deal with a coerced compliant
11 confession; right?

12 A. That's correct.

13 Q. Net.hij~g of your articles here in the United States
14 deal with a profile of coerced compliant confession; is that
15 fair to say?

16 A. I don't deal with a profile of any kind of a

17 confessor.

18 Q. Now you have an approach to analyzing a person's
19 confession to determine whether, in fact, it could be a false
20 confession; correct? You have an approach?

21 A. Yes.

22 Q. All right. And this is your own theory on how to
23 determine whether, in fact, there are signs that the
24 confession was false; correct?

25 A. No.

26 Q. It's not a theory?

27 A. It's not my own theory.

28 Q. Okay.

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1 A. I mean, this is the way in which everyone approaches
2 this subject.

3 Q. But you have specifically delineated certain things
4 to look at which are your own hypothesis or idea about how an
5 interrogation can become coercive and suggestible and thus
6 lead to a false confession, and that is your own beliefs;
7 correct?

8 A. No. Because at the time I wrote that first paper,
9 very few people in the world had ever actually seen the full
10 transcripts of these kinds of interrogations, Subsequent to
11 my publishing that and subsequent to more and more police
12 agencies recording, other people have seen the same
13 phenomena; and, in fact, that paper and my analysis of it,

14 simply because I managed to get to the transcripts before
15 anybody else, is where this literature begins.

16 Q. Let me ask you about specific interrogation tactics
17 that you look for in the course of an interview.

18 Is it true that you're looking for indications that
19 they're trying to convince the suspect or the witness that
20 they, in fact, have been caught? Is that true?

21 A. Sure, because that's what the research shows on what
22 interrogators do and what it is that leads to a confession
23 from someone who actually committed the crime.

24 Q. Understood.

25 And also you're looking for indications of whether
26 they offered a benefit to the suspect at some point; isn't
27 that correct?

28 A. Sure.

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1 Q. Examples that you've given are suggestions that a
2 suspect will feel better if they gave a confession; correct?

3 A. Yes.

4 Q. You're also looking for suggestions by the
5 interrogators that the suspect will be less severely punished
6 if they confess or more severally punished if they don't?

7 A. Sure. If those things are present, then those would
8 be factors that would contribute to giving the confession.

9 Q. You also look for evidence that a suspect is being
10 encouraged to adopt a specific scenario over another

11 scenario; isn't that true?

12 A. That's true. And in order to know exactly how much
13 that scenario is being -- is being encouraged or being jammed
14 down their throats, we need to have a transcript, a record of
15 what the interrogators did, because that tells us that this,
16 in fact, was going on.

17 Q. You're also looking for statements showing a suspect
18 was, in fact, convinced that they would be convicted;
19 correct?

20 A. Again, usually when there is a transcript, when we
21 have an actual record, what we find is that as this process
22 develops, there are many indications that the person's being
23 moved that way. And then, after, the person will demonstrate
24 why they are doing it, and it will become clear in the record
25 of what happened why the person did it. We can often
26 identify the particular thing, the suggestion and so on, that
27 led the person to make the decision to give the false
28 confession.

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1 Q. Isn't it true you're also looking to see if there are
2 references to particular benefits or threats implicitly
3 suggested?

4 A. The -- certainly one would look for that because it's
5 generally recognized that those kinds of benefits and threats
6 are likely to produce both true and false confessions.

7 Q. As an expert in police interrogation, what effect, if
8 any, does the actual tape recording of the confession have
9 upon the witness if the witness is aware that the tape
10 recording is being confessed -- I'm sorry -- is being played?
11 Any effect at all?

12 A. Well, that's a disputed subject. There are many
13 police officers who will report that it chills the
14 interrogation.

15 I believe there are studies that -- done in England
16 that don't find that.

17 It's been my experience in interviewing people for 20
18 years that the tapes are not -- the fact of a tape recording
19 is not particularly significant. And perhaps to me the most
20 impressive point about that is a lot of the interrogations
21 that I review when there are full tape recordings I end up
22 reviewing them because these are very high profile cases in
23 which there is a great deal of interest and, for that reason,
24 the interrogation is being taped when normally it's not
25 taped. The police officers know it's being taped, and they
26 still issue death threats, threaten more severe punishment,
27 do all manner of things that we know they know they shouldn't
28 be doing because they don't know how to do the interrogation

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1 any other way. And the fact that it's being taped recorded
2 is ignored.

3 MR. MIFSUD: I'll move to strike the last part of his

4 answer as nonresponsive to my question, Your Honor.

5 THE COURT: Well --

6 MR. MIFSUD: I'm sorry. I'm not being clear about my
7 question.

8 Q. What I really want to know is whether there was an
9 effect, in your opinion, on a suspect in a case by the mere
10 fact that a tape recorder is playing.

11 And I appreciate you explaining, but I think you went
12 off on a different tangent.

13 A. Well, I mean it can happen in a particular case.
14 Many police agencies surreptitiously record --

15 THE COURT: That is nonresponsive. He wants to know
16 do you have any opinion on the effect of the subject being
17 interrogated because of the fact it was being tape recorded.

18 THE WITNESS: Sometimes it will have an effect.
19 Sometimes it won't have an effect. Sometimes the effect can
20 be overcome, and sometimes the tape recordings can be done
21 surreptitiously.

22 MR. MIFSUD: Q. Would the tone -- if a jury was to
23 listen to a tape recording and listen specifically for the
24 tone of the voices of the interrogators, would that help them
25 in assessing whether, in fact, there was a condition, a
26 coercive environment during the course of the taped portion
27 of the interview?

28 A. It could. It depends on the particular

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1 interrogation. It depends on what the interrogators are
2 doing. If the interrogators are screaming at the person,
3 that tells you very clearly it's coercive.

4 On the other hand, sometimes people can communicate
5 threats without screaming in a very deliberate, modulated way
6 by emphasizing things.

7 Q. So you can't tell?

8 A. No. You can listen to it, and you can form an
9 impression about what the person controlling their speech
10 wants to accomplish in the way in which they are doing it at
11 the moment. But you have to listen to the particular tape
12 and see whether or not one feels confident in making an
13 inference from that.

14 Q. Now I think you testified yesterday that when a
15 portion of the interview is taped and another portion of the
16 interview is not taped, you try to reconstruct what might
17 have taken place during the portion that was not taped by
18 some reference that may be made on the actual taped portion;
19 is that true?

20 A. No, not reconstruct by that. What I try to do is to
21 try to debrief the person who has been through the
22 interrogation for the purpose of trying to reconstruct what
23 happened during the untaped portion. Sometimes there are
24 references in the taped portion to exchanges that may have
25 been quite important in the untaped portion, so sometimes
26 those references in the taped portions corroborate what the
27 person says about what happened in the untaped portion.

28 Q. When you debrief the person that has given a

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1 confession, those people are people that were charged with
2 crimes most of the time.

3 Isn't that fair to say?

4 A. Yeah, all the time.

5 Q. And you have to rely upon what they are telling you
6 to form your opinion as to what happened off tape.

7 Is that fair to say?

8 A. That's true.

9 Q. In your experience as an expert in police
10 interrogation, can you describe for the jury the typical
11 characteristics of an interrogation room?

12 A. As they are suggested in the interrogation manuals,
13 the room will be relatively small, relatively bare, fairly
14 spartan. The interrogator is advised to position himself
15 between the suspect and the door as opposed to being in the
16 bottom of the room, so to speak. The room is supposed to be
17 a space over which the interrogator has control, not to be a
18 place in which the suspect would feel at home and
19 comfortable.

20 Q. Would a room where the individual inside the room is
21 not locked in, that is that person can open the door and walk
22 out, would that be characteristic of your typical
23 interrogation room?

24 A. Often the doors are unlocked, and sometimes they are
25 locked.

26 Q. So it's not necessarily kept locked; correct?
27 A. No.
28 Q. How about windows? Is that characteristic of an

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1 interrogation room?
2 A. I don't know that anyone knows what's characteristic.
3 I could only tell you what's advised and the similarities
4 between what's advised in the interrogation rooms I've seen
5 or seen photographs of.
6 Q. Well, let me ask you your opinion in terms of what
7 would constitute a coercive environment.
8 Would a room with windows be one factor in indicating
9 coercion or something that might cause the individual to feel
10 that they've been isolated and put in a position of a very
11 coercive type situation?
12 A. Not a very coercive type situation. Lack of windows
13 is just one factor that gives a tone to a room. And so one
14 can easily imagine a room that is decorated to feel
15 comfortable and pleasant and a room that is decorated to feel
16 spartan and cold, and so spartan and cold is the intent in
17 designing interrogation rooms.
18 Q. Would you expect a person who designs an
19 interrogation room to include a soft sofa?
20 A. They might. They are not advised to do that, but

21 they might.

22 Q. How about a telephone to communicate with the outside
23 that the individual inside the room could use, would that be
24 a fact which would lead you to believe that such a room might
25 be a coercive environment?

26 A. That would not -- I mean that would be one of the
27 things that, like a sofa, would not be the kind of
28 recommendation that you see in the manuals describing how to

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1 set these things up.

2 Q. So that would allow the individual to feel some sort
3 of control, wouldn't it, that he can communicate with the
4 outside world?

5 A. Not necessarily. I don't know if the telephone is
6 working in your example.

7 Q. Let's assume that it works.

8 A. But it -- it's certainly something -- having it there
9 is an element that's not -- not normally suggestive in any of
10 the manuals of how to do it.

11 Q. Do the manuals also suggest that the individual in
12 the room not have any access to a clock, that is any visible
13 clock?

14 A. Sometimes the manuals suggest that, like -- I think.

15 Q. You talked about the intent to isolate the
16 individual, to show them that they are not in control;

17 correct?

18 A. Correct.

19 Q. Okay. Would allowing a witness or a suspect the
20 opportunity to decide when they will be interviewed, would
21 that be a factor which would suggest to you that the
22 situation is coercive, less -- not coercive, whatever?

23 A. No. I mean that's not -- that is clearly something
24 that would work against creating the sense of powerlessness
25 that I'm talking about.

26 Q. You talk about the tactic of overstating evidence,
27 that the police try to convince the confessor that the
28 evidence is so overwhelming that they've done the crime that

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1 they should basically just admit it.

2 Isn't that fair to say that's a tactic?

3 A. That's a tactic that is very frequently used.

4 Q. In your opinion as an expert in order to overstate
5 evidence, isn't it common that investigators need to have all
6 the facts before they overstate the facts?

7 A. It would be nice to have some of the facts, but they
8 don't need to because they can just make them up if they
9 choose to. But it's bad strategy because they may make up
10 things that are patently ridiculous.

11 Q. So it would be bad strategy if they didn't have most
12 of the facts?

13 A. It would be bad strategy, and it would be bad

14 practice because not having done an adequate investigation to
15 begin with creates conditions under which the interrogator
16 has to rely on intimidation, pressure, and so on, almost --
17 almost exclusively, and these are precisely the conditions
18 that are likely to produce one kind of false confession.

19 Appropriately done, the interrogators can reveal
20 what's known and perhaps add to it and convince the person
21 without the ability to do that, the interrogators may be
22 thrown back on simply having to pressure and overwhelm the
23 person.

24 Q. It also wouldn't be advisable for a detective to
25 confront an individual in regards to the cause of death if he
26 didn't know the cause of death.

27 Is that fair to say?

28 A. Oh, yeah, that would be very fair to say.

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1 Q. Because it might produce a false confession.

2 A. Correct.

3 Q. Now if, in fact -- in your experience as an expert,
4 if an interrogator has no clue as to a cause of death of an
5 individual, is he less likely to lead a witness or a suspect
6 down the primrose path, so to speak?

7 A. It depends on what strategy of interrogation he
8 chooses to use. If the interrogator, knowing little or

9 nothing about the crime, chooses to use a more subtle
10 strategy of developing rapport with the person and maybe
11 suggesting that perhaps there's a problem here and beginning
12 to draw the person out, then they can learn about what
13 happened from the person if they happen to be talking to the
14 person who committed the crime and if they can manipulate
15 them and get them to talk about it.

16 On the other hand, if the interrogator chooses to
17 simply begin a high-pressure, accusatory interrogation from
18 the get go and is going -- and the strategy depends utterly
19 on intimidation, on relentless pressure, then that's very
20 dangerous because they may be selecting someone who is, in
21 truth, innocent and not able to resist these pressures.

22 Q. In your experience, how likely would a experienced
23 homicide detective use this powerful accusatorial approach if
24 that detective didn't have many facts, didn't know what
25 happened? How common is that?

26 A. It depends on the circumstances, how much pressure
27 there is on the interrogator, what the interrogator feels
28 about the particular case, whether or not evidence -- well,

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1 it depends on a lot of these factors. And people make
2 mistakes. Sometimes an interrogator will take an approach in
3 a case and make a terrible mistake and in another case may
4 take a much better approach. Sometimes when they have

5 evidence they can be very skillful, but not having evidence
6 and having a hunch, they can use this high-risk strategy --

7 Q. So you're saying -- I'm sorry.

8 A. -- perhaps inaccurately.

9 Q. I'm sorry. You're saying that someone would, in
10 fact, use this high-risk strategy without all the facts, but
11 an experienced, skillful homicide detective probably
12 wouldn't.

13 Is that fair to say?

14 A. An experienced, skillful homicide interrogator doing
15 it the right way, choosing to do it the right way, following
16 the advice given in -- even the police interrogation training
17 manuals, strongly suggests -- advocates not doing this kind
18 of accusatory interrogation until the interrogator has
19 sufficient evidence that the interrogator feels pretty
20 certain, based on good reason, not just some gut feeling or
21 not just some prejudice or not just some hostility, that is
22 has good evidence that this person committed the crime. Then
23 and only then is it advised that they shift to an accusatory
24 mode.

25 Prior to that, one seeks information. One seeks to
26 elicit information which may suggest that the person has done
27 something wrong. You try to develop it. That's why the
28 strategy of developing rapport and working it out slowly is

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1 far more advisable rather than going in like a bull in a

2 china shop and just seeing if you can brow beat compliance
3 out of someone.

4 Q. Isn't it fair to say that most police departments
5 would actually train their detectives to take the prudent
6 approach if they don't have all the facts? Is that fair to
7 say?

8 A. I don't know what they would train them to do. I
9 could tell you that in the interrogations that I've reviewed
10 from departments that routinely tape record, they use more
11 skillful approaches.

12 In the interrogations that I've reviewed that are not
13 from departments that don't routinely tape record or where
14 portions are systematically left out, either those that I've
15 seen that happen to be tape recorded this one time or the
16 accounts given by people who were involved in the
17 interrogation where it was not recorded, sometimes either
18 demonstrate or it is alleged that completely inappropriate
19 tactics are used. So I think it makes a big difference
20 whether or not the department routinely tape records because
21 that will guarantee compliance with the law.

22 Q. So since the FBI does not tape record, you have
23 strong suspicions about what really goes on in those
24 interrogations.

25 Is that fair to say?

26 A. I've looked at police interrogations, not FBI
27 interrogations. The FBI may have very different training
28 rules. The FBI may accomplish things in other ways.

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1 You were asking me about -- my experience is
2 principally with police officers, not FBI. FBI may be
3 trained very differently.

4 Q. In California, isn't it true that police are trained
5 that when, in fact, they want to talk to a suspect, a suspect
6 in a crime, and the person has been arrested that they are to
7 read them Constitutional Rights referred to as the Miranda
8 rights? Are you familiar with the fact that they are
9 required to do so?

10 A. Yes.

11 Q. And is it true that police are not required to read
12 these Constitutional Rights to a person they don't suspect of
13 having committed a crime?

14 Is that what your understanding of what police
15 officers are trained to do in the State of California?

16 A. I don't know because I've never studied particularly
17 training techniques in California. I'm not talking about
18 police standards. I'm talking about interrogation tactics.
19 But it's generally my understanding that there is no
20 requirement to use Miranda if you're just interviewing a
21 witness.

22 Q. You testified, I believe it was yesterday, that
23 people that are susceptible to falsely confessing, either
24 through a coerced compliant model or the coerced internalized
25 model, don't realize that they can halt the interview.

26 Is that true? Is that what you believe occurs?

27 A. I think I probably more likely said something about
28 if they don't halt the interview, if they don't stop it.

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1 Whether they realize it or not is not really the question.
2 If you asked them could you invoke your Miranda rights and
3 stop it and you stop the interrogation and you raise that
4 question, I would suspect that most people know they can
5 because they've seen a lot of television shows.

6 That they don't is the important issue, that people
7 do not invoke, do not say, stop, I want to leave that. They
8 are drawn into the interrogation is what's of significance.

9 Q. And they confess because they feel they cannot halt
10 the interview and they want to halt it.

11 Isn't that fair to say?

12 A. Because they feel that the situation has become
13 intolerable, that they were overwhelmed. Because remember
14 that an interrogation like this is not a static thing. It is
15 something as it develops the person feels more and more they
16 are losing control of their life, that the situation is
17 horrible.

18 The interrogator is not likely -- in fact, I've never
19 seen it, but the interrogator is stopping every 15 minutes to
20 say, by the way, I just want to make sure that you want to
21 continue this discussion that we are having. If you would
22 like to call it quits, remember you can do that. It doesn't
23 work that way.

24 It works that the interrogator is pushing, pushing,

25 pushing, and the person is coping with that. The person is
26 responding to that. They don't have a time out and a rest
27 period and a time to regroup and think about it. That
28 this -- this issue of stopping it is a dynamic thing. It's

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1 not a static --

2 Q. In the coerced compliant model that you've talked
3 about extensively, isn't it true that the theory is that the
4 person believes that they are not going to be able to go home
5 until they confess and they simply want to remove themselves
6 from the situation?

7 A. No. Often people after the fact, when asked why did
8 you give the confession, will fix on things and will say,
9 because I just wanted to get this over with and go home. And
10 that's what they will say after the fact.

11 Now I don't believe that it's likely that that's why
12 they did it. I believe it's far more likely that that's the
13 explanation that they offer as to why they complied.

14 Q. Now does Gudjonson say that in a coerced compliant
15 confession the person -- perceiving of some immediate
16 instrumental gain, the person may be aware of the potentially
17 long-term consequences of the confession but the perceived
18 immediate gain -- for example not more pressure by police,
19 being allowed to go hom~~ may be far more powerful in the
20 short-term? Isn't that Gudjonson says?

21 A. Right. He is utilizing the same information that I

22 made reference to. That's what people say.

23 It's a more subtle question to know whether someone
24 who is in the process of committing -- of confessing to a
25 triple murder really thought they would be allowed to go
26 home. I know full well that after it's over and you ask
27 someone why did you do that, they will say, well, at the
28 beginning of the interrogation, he told me once we finished,

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1 I could go home.

2 I don't think that that is what is causing them to
3 confess. I think that's the explanation. That's what they
4 are grabbing onto because they don't know why they did it, if
5 they did it in response to the intense pressure and they felt
6 like they couldn't stand it anymore, they just had to end it,
7 and so they give up.

8 But then later they're asked, well, why did you give
9 up, as if they had made a decision. Now they are liable to
10 say, well, I gave up because of this, this, and this, and
11 when, in fact, they are just exhausted and they couldn't
12 struggle any longer. It's the difference between what was
13 the real cause and what they will account -- use to account
14 for their own conduct.

15 Q. Gudjonson doesn't make that distinction in this
16 article; isn't that true? He doesn't say this is what this
17 tells us. Later on he says what they're perceiving is no

18 more than pressure and I want to go home.

CA~A ~ '1C"

19 Isn't that Gudjonson says?

20 A. He is predicating it on what they say, and I don't
21 dispute that. I accept that. I simply am going one step
22 beyond that and saying that I think there's a more subtle
23 explanation to why they say it. I know full well that they
24 say it, just as well as he knows that they say it.

25 Q. Well, let me ask you this:

26 If a person has had prior police experience, that is
27 has been interrogated in the past by police, and in the past
28 when that person has been interrogated they have denied a

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1 crime, absolutely denied the crime, and as a result of
2 denying the crime the person is set free, able to go home,
3 would you expect a person who's had that kind of past
4 experience with interrogation to be as susceptible in a new
5 interrogation as a person who hasn't had prior interrogation
6 experience?

7 A. It would depend on what the prior interrogation was
8 like and what the current interrogation was like.

9 If someone is being interrogated about something,
10 they are being questioned about it and they say, no, I didn't
11 do it, and that's the end of it, that doesn't mean that they
12 have any reason to expect what will happen in a
13 high-pressure, accusatory interrogation. Not all interviews

14 are high-pressure interrogations.

15 If you haven't experienced one of those and you
16 haven't seen them, it's very difficult to predict how each of
17 us would react. It's also very difficult to fully appreciate
18 the intensity of the situation.

19 Q. Would a 50-minute interrogation where the individual
20 is being accused of child abuse, where the individual has
21 been read his Miranda rights, where the individual is told
22 that they are not telling the truth, at least on one
23 occasion, would that be an interrogation that might be
24 pressure packed to some degree?

25 A. From what you've told me, it's completely open how
26 intense that was, how mild that was. I could take everything
27 that you just described and put it in a very mild, very
28 civilized, very unpressured interview, or I could fold that

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1 into the most aggressive, accusatory interrogation.

2 Q. What about the fact that an individual has denied in
3 the past a crime that he's been accused of and the person
4 then knows that he goes home as a result of denying? Does
5 that impact that same person's perceptions of what are taking
6 place during a subsequent interrogation? In other words, if
7 I deny it again, I could go home. Do you think that's
8 something that might occur?

9 A. Well, if you can guarantee to me that the intensity
10 of the interrogation was the same under both circumstances,

11 then I would say that the chances are that having said no the
12 first time is like -- and believing that you didn't do the
13 crime is likely to lead you to say no the second time,
14 believing you didn't do it.

15 But if the first time you said no and everyone said,
16 okay, we believe that, are you sure you didn't do anything,
17 no, I didn't do anything, all right, you can go home now does
18 not prepare you for the kind of in-your-face, directly
19 accusatory interrogation when someone simply decides that is
20 the way they are going to get a confession. They are utterly
21 different.

22 Q. Isn't it fair to say that the use of leading
23 questions is the most effective way to get somebody to admit
24 something they didn't do?

25 A. Usually they will be leading and suggestive as part
26 of an interrogation unless the person's coming in and wanting
27 to confess to the crime.

28 Q. If the questions were open ended, would that suggest

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1 a less coercive environment, a -- less of a likelihood a
2 person might falsely confess?

3 A. Yes.

4 Q. In your experience in reviewing hundreds --
5 Is it hundreds of tapes and transcripts?

6 A. No. I've reviewed well, I know of 60 some odd,

7 maybe as much as 70 now with things that I'm currently
8 working on, plus many others as part of the research. I
9 don't know whether hundreds is appropriate, but...

10 Q. Would you expect a person lower in intellectual level
11 who is suggestible, who is compliant, who has very poor
12 memory to be able to memorize a detailed, scripted version of
13 something that didn't happen, be able to memorize and recount
14 that version within 15 to 20 minutes?

15 A. It depends on how simple it is and how many
16 promptings there has been and how readily someone adopts it.
17 Just because someone is of lower intelligence than average
18 does not mean that they're completely incapable of doing
19 anything human.

20 Q. Wouldn't you expect such an individual who has been
21 scripted, who has been told what to say -- wouldn't you
22 expect the questions to be leading questions and the
23 individual to be responding yes, yes, no, yes, in essence?

24 A. Not necessarily. It depends on how cooperative the
25 person has decided to be, whether they're willing to fill in
26 stuff, whether they -- it might -- for example, exactly that
27 might follow from being totally intimidated and wanting to
28 please the interrogator, so now when they're in the phase of

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1801

1 telling the story, the person may offer a lot more stuff
2 because they're scared of the interrogator.

3 Q. So you believe that the person might make up facts*

4 themselves; correct?

5 A. Could happen. Confabulate details around an accepted
6 theme would not be surprising.

7 Q. Is that common in your experience?

8 A. Oh, yes.

9 Q. Threats and promises obviously during interrogation
10 suggest a coercive environment; correct?

11 A. Yes.

12 Q. The discussion of punishment also would suggest a
13 coercive environment; correct?

14 A. Yes.

15 Q. Would you expect a skillful, experienced homicide
16 detective to discuss punishment if he didn't know what had
17 happened in a case at all, whether there was even a death?

18 A. Oh, sure. Well, I mean, presumably, there's got to
19 be some kind of a crime before there's an interrogation going
20 on, so when you say he doesn't know anything about the case
21 at all, I can't understand your question.

22 Q. But if the interrogator does not know the particular
23 circumstances, doesn't know whether this crime could have
24 been an accident or could have been a premeditated murder,
25 the interrogator is very likely to use threat of the most
26 severe punishment to elicit a story that makes the crime seem
27 less severe if that detective believes that some criminal
28 agency had occurred; correct?

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1 A. Why is the detective doing an accusatory
2 interrogation of someone if they don't believe that?

3 I don't understand your question.

4 Q. I'm not sure that I included accusatory in my
5 hypothetical.

6 A skillful interrogator -- homicide detective -- that
7 is interviewing a witness who didn't know whether there's a
8 criminal agency involved, would you expect him to start
9 talking about punishment?

10 A. No, you would not expect him to because if he's
11 interviewing, he is not accusing.

12 Q. And he doesn't know what happened in the case;
13 correct?

14 A. If he's interviewing, he's interviewing to gain
15 information. You would expect someone to do the interview to
16 gain the information, and then if they decide that this
17 person is a very likely suspect, then to set about doing an
18 interrogation.

19 Q. You talked a lot about the overstatement off evidence
20 as a tactic that is used by police; correct?

21 A. I've talked before it, yes.

22 Q. And do you have any objection to the use of that
23 tactic?

24 A. No.

25 Q. It's a necessary tactic in law enforcement; correct?

26 A. It's a very effective tactic if it is embedded in an
27 otherwise -- otherwise appropriate investigation and can be
28 extremely valuable when used correctly.

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1803

1 Q. Arid it's effective and it's necessary, isn't it true,
2 because most people that have committed a crime in your
3 experience are not eager to admit they committed a crime;
4 correct?

5 A. Correct.

6 Q. Arid, in fact, in your experience isn't it true that
7 most of these people that have committed crimes are only
8 going to admit what they perceive they have to admit? Isn't
9 that the typical situation?

10 A. That happens.

11 Q. It's not the typical situation?

12 A. Sometimes when people tell the story, they tell the
13 entire story. Sometimes it's attractive -- if they're
14 offered a scenario of the crime that minimizes the severity
15 of the crime, that's called "lower the threshold." People
16 will respond to that if they know they are guilty. It
17 happens all the time.

18 Q. Now you have come to the conclusion in cases that the
19 confession was true in your history; correct?

20 A. Yes. Or I've come to the conclusion that the
21 statement was not involuntary and did not appear to be
22 unreliable and that, privately, I've also come to the
23 conclusion that they are true.

24 Q. Isn't it true that -- in many of those statements
25 that you've reviewed, either audio taped or transcript, isn't
26 it true that the people start out lying, people that you have

27 decided were, in fact, guilty, that they start out lying,
28 giving a false version of what happened? Isn't that very

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1 common?

2 A. That's common.

3 Q. And in many of these instances, they sort of spin a
4 web of lies that doesn't make a heck of a lot of sense to an
5 intelligent person; is that true?

6 A. Correct.

7 Q. And often when that happens --

8 A. Let me add to that.

9 Yes, that's true that that occurs, but that is a
10 joint effort that occurs at the direction of the
11 interrogator. It's not as if a person spins a web of lies
12 and the interrogator just happens to hear it. This happens
13 because the interrogator is suggesting and a person is
14 accepting. The interrogator is formulating, and the person
15 is working with the interrogator at this point, so it's a
16 joint effort, not just something that the suspect spins out.

17 Q. Well, haven't you ever reviewed a transcript where on
18 tape the person is asked what happened and he or she gives a
19 ridiculous bizarre version of what happened that makes no
20 sense without any kind of prompting? Haven't you ever seen
21 that?

22 A. Yeah. It usually starts out "I was someplace else
23 when it happened," and it winds up with an admission to

24 having committed the crime with corroboration. I've seen
25 plenty of those. That's an example of skillful
26 interrogation.

27 Q. If an interrogator doesn't have any evidence to
28 confront the individual in terms of the false version, he is

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1 not going to be very effective during the course of the
2 interview most of the time.

3 Is that fair to say?

4 A. The only tool open to the interrogator at that point
5 is pressure and intensity. That's why it's not a good idea
6 to do that.

7 Q. Has it been your experience that in the
8 interrogations that you're familiar with police will obtain
9 information from a suspect through a confession on one day
10 and then learn days later or even weeks later that
11 information was not accurate and that the investigator will
12 then confront the suspect again and confront him with the new
13 evidence that that investigator has uncovered? Do you find
14 that to be something that occurs commonly?

15 A. No.

16 Q. No?

17 A. No. Because usually days later the suspect --
18 there's usually no second shot at the suspect. And
19 interrogators know that because they know that as soon as the

20 suspect gets an attorney, the attorney will advise the person
21 not to speak to the police any longer. So usually they have
22 to get it all done in one session.

23 Now if it happens that somehow the person has not
24 gotten an attorney, then they can get a second shot at them,
25 but that's very rare in my experience.

26 Q. How about a situation where the following day, before
27 the individual has gotten an attorney, that he is or she is
28 confronted with new evidence? Have you ever seen that?

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1 A. I've seen it.

2 Q. Or confronted with new accusations, in any case.

3 You say that an innocent person may falsely confess
4 to murder if she is convinced she would be convicted;
5 correct?

6 A. Yes, that's one of the things that can precipitate
7 it.

8 Q. And so will a guilty person; correct?

9 A. Yes, will truly confess.

10 Q. Are you aware of any other reasons why guilty people
11 confess to crimes they've committed other than having been
12 confronted with the truth?

13 A. Sometimes they actually feel remorse. Sometimes I've
14 seen interrogations in which someone has literally come into
15 a police station and said I killed somebody and then the
16 statement was taken.

17 Q. There's a feeling of relief once one confesses to
18 what one's done.

19 Is that your experience?

20 A. Well, I mean that's certainly suggested often as part
21 of interrogations. I don't know if there's a feeling of
22 relief. Sometimes people who have done something wrong feel
23 genuine remorse and recognize that the right thing to do is
24 to report what they did and do what is appropriate.

25 Q. I think you testified yesterday -- almost done
26 here -- that if overly threatening techniques are used
27 creating a condition where the person is convinced he'll be
28 convicted and the interrogator offers an inducement of less

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1 severe punishment, in that situation you would say it's
2 difficult to determine if the confession was true or false;
3 is that correct?

4 A. That would be -- yeah, I will agree with that.

5 Q. And you've also testified, both yesterday and today,
6 that if a suspect gives a descriptive, post-narrative version
7 of what happened, that it would lead you to believe in many
8 situations that the confession was, in fact, true; correct?

9 A. If they give a description that is verifiable. If
10 they corroborate their own confession, if they tell you
11 something that you didn't know or that nobody knew except the
12 person who committed the crime, or they're at least able to

13 describe the facts of the crime accurately, then that would
14 suggest that they know about it.

15 If, on the other hand, they make errors, especially
16 if those are forced errors or because the interrogator is
17 pressing for something, as in the Sawyer case, then that has
18 to be seen as evidence that this is all the product of
19 influence because they haven't shown that they have guilty
20 knowledge of the crime.

21 Errors are extremely important in evaluating the
22 reliability of a statement that may have been coerced.

23 If we know a statement was not coerced because we
24 have a full record of it, then at least one part of this
25 problem is taken care of. But if we have a situation in
26 which we don't know if the statement was coerced and the
27 post-admission narrative is full of errors and is not full of
28 correct accounts, and correct accounts that are not arguably

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1 suggested by the interrogators, it's full of errors, under
2 the circumstances there is a real problem. We can't tell
3 that the person is telling the truth, and we have to
4 seriously consider that they have been made to falsely
5 confess.

6 Q. Assuming it's not full of errors, assuming that it's
7 specific in detail, assuming that it explains why the person
8 did it, a rational -- assuming that the person also explains
9 why they thought they would get away with the crime, assuming

10 that the individual articulates that the person understood
11 that the person had options other than murder, if the person
12 articulates that the person understood that what he or she
13 was doing was murder, wouldn't those factors strongly suggest
14 that the confession is reliable?

15 A. Not necessarily, because each and every one of those
16 points could have been easily worked into a totally coerced
17 statement.

18 And, for example, in the interrogations I've looked
19 at where the person finally gives a story -- let's say it's
20 an event that -- something they've been thinking about doing
21 for a while. A skilled interrogator might say, well, when
22 did you first think about this?

23 And then the person might say, well, it was about two
24 weeks ago.

25 And what did you think about it at the time?

26 And then they will describe what they thought about
27 it.

28 And what were you feeling, and what did you decide to

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1809

1 do then? Did you make any attempts to do this before?

2 And what comes out of this is a story of someone
3 relating something that's been on their mind for a long time,
4 that they've considered doing, that they planned to do, that
5 we know has been of great significance to them.

6 Then one gets a -- a voluntary or at least responsive
7 to open-ended questions about the particular event, and one
8 hears detail after detail. We get the kind of description
9 that each and every one of us could give about some very
10 significant event that had recently happened, and we can
11 answer anything about it because it all hangs together
12 because the person is talking about something in their
13 experience.

14 When it is a coerced statement, that's going to be
15 lacking. It's going to be this: It's just going to be, yes,
16 I did this, yes, I did that.

17 Tell me why you did this?

18 Because, and then give some very short reason.

19 There is not a well-developed narrative in there that
20 shows a richness of the story that suggests that it's real
21 and there's no accuracy. That's what I would look at.

22 Q. I guess wouldn't that have to do with the person's
23 ability to articulate all the things that you've just laid
24 out -- in other words, specify detail rich with explanation?
25 Wouldn't it have something to do with the individual's
26 ability to articulate those things?

27 A. Depends on how severely or how capable or incapable
28 the person is, that if someone is able --

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1810

1 For example, if I were interviewing someone on that
2 point two days after the event of interest, I might ask them
3 to tell me about the other activities that occurred two days
4 earlier or three days or four days earlier that are not the
5 event at issue. And they might be able to describe, well, I
6 went shopping, and I explained this, and I needed to find
7 that, and I did that, and I called my friend and we did this,
8 we made these arrangements, and we went here and there, and
9 we did all of these things.

10 Now that's the kind of account of one's life that
11 most of us can give, even people who are handicapped. And if
12 that kind of description is there but they can't give a
13 description of equal detail about a momentous event and
14 there's some question as to how the statement was elicited,
15 I'd be very worried.

16 Q. Have you ever had a tape where you've listened to the
17 tape and the subject is correcting the interrogator as to
18 certain facts that took place?

19 A. Offhand -- I mean I can't, without reviewing all the
20 tapes I've ever listened to, really answer that question. I
21 could -- sorry.

22 Q. Would that seem to suggest that the subject might be
23 truthfully confessing to things that he or she did?

24 A. Depends on whether they're correcting them and
25 leading them to something that is accurate and verifiable or
26 whether the person having adopted the story is now trying to
27 prove to them that, see, I've learned the story and I'm going
28 to say exactly what we agreed I would say before you turned

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1811

1 the tape recorder on. Corroboration still is the crucial
2 factor.

3 MR. MIFSUD: Thank you, Doctor.

4 THE COURT: Mr. Greenberg.

5 REDIRECT EXAMINATION

6 MR. GREENBERG: Q. Doctor, a few things briefly.

7 I may be more than brief, but the first few questions
8 will be brief.

9 A. I'll try to be briefer.

10 Q. You testified on cross-examination that you have
11 testified as an expert in recovered memory cases five times,
12 correct?

13 A. Yes.

14 Q. And I believe you said that in each occasion you had
15 testified for the defense; correct?

16 A. That's correct.

17 Q. Were these civil cases or criminal cases in which you
18 testified on recovered memory?

19 A. I think they would mostly be civil cases.

20 Q. Okay. So you made reference in your
21 cross-examination testimony to the McMartin case.

22 Could you briefly tell the jury what the McMartin
23 case involved?

24 A. The McMartin case was the most famous of the day care
25 cases, the case in which hundreds or thousands of allegations
26 of sexual abuse were brought against the staff of a day care.

27 This was a case brought in Los Angeles. I believe it would

28 up being if not the longest, I suspect -- I believe the most

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1812

1 expensive criminal trial in American history in which all the
2 defendants were acquitted the first time and then the
3 retrial, acquitted again.

4 And that was a case that depended on how certain
5 statements were elicited from preschool children, whether the
6 interviewing had been coercive and demanding or whether it
7 had been properly done.

B Q. Next, in the cases -- in the 67 some cases that
9 you've worked on since 1991, you indicated, I think, that
10 over -- in over half of them you determined that the
11 confessions were voluntary and reliable; correct?

12 A. Or that I was unable to tell.

13 Q. Or that you were unable to tell.

14 What percentage of the remaining cases that you
15 worked on were coerced internalized confessions, or did you
16 find that the confessions were coerced internalized
17 confessions?

18 A. Without thumbing through to get the page, I think
19 it's about one-third of the cases -- of the remaining, and
20 about two-thirds would have been coerced compliant. But I
21 could get the exact numbers.

22 Q. So -- I don't think -- so about one-third of the 50
23 percent of the cases, or a little bit less than 50 percent
24 the cases, that you determined to be coerced were coerced, or

25 one-third of half. In other words, about one-sixth of the
26 cases were coerced internalized and two-sixths or
27 approximately two-sixths or one-third were coerced compliant.
28 Correct?

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1813

1 A. Yes.
2 Q. Okay. Now referring briefly to the Bedau article
3 that you testified about in direct and cross-examination, did
4 that article cover only potential capital cases?
5 A. Yes.
6 Q. Meaning cases in which capital punishment or the
7 death penalty were a possible outcome?
8 A. That's correct.
9 Q. Did it cover any non-capital cases at all?
10 A. No.
11 Q. Did it discuss the problem of wrongful conviction or
12 coerced confessions in any cases which weren't capital cases?
13 A. No. It was focused on capital cases.
14 Q. Now in approximately -- well, the beginning of this
15 year, were you retained by me to work -- to do some work in
16 the Traci Foscett case?
17 A. Yes.
18 Q. And in connection with your hiring, did I send you
19 certain materials?
20 A. Yes.

21 Q. And I would like marked for identification as the
22 defendant's next in order a letter --

23 THE COURT: That's Defendant's F.

24 No, I beg your pardon. Defendant's G.

25 (Whereupon, A LETTER was marked
26 as Defendant's Exhibit G for
27 identification.)

28 THE COURT: That's the letter to -- to the doctor?

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1814

1 MR. GREENBERG: Q. Do you have --

2 Let me mark this for identification if I could.

3 And that's G?

4 showing you Defendant's G for identification, Doctor,
5 would you take a look at that and see if you recognize it?

6 A. It appears to be a letter you sent to me.

7 Q. Okay. Do you have a copy of that letter other than
8 Defendant's Exhibit G?

9 A. I can't seem to find it now, but it's not unusual for
10 me.

11 Q. Okay. And in that -- well, together with that
12 letter, did I send you certain other materials?

13 A. Yes.

14 Q. And together with that letter, did I send you a
15 police report by an Officer Harris? Do you remember?

16 A. Not without looking at the letter.

17 Q. Would reviewing the letter refresh your recollection?

18 A. It certainly would.
19 Q. Take a look at the last page, please.
20 A. (Complying.)
21 Yes.
22 Q. Does that refresh your recollection about whether I
23 sent you a police report regarding Traci Foskett's statement
24 to Officer Harris?
25 A. Yes.
26 Q. And did I also include the statement that she made, a
27 signed statement that she made to Officer Harris?
28 A. Yes.

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1815

1 Q. As well did I send you a copy of a transcript of
2 testimony regarding Traci -- of testimony by Sergeant Wallace
3 regarding statements that Traci Foskett had made to him on
4 January 11th, 1992, and January 12th, 1992?
5 A. Yes.
6 Q. And did I also send you notes that had been prepared
7 by Sergeant Wallace in connection with those two
8 interrogations?
9 A. Yes.
10 Q. And did I also send you notes by a Sergeant Voznik in
11 connection with those two interrogations?
12 A. I don't have them here.
13 Q. Would it --

14 A. Oh, Voznik, yes, yes.
15 Q. Okay. And did I also send you a copy of Sergeant
16 Wallace's quote, log, end quote, of his investigation?
17 A. Yes.
18 Q. And did I also send you a separate time log of Traci
19 Foskett's time in the Oakland Police Department interview
20 room on January 11th, of 1992?
21 A. Yes.
22 Q. And did I send you transcripts of Traci Foskett's
23 statements to the police on January 11th and January 12th,
24 1992?
25 A. Yes.
26 Q. And did I send you the tapes of those two particular
27 statements?
28 A. Yes.

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1816

1 Q. Now in connection with your hiring by me in the
2 Public Defender's office, did you interview Traci Foskett in
3 connection with this case?
4 A. Yes, I did.
5 Q. When did you do that?
6 A. I knew you were going to ask that.
7 March 23rd, 1994.
8 Q. And did you tape record that interview?
9 A. Yes, I did.
10 Q. How long did the interview last?

11 A. Seven hours.

12 Q. Now for what purpose did I retain you in this case?

13 A. To analyze the records of the transcripts of the
14 interrogation of Traci Foskett for the purpose of forming an
15 opinion as to why I thought the statements she made came
16 about.

17 Q. And, by the way, when Traci talked to you on the 23rd
18 of March, did she talk to you about what she had told Officer
19 Harris?

20 A. Yes.

21 Q. In addition, the district attorney asked you on
22 cross-examination whether you had received a copy of a 1989
23 police report, and you said no.

24 You remember that testimony?

25 A. Yes, I do.

26 Q. In connection with this case, did you and I before
27 you interviewed Traci Foskett discuss an incident in which a
28 girl named Rebecca Foskett had been injured?

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1817

1 A. Yes.

2 Q. So you were aware of that?

3 A. Yes, I was.

4 Q. And did Traci Foskett talk to you about Rebecca
5 Foskett?

6 A. Yes.

7 Q. Now after you interviewed Traci Foskett, did you ever
8 review the tapes of that interview?

9 A. Of my interview with her?

10 Q. Yes.

11 Were you provided with transcripts of that interview?

12 A. Yes.

13 Q. And did you also review all the other materials that
14 I sent to you?

15 A. Yes.

16 Q. And as a result of reviewing those materials and
17 reviewing Traci Foskett's taped statement, did you form an
18 opinion about whether or not her statements were reliable?

19 MR. MIFSUD: Objection; irrelevant.

20 THE COURT: Sustained.

21 MR. GREENBERG: Q. Well, I'm -- I believe that
22 Mr. Mifsud has completely opened up this particular area.

23 THE COURT: Wrong. Wrong. You're wrong again,
24 Mr. Greenberg.

25 MR. GREENBERG: Well, it's the first time I've been
26 wrong in this trial.

27 THE COURT: He is not going to give an opinion on
28 whether or not the statement given by Ms. Foskett is reliable

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1818

1 or unreliable. That will be for the jury to decide.

2 MR. GREENBERG: Q. Okay. Now, Doctor, the
3 tape-recorded statements that you have reviewed among the 67

4 instances in which you have been consulted on suspected
5 coerced statements, were those tape-recorded statements
6 complete statements in terms of detail of the crimes being
7 discussed?

8 A. Well, not all the 67 were completely or in some cases
9 even partially recorded.

10 Q. But in the cases -- the statements which were taped,
11 were there any signs in those statements that the confessors
12 were withholding the details or were reluctant to talk?

13 A. By the time it was over or at the beginning?

14 I don't understand your question.

15 Q. By the time it was over? Let me rephrase the
16 question.

17 During these taped statements, was there -- having
18 reviewed any -- all of these taped statements, were there any
19 signs that the tape recording by itself had inhibited in any
20 way the giving of the statements by the confessor?

21 A. I've seen examples in which at a certain point in the
22 interrogation -- even though this was being taped recorded,
23 I've actually seen an example in which a mentally ill young
24 man tells them to turn the tape recording off, the tape
25 recorder off, and then he will tell them the answers to
26 certain questions. So they turn it off, and then they turn
27 it back on, and then they start asking him about what he told
28 them off the tape. He wasn't terribly clever in how he did

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1 that.

2 Q. In other instances of the tape-recorded statements
3 that you've seen, did any of the confessors reveal -- refuse
4 to give information on the tape in any other situation other
5 than the one that you've just indicated?

6 A. No. Some of these were surreptitiously recorded.

7 Q. Now you indicated in cross-examination that at some
8 point you rely on the debriefing of the confessor in aiding
9 you to reach your opinion.

10 A. That's right.

11 Q. Does that mean that you automatically accept what
12 your told by the confessor at the debriefing?

13 A. No. Sometimes I've told them at the end of a
14 debriefing I think they're lying to me.

15 Q. How do you go about evaluating whether or not what
16 the confessor has told you in debriefing is accurate or
17 inaccurate?

18 A. Well, first i'm looking for descriptions of events
19 that I know are likely to take part -- take place in
20 interrogation.

21 And I'm interested in what the person is describing,
22 not so much -- I mean there may be a dispute. For example,
23 I've had cases and circumstances in which someone has said
24 the police did not read Miranda to me ever and the police
25 maintain that they did. And I might believe that the police
26 did and the person is lying to me about that. It's a common
27 thing for people to deny what happened when, in fact, it
28 happened.

□

1820

1 I've even seen cases in which a signed Miranda waiver
2 form was presented, and the person said I never signed that
3 form, and I just don't believe that.

4 It's perfectly possible that people will lie.

5 However, I'm not interested uniquely in particular
6 things like that. What I'm interested in is their account of
7 how the interrogation worked. Because often I've had people
8 describe to me what I could identify as intense accusatory
9 interrogations or interrogations using various tactics that
10 it's very unlikely someone is inventing as we go down this
11 road. They must have experienced this because otherwise this
12 is a person capable of inventing everything about modern
13 police interrogation from whole cloth. They would be a
14 genius reinventing the wheel. And so the fact that they're
15 describing something that I could see is an interrogation
16 tells me that this is something that they probably
17 experienced.

18 Then as they tell me about their reactions to it,
19 they'll often be telling me about things that I don't think
20 that they understand. And I'm not interested in their
21 interpretations. I'm interested in their telling me, and he
22 said this, and he did that, and sometimes them recounting
23 things that it's very clear that they don't understand. They
24 just don't have idea why this happened, but they are telling
25 me about it, and I recognize it to be a very commonly used
26 technique.

27 I will also use this material in relation to what the
28 police officers have reported about what happened in the

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1821

1 interrogation, their account of what the person confessed,
2 and try to get an understanding about what I think is the
3 best description of what happened.

4 Because it's a terribly difficult job to get the
5 facts together in an interrogation that has not been
6 recorded. That's why I try to do this with great care and
7 recognize that my principal interest is to make sure that
8 nobody is fooling me, whether it's the person whose attorney
9 has asked me to interview them or the interrogator who is
10 saying the interrogation happened in a certain way. I'm
11 interested in trying to figure out what happened for my
12 purposes to do the proper job.

13 Q. Do you use the same care in evaluating what the
14 police say happened during the interrogation that you use in
15 evaluating the debriefing of the confessor?

16 A. Sure, because I'm not interested in helping anybody
17 under these circumstance. I'm interested in coming out with
18 a conclusion that makes the most sense given everything
19 that's available to me and given what I'm capable of doing
20 and understanding something that's difficult to understand.

21 Q. Is it in your interest to reach an erroneous
22 conclusion about whether or not a statement is coerced?

23 A. Obviously not.

24 Q. Is it in your interest to reach an erroneous
25 conclusion about whether or not a statement is reliable?

26 A. No, of course not.

27 Q. Is it in your interest to reach an erroneous
28 conclusion about whether or not a statement is true or false?

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1822

1 A. No.

2 MR. GREENBERG: I have nothing further.

3 THE COURT: Any recross?

4 MR. MIFSUD: Yeah, just a few questions, and I mean a
5 few.

6 RE CROSS -EX7~MINATI ON

7 MR. MIFSUD: Q. You said that you did receive,
8 after your memory was refreshed, the statement by the
9 defendant taken by Officer Harris; correct?

10 A. According to the cover letter, I received it.

11 Q. Did you read it?

12 A. If I did, I would have read it when I got it. And I
13 can't seem to find it in the file. But, then again, I have
14 hundreds of thousands of sheets of paper in my office, and
15 things unfortunately get misplaced.

16 Q. You don't remember whether you read that; is that
17 correct?

18 A. No. But I'm aware of what happened in it, which I
19 guess I acquired someplace.

20 Q. All right. Let me ask you this. You never did

21 receive Captain Norris's report in which he indicates a
22 statement from the defendant; is that correct?

23 THE COURT: Captain Norris is the fire chief.

24 MR. MIFSUD: Q. Fire department. I'm sorry.

25 A. I don't believe so.

26 Q. And you never did receive a report of Carletta
27 Garrett from the Oakland Police Department in which a quote
28 is attributed to the defendant; isn't that correct?

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1823

1 A. Unless it's mixed in with this collection of police
2 reports and not separately identified. I don't recall a
3 particular statement, and I don't know -- I don't recall
4 anything listed by that person.

5 Q. Doctor, you are receiving \$150 an hour for your
6 service in this case; is that correct?

7 A. That's correct.

8 Q. And how many billable hours have you billed up to
9 this point?

10 A. 12, 13, 14, perhaps, maybe 15 or more. Something
11 like that.

12 Q. Maybe 15 or more?

13 A. Yes.

14 Q. Do you have your billing records with you?

15 A. I don't think so. I think -- I think I billed about
16 \$2200 or whatever that would be divided by 150. I think

17 that's my best recollection.

18 Q. Does that include your testimony in court the last
19 two days?

20 A. No.

21 Q. And how much are you receiving for your testimony in
22 the last two days?

23 A. My rate would be -- time spent in court is \$3,000 a
24 day.

25 Q. Over two days; correct?

26 A. I wasn't here for two full days. I know it feels
27 that way for everyone, but I wasn't.

28 Q. Well, how about \$4500, does that sound about right

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1824

1 for your two days of testimony?

2 A. That would be nice, but I don't think it adds up to
3 that. If you would like to make up the difference, I'd be
4 more than happy to accept it.

5 Q. I'd rather not. No offense.

6 A. Well, then why don't we get an estimate that's sort
7 of like about the half way --

8 Q. How about 3,000 for yesterday? Is that fair to say
9 that you received \$3,000 for testifying yesterday, or is that
10 not fair?

11 A. I was here yesterday, I think, from 11:00 in the
12 morning until 12:00 and 1:30 to 2:30, so that's about two
13 hours.

14 Q. And how many hours have you been here today?

15 A. About five. I don't recall what time we got started
16 this morning.

17 THE COURT: Well, I'll take judicial notice that the
18 doctor was here at 9:30.

19 MR. MIFSUD: Q. And now it's 3:10, approximately?

20 A. Do I get to bill for time I spent waiting?

21 I didn't know that.

22 THE COURT: Eight after 3:00 according to my watch
23 here.

24 MR. MIFSUD: Q. So, Doctor, this is almost a full
25 day; correct?

26 A. Well, the way I had been planning to bill for it was
27 the time I actually sort of spent on the witness stand, but I
28 think that's a great idea.

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1825

1 Q. So it's a minimum \$3,000 additional for your
2 testimony; correct?

3 A. I think it will probably be equivalent to a full day
4 or less.

5 Q. You did receive a letter from Mr. Greenberg dated
6 February 17th, 1994; correct?

7 A. Probably.

8 Q. Do you have it with you? Do you recognize that as
9 the letter you received?

10 A. I recognize it as the letter I've seen before and
11 probably received.

12 Q. You read it, didn't you, when you received it?

13 A. Yes.

14 Q. Isn't it true the first sentence says: "I am glad
15 that you are willing to work on Traci's case. I am hopeful
16 that with your help we will be able to convince a jury that
17 she did not kill her two children"?

18 A. Those are Mr. Greenberg's words.

19 MR. MIFSUD: Nothing further.

20 THE COURT: Any redirect?

21 MR. GREENBERG: No.

22 THE COURT: Doctor Of she, thank you very much. We
23 appreciate your time.

24 Ladies and Gentlemen, we've got one more witness
25 sitting out there. We'll take the 15-minute recess, and then
26 we have the next witness, who is Dr. Cooper, and we'll hear
27 from him in about 15 minutes.

28 (Recess.)

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