

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,) Criminal Docket
) No. 94-20036
Plaintiff,

vs.) Peoria, Illinois
) August 11, 1997
LARRY D. HALL,) 9:35 A.M.

Defendant.

HEARING ON PENDING MOTIONS -- VOLUME 1 OF 3

BEFORE THE HONORABLE JOE B. McDADE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Peoria, Illinois 61602

Proceedings recorded by mechanical stenography, transcript
produced by computer.

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1 THE COURT: I see in my absence counsel's been very

2 busy filing motions. I won't go away again. There appear to
3 be something like eight additional motions which have been
4 filed which I'm not prepared to take up today, and I will try
5 to look at them tonight and hopefully be in a position to rule
6 on them tomorrow. I'm not so sure the government has had a
7 chance to respond to any of them, have you?

8 MR. BEAUMONT: We responded to six of them. The
9 last two that were filed last week I have not responded yet.

10 THE COURT: When do you anticipate being able to
11 have a response on file of the --

12 MR. BEAUMONT: I could have a response on file by
13 tomorrow.

14 THE COURT: You think so?

15 MR. BEAUMONT: Yes, sir.

16 THE COURT: Then it may be I may have to wait until
17 Wednesday morning or sometime -- well, Wednesday morning
18 before I can decide the case, because I do need to have the
19 government's response. So maybe I'll point toward deciding
20 those motions Wednesday.

21 All right. This is a -- oh, the record will
22 show the presence of the defendant and all defense counsel and
23 also government counsel.

24 And this is a continuation of the evidentiary
25 hearing in connection with the admissibility of various expert

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1 testimony proffered by the defendant. And it's my
2 understanding that the -- Dr. Ofshe is not available today to
3 complete his testimony but he will be tomorrow. In the
4 meantime, the Court will hear other witnesses, either by the
5 defendant or the government, in connection with this issue.
6 As I understand it the defendant has no other witnesses, but
7 the government does have a witness available today.

6 MR. BEAUMONT: Your Honor, I have to apologize to
9 the Court. We met with our expert till approximately
10 11 o'clock last night. I finally got into town. But prior to
11 that we had talked over several hours, and we have decided
12 that we're not going to call him at this point. One of the
13 main reasons is we're not sure exactly what Dr. Ofshe's going
14 to testify to, and the relevance portion in his testimony in
15 essence would deal with the issue of relevance of Dr. Ofshe's
16 testimony. So after meeting with him and discussing what it
17 is he can or cannot testify to, we decided that we're not
18 going to call him at this point. I couldn't notice the Court,
19 obviously, because I just got into town last night. We met
20 with him yesterday evening, and I just got here late last
21 night.

22 I did think perhaps we can deal with the
23 motions, but I understand the Court hasn't even seen them, so
24 of course that's not going to be possible. So I will get my
25 response to the last two motions on file, maybe I can do it

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1 today if that will help the Court, and then we can deal then
2 whenever you want. The bottom line, we do not have testimony
3 to present today.

4 THE COURT: All right. Docket entry 171 is a motion
5 by defendant to preclude the government from referring to
6 defendant's alleged acts as stalking. That has been on file
7 since June 9. I suspect in order to use this time today that
8 I might can look at that one.

9 Docket 174 is a -- that just must be the
10 government response is that all that is.

11 THE CLERK: 174 is a motion for leave to reply.

12 THE COURT: To?

13 THE CLERK: To that same motion in limine regarding
14 the stalking.

15 THE COURT: Filed by whom?

16 THE CLERK: By the defendant.

17 THE COURT: The defendant wishes to reply to. What
18 is that motion? Apparently 171 is the defendant's motion to
19 preclude the government from referring to defendant's alleged
20 acts of stalking, and 174 is defendant's motion to reply to
21 what?

22 THE CLERK: Government's response.

23 THE COURT: Oh, I see.

24 MR. MOTE: Your Honor, I should let the Court know
25 at this point that although Mr. Beaumont has mentioned they

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1 responded to six of the motions, I filed and signed a number
2 of them, at least four or five, and I was not sent copies of
3 any of the government's responses. I understand from
4 Mr. Beaumont they sent responses to Peoria. I don't know if
5 Mr. DeArmond was sent responses, but I filed the motions and
6 was not aware that they had been responded to. I was given a
7 copy this morning of the response to the motion regarding the
8 hearsay type evidence and have had a chance to go over that,
9 but I haven't seen the responses to any of the other motions.

10 THE COURT: And then docket entry 175 is defendant's
11 motion with respect to hearsay and other evidence implicating
12 other suspects which the government has responded to. That's
13 not down here though, the government's response.

14 MR. BEAUMONT: We filed it Thursday, Judge, but I
15 don't know, we filed it in Urbana. I don't know that it made
16 it here. I have a copy if the Court wants.

17 THE COURT: Well, I can't decide that now because I
18 haven't read it. Then there's entry 178, defendant's order
19 for approval of fund for services, for service and process.
20 guess that's something we can take up. And 179, order for
21 approval of payment for expert witness. And entry 184, a
22 motion to exclude testimony concerning type of engine. Has
23 the government responded to that?

24 MR. BEAUMONT: No, that's one of the last two
25 motions. We have not responded to that motion nor the motion

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1 about precluding the government referring to the fact that the
2 hands were severed.

3 THE COURT: Okay. And entry 187, a motion to redact
4 the written statement. What's that all about, defense
5 counsel?

6 MR. MOTE: Your Honor, that motion -- well, the
7 Seventh Circuit's opinion says that the evidence regarding the
8 part of the confession to three other murders should not have
9 come in because it wasn't corroborated and was unduly
10 prejudicial. I think it's automatic from that that the
11 testimony that came into the first trial, particularly about
12 Tricia Reitler, wouldn't come in, but reviewing things I was
13 also reminded that in the confession itself the written
14 statement that the government put in before the last, at least
15 the last full portion of the written statement, is completely
16 about these three other murders that the court -- Seventh
17 Circuit said should not be part of the trial. There is also a
18 statement earlier in the written statement, a sentence earlier
19 in the written statement where it makes reference to these
20 murders, and I'm not sure how the Court -- how that should be
21 addressed to comport with the Seventh Circuit's indication
22 that this should just be about the Jessica Roach case.

23 THE COURT: All right. Let's take up this motion
24 about stalking, and No. 171. All right. Defense counsel.

25 MR. MOTE: If I could just summarize the motion,

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1 Your Honor. During the first trial, the evidence came in, of

2 course, about the numerous instances where Mr. Hall drove past
3 other girls, incidents all but one of which occurred after the
4 Jessica Roach abduction, and spoke to them or yelled
5 something, usually something they could not determine, which
6 led them to run from the van or take notice of the van and
7 write down license plates. I believe there were a couple of
8 occasions where the reports indicate he asked the girls if
9 they would want a ride.

10 In our motion we discuss both the Indiana
11 stalking statute, which is where most of these incidents
12 occur, and the Illinois stalking statute. And in both
13 statutes what they are talking about as stalking and what we
14 as lawyers understand to be stalking is harassment on repeated
15 occasions. And it is simply our contention that the acts
16 alleged, even if completely true, don't constitute stalking.
17 And you know what they consist of on most occasions is driving
18 by, saying something to a girl, making her uncomfortable, in
19 some occasions driving past her several times, but we're
20 always talking about on the same day, kind of being a
21 continuous nuisance on one day.

22 THE COURT: What do you call that type of conduct?

23 MR. MOTE: Well, I think it might be fair -- it
24 might be fair to characterize it as some kind of harassment,
25 but what the law is directed at, and the way both statutes

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1 have been applied are occasions not where somebody makes an
2 unwelcomed approach or advance but situations where somebody
3 on repeated occasions gives someone unwelcome attention. You
4 know, if you're talking about a domestic situation, which is
5 the most common situation where the stalking comes up, you're
6 talking about following the person, going to places where they
7 know the person is going to be, making repeated calls to that
8 person at home. This is perhaps, well, this is unquestionably
9 an unwanted -- an unwanted encounter by these girls, but this
10 is not -- these are not individuals that Mr. Hall even knows.
11 These are not repeated incidents. These are, you know, they
12 happen in one place, at one time, and that's it. There's no
13 follow-up call to home, or sees them on the street and bothers
14 them and shows up at their house and followed them at the
15 mail. These are single incidents of odd behavior that quite
16 understandably makes these girls uncomfortable, but it doesn't
17 meet the legal definition of stalking. I think it is -- that
18 is part of the reason that the stalking charges were dropped
19 in Indiana.

20 Now, you know, obviously with the other
21 developments that may well not be the only reason they were
22 dropped, but I think that's certainly part of it. And it
23 doesn't meet the legal definition, and I think when the jury
24 hears about stalking, what they think of is the kind of
25 situation the law was intended to address. They think of --

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1 THE COURT: Let us assume that the government does
2 get into evidence these incidents where various girls
3 identified the defendant as being the driver of a car that
4 caused them to feel uncomfortable and fearful. In argument,
5 when the government refers to these incidents which are in the
6 record, how can they refer to them in the shorthand way?

7 MR. MOTE: Well, they could say, you know, you've
8 heard about these occasions where Mr. Hall would drive by and
9 harass these girls and make unwanted comments to them and
10 invite them in the van.

11 THE COURT: So they could say that's harassment.

12 MR. MOTE: Yes.

13 THE COURT: Is harassment a crime anywhere?

14 MR. MOTE: I don't --

15 THE COURT: In Illinois and Indiana?

16 MR. MOTE: I don't think what Mr. Hall did would be
17 considered a crime anywhere.

18 THE COURT: Whether you call it stalking or whether
19 or not you call it harassment. Correct?

20 MR. MOTE: Correct.

21 THE COURT: All right. So what's wrong with calling
22 it stalking?

23 MR. MOTE: Well, stalking is a crime.

24 THE COURT: Well, harassment is a crime too; isn't
25 it?

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1 MR. MOTE: Sexual harassment can be a crime, but
2 harass has a --

3 THE COURT: Can that be disorderly conduct under any
4 law?

5 MR. MOTE: It could be disorderly conduct. You
6 know, people understand if you say somebody is harassing me,
7 you aren't necessarily -- that is not necessarily understood
8 as they're doing anything illegal. It can be, you know --

9 THE COURT: Well, suppose I tell the jury that the
10 conduct which has been described by the defendant in
11 connection with these girls does not constitute a crime and
12 he's not on trial for that. And the use of the phrase
13 stalking is simply a shorthand characterization of the
14 conduct. It is not meant to imply violation of any criminal
15 law.

16 MR. MOTE: I think that would be -- I think that
17 would be helpful, and if they were allowed to use the term
18 stalking we would certainly think that that would be an
19 appropriate instruction to give to avoid or to minimize the
20 prejudice that term might cause, but I think the use of that
21 term by the government would be unnecessary, and it injects an
22 issue that doesn't have to be there. When lay people hear of
23 stalkings they usually hear of stalkings in connection with
24 some celebrity being stalked.

25 THE COURT: But in this case the stalking is

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1 directly related to this defendant's conduct, which is in the
2 record, and they know what the conduct is.

3 MR. MOTE: Well, there is not a question about the
4 conduct. There is a question about whether that term is
5 appropriate to describe the conduct.

6 THE COURT: Right.

7 MR. MOTE: And as I say, if they are allowed to use
8 that term we think an instruction such as Your Honor mentioned
9 would be appropriate.

10 THE COURT: I'm sorry, did you complete your
11 argument as to why I should not allow them to use the term?

12 MR. MOTE: That fairly outlines the argument. Under
13 the, you know, we cite in our motion, and I know Your Honor
14 hasn't had a chance to read it.

15 THE COURT: The Court will also give you leave to
16 file your response to the government's reply to the
17 government's response so you can argue that point, too, if you
18 wish.

19 MR. MOTE: But the cases in Illinois talk about the
20 stalking statute being intended to "prevent violent attacks by
21 prohibiting contact that may precede them." There is a case
22 where they -- People versus Cortez where the Court finds the
23 stalking statute to be a violation of the word person
24 knowingly and without lawful justification beat the victim,
25 attempted to run her off the road, repeatedly stood outside of

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1 her residence, and tried to breakdown the door of her home.
2 And told her that if she informed the police he would beat her
3 and take her kid away. Those are the kind of -- and we cite
4 several other cases, but those are the kind of conduct that
5 the Court is applying the stalking statute to. The Bailey
6 case, which we cite on page 12 of our motion, the Court says,
7 "the offense of stalking," we' re -- the offense, referring to
8 stalking, "cannot be committed without the initiation of the
9 threat." And that's the last paragraph on page 12 of our
10 motion, Your Honor.

11 In this case on none of the occasions do any of
12 these girls indicate that Mr. Hall either got out of the van
13 or stated any threat. That makes -- that makes this case
14 where the government alleges that Mr. Hall pulls up, gets out
15 of the van, grabs her off a bike, and drags her in the van.
16 This incident is very different than the incidents that were
17 put into evidence before.

18 We -- and this goes a little bit to the closing
19 argument, but in the closing argument in the first trial
20 Mr. Beaumont indicated that Mr. Hall stalked Jessica Roach
21 like he stalked these other girls. There is no evidence of
22 that. No one -- I mean, they can put her disappearance within
23 a three-minute time frame. No one saw a van, like, any kind
24 of van. They say Mr. Hall was in a van, driving up and down
25 that road. No one says that there was any prior contact

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1 before the alleged abduction between Mr. Hall and Jessica
2 Roach. So it -- the facts even as the government alleges them
3 really don't fit stalking and to, you know, part of the
4 problem if they're allowed to characterize these other
5 incidents as stalking you get in the jury's mind this man is a
6 stalker, and that by itself carries a connotation of
7 dangerousness of somebody waiting to go off and then to --

8 THE COURT: But he did do what these girls said he
9 did if the Court admits that. There is evidence that he did
10 it.

11 MR. MOTE: Correct.

12 THE COURT: And the only thing we're talking
13 about --

14 MR. MOTE: Is whether or not it's stalking.

15 THE COURT: Is how can that -- how can that conduct
16 be described by the government? Can it be described as
17 constituting stalking? I mean that's the only issue here;
18 isn't it?

19 MR. MOTE: That is the issue here. And according to
20 the legal definitions in both, under both the Indiana statute
21 and the Illinois statute and the case law in both statutes,
22 this is not the kind of conduct to which either state has
23 applied the stalking statute.

24 THE COURT: Right. So your point is that if
25 stalking is meant to describe some type of criminal conduct,

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1 then this is not criminal conduct and should not refer to, in
2 that sense.

3 MR. MOTE: That is correct. I also --

4 THE COURT: That legal sense.

5 MR. MOTE: I also think as the term stalking is used
6 in common speech.

7 THE COURT: Yes.

8 MR. MOTE: Outside of a legal context it is not
9 under -- understood to apply to one unwelcomed advance or
10 feeling uncomfortable on one occasion around one person. We
11 think it's more appropriate to describe this, as I said
12 before, as harassment. It's a less inflammatory term and it
13 fairly describes the conduct that the girls described.

14 THE COURT: Okay. Thank you, Mr. Mote.
15 Mr. Beaumont.

16 MR. BEAUMONT: Well, Your Honor, I think the problem
17 is 404(b) evidence does not contemplate only offering evidence
18 of other crimes. It's other crimes, wrongs, or acts. The
19 conduct, stalking is defined as pursuing -- going through an
20 area in search of prior quarry. There is going to be evidence
21 presented at trial that the defendant was in search of these
22 women, so he could have somebody, he had these urges to be
23 near women or he could talk to them or have some contact with
24 these women, and that's exactly what he did.

25 THE COURT: There's going to be evidence that --

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1 MR. EEAUIAONT: That he needs to be with women, and
2 that's the reason -- hence the reason for his following these
3 women, yes. And regardless of that, in the opinion, the
4 Seventh Circuit in this case said they call it stalking. The
5 evidence -- I'm quoting from page 1346 of United States versus
6 Hall, 93 F.3d page 1346. It says -- the Seventh Circuit
7 states the following: "The evidence of stalking, of course,
8 was well documented and clearly admissible to show intent,
9 preparation, or plan under Rule 404(b)."

10 So I think the distinction here, what counsel
11 is attempting to suggest, is that it has to be a criminal act
12 to meet the element of a crime in a particular state to be
13 called that, and that's just not the case, first of all. And
14 I would offer it to the Court that the fact that these
15 stalking charges in Indiana were dismissed had nothing to do
16 with whether they could prove them or not. The reason the
17 stalking charges were dismissed is because the defendant was
18 convicted in this case, and because of his sentence in this
19 case there was no need to pursue those charges. And I offer
20 that to the Court because I discussed the matter with the
21 prosecutor early on. So I just suggest that there's no
22 substance of this motion, Judge.

23 Stalking is what is defined his activity, and
24 conduct is what he did. And I don't think we have to meet the
25 elements of a criminal act charged in this state or any other

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1 state. So I would suggest that this motion should be denied.

2 MR. MOTE: Could I briefly respond, Your Honor?

3 THE COURT: All right.

4 MR. MOTE: I would say -- I would suggest, first of
5 all, Your Honor, that the fact that the Seventh Circuit used
6 the term stalking is not -- is not an indication from them at
7 all that that's the appropriate or most appropriate term to
describe the conduct. That was how it was described at trial.
9 And evidence of the stalkings coming in was raised in the
10 briefs as an issue. There was no argument by either side
11 about whether that should have been the term used at trial.
12 don't think that term was objected to at the first trial, but
13 we feel that it is an unfairly inflammatory term.

14 I think the description of it, the question
15 about whether it comes in as 404(b) evidence is decided by the
16 Seventh Circuit, and I think Your Honor has indicated it
17 should come in, too. That doesn't answer the question of how
18 it should be characterized by the government. The way
19 Mr. Beaumont describes stalking, the evidence, as far as I
20 know, the only evidence of this irresistible urge to be with
21 women is a statement written in FBI Agent Randolph's report
22 that at some point in the interrogation Mr. Hall admitted he
23 had irresistible urges to be with women. If going out and
24 making contact with women because you would like to talk to
25 women was stalking, you could describe, you know, every

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1 college student who goes out to the bar, and because he wants
2 to meet girls is a stalker. That's obviously not a fair
3 characterization, and if people heard some student who had
4 gone out to a bar hoping to talk to some girls as a stalker
5 they would not think, oh, this is normal activity and -- he's
6 going there doing what people frequently do hoping to meet
7 someone of the opposite sex.

8 Stalking carries a very negative connotation.
9 And it would be fair and more accurate not to use that term,
10 to use a term such as harass if they want to put it in that
11 kind of shorthand. There, you know, to talk about Jessica
12 being stalked like those girls were stalked, when the conduct
13 according to what the girls will say in the "stalking
14 incidents" is very different than the conduct that the
15 government alleges occurred in the abduction is unfair to the
16 defendant and confusing to the jury. And we would ask the
17 Court to allow the motion. Thank you.

18 THE COURT: All right. In connection with the
19 conduct of the defendant, which apparently several girls will
20 testify to, if the government wishes to describe the
21 defendant's activity in that regard as stalking, the Court
22 will allow it. The Court will also at that time upon the
23 request of the defendant inform the jury that the use by the
24 government of the term stalking is not meant to indicate that
25 the defendant has or was committing anything illegal or a

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1 criminal act, but that's simply a descriptive term to describe

2 the conduct of the defendant which has been testified to and
3 admitted into evidence. Whether or not the government
4 misstates the facts when they argue or attempt to argue that
5 the defendant stalked Jessica Roach is a different question
6 entirely. That's whether or not that argument is based on the
7 record. And the Court will obviously at various times
8 instruct the jury that anything that counsel says in argument
9 which is not based on the evidence should be disregarded. And
10 if there's no evidence that Jessica Roach was stalked by the
11 defendant, then that should be -- any argument to that effect
12 should be disregarded by the jury. So I don't see any issue
13 there.

14 It seems to me the only issue of stalking is
15 whether or not the government can use that term in referring
16 to the conduct of the defendant which will be testified to by
17 these young girls. And I think since -- it seems to me that
18 that conduct does fit the common understanding of stalking
19 reasonably, in a reasonable sense, and that it's not an
20 unreasonable and unduly prejudicial characterization of that
21 conduct. Certainly if the jury is told that that's the use is
22 to describe the conduct and not to in any way suggest that the
23 defendant has violated any criminal law by that conduct. So
24 the defendant's motion is denied except as qualified by the
25 Court's explanation.

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1 Now, entry 178 is an order for approval of
2 funds for service of process. I guess, Mr. DeArmond, the
3 issue here is whether or not all these witnesses are
4 necessary; is that not correct?

5 MR. DeARMOND: Your Honor, in the last trial -- the
6 reason I filed the motion was in the last trial I had been
7 asked to file such motions any time we were seeking to use
8 those funds that had been originally approved for
9 investigative purposes, and I did so again in this case
10 because there were a number of witnesses necessary to be
11 subpoenaed, and obviously the federal defender's office only
12 had a rather limited resources available. They had one
13 person, two people at times, available to try to subpoena
14 quite a number of people in both Vermilion County and Indiana.
15 So we asked leave of the Court to employ the service of a
16 private process server to assist in getting a number of those
17 subpoenas served for trial.

18 THE COURT: Yeah, I guess the only question I'm
19 asking is that it requires some finding by the Court that
20 these witnesses are necessary; isn't that right?

21 MR. DeARNOND: I believe so, yes, sir.

22 THE COURT: And you've mentioned you have 60
23 witnesses or 60 witnesses necessary for this defense.

24 MR. DeARMOND: That was whittled down substantially.
25 The federal defender's office had given me a list of

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1 individuals whose names had appeared in various reports. We
2 cut those down to probably 25 to 30 at the most, and we had
3 had more than that listed in our list of witnesses.

4 THE COURT: All right. Well, the Court has no
5 qualms about authorizing or approval of payment of witness
6 fees for the presence of all witnesses necessary to an
7 adequate defense. And without making inquiry as to each of
8 the witnesses that you're seeking payment for, I have to
9 accept counsel's representation to the Court that your request
10 only relates to those witnesses who are necessary for an
11 adequate defense and not simply a parade of people in here who
12 perhaps are going to just present cumulative evidence or
13 information which really is not probative of anything.

14 MR. DeARMOND: That's why we cut it down
15 substantially.

16 THE COURT: All right. I don't know, has there been
17 a witness list that's been filed with the Court?

18 MR. DeARNOND: At the very outset there was, our
19 first appearance here.

20 MR. BEAUMONT: We did originally, Your Honor. I do
21 have a new witness -- the same witnesses, there's no
22 difference from the original list, but I do have a current
23 list which I could file with the Court. I've given to the
24 defense already.

25 THE COURT: Were all these people -- did they

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1 testify at the first trial or do you have some new people?

2 MR. DeARMOND: Everyone on my list testified at the
3 first trial. There were additional names, however, sought by
4 the federal defender's office that include people who had not
5 testified at the first trial and for whom there will be some
6 rulings yet to be made, I'm sure, as to whether they are in
7 fact going to be allowed to testify.

8 THE COURT: Who would they be? Would that depend
9 upon this hearsay determination by the Court?

10 MR. DeARMOND: That has -- that's one of the motions
11 that would address it. I believe those motions were all being
12 prepared out of Springfield, Your Honor, and I apologize, but
13 I think they go primarily to that motion.

14 THE COURT: All right. At this point the Court
15 would allow the defendant's motion for approval of funds for
16 service of process, entry 178, to the extent -- with reference
17 to all persons who testified at the first trial. And the
18 balance of the persons for whom expenses are sought would be
19 denied at this time.

20 MR. DeARMOND: And I am assuming we can bring that
21 back up before Your Honor after that ruling?

22 THE COURT: Yes.

23 MR. DeARMOND: Thank you.

24 THE COURT: Entry 179 is motion for approval of --
25 we don't seem to have that motion in the file. Mr. DeArmond,

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1 do you have a copy of it?

2 MR. DeARIMOND: I didn't bring it with me, but I am
3 familiar with it.

4 THE COURT: Okay. Why don't you tell me briefly
5 what it says.

6 MR. DeARMOND: Yes, sir. At the request of
7 Mr. Taseff I was asked to file the motion with regard to
8 Mr. Wells. If the Court will recall, Dr. Wells was the
9 individual who was here to testify for purposes of the
10 reliability or unreliability of eyewitness testimony, and that
11 was objected to prior to Dr. Wells actually testifying.
12 However, we did spend a substantial amount of time preparing
13 with Dr. Wells, as well as getting him out here for that
14 hearing. It was an issue which obviously the defendant
15 considered to be a significant issue and which, of course, the
16 defendant still maintains is a significant issue. And even
17 though the government's objection prevented us from even
18 offering the testimony of the doctor in a 104 proffer, there
19 still were obvious expenses involved in getting him out here
20 and preparing him for the hearing. It's for those purposes
21 that we requested the funds.

22 THE COURT: Well, it looks like the total bill of
23 \$2,017.63 consists of \$150 for services and the rest is for
24 expenses; is that right?

25 MR. DeARMOND: Your Honor, without the bill in front

1 of me I can't obviously answer that.

2 THE COURT: Okay. And you don't have a copy of
3 this?

4 MR. DeARMOND: I did not bring it. Much like the
5 Court, I had assumed Mr. Taseff was going to be here today.

6 THE COURT: Would you like to look at it? Because
7 the statute says -- puts a cap on a thousand dollars for
8 services exclusive of reimbursement for expenses reasonably
9 incurred. Maybe I'm reading that bill wrong. Did this
10 gentleman testify at the first trial, Mr. DeArmond?

11 MR. DeARMOND: He did not.

12 THE COURT: He did not. Would -- am I reading this
13 bill wrong? Should we include the \$800 a day as part of his
14 expenses or is that part of services rendered?

15 MR. DeAPMOND: My suggestion, Your Honor, would be
16 that that would be part of services rendered, since I think
17 it's pretty common practice among experts that the time that
18 is involved in their being present and available for testimony
19 is part of their service.

20 Perhaps if I could just back up. At the very
21 first hearing before Your Honor my purpose in requesting the
22 Court to once again approve the payment of funds for expert
23 services was to address that one provision in the statute
24 that, I think, requires us to come before the Court and make a
25 request for funds in excess of the minimum, since it was

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1 assumed that in almost each one of these expert's instances
2 their services are going to cost us more than the minimum or
3 the maximum, I'm sorry, that's provided by statute. If that's
4 not clear, and I'll be glad to follow that up with another
5 motion, because I know in each one of these gentlemen's
6 instances there are going to be expenses that are incurred in
7 excess of what the statutory maximum is. In fact, I can pull
8 the vouchers from the first trial, and each of them that were
9 approved by Judge Baker, both in advance and then at the time
10 that they were submitted, to give the Court some idea of what
11 we would anticipate their possible fees to be.

12 THE COURT: I guess the only question then is
13 whether or not the fees for services is reasonable when it
14 exceeds the maximum?

15 MR. DeAR1AOND: As I understand --

16 THE COURT: Like in this case, the maximum, a
17 \$1,000, and actually his fees comes to about \$1,750 for
18 services.

19 MR. DeAPMOND: Yes, sir.

20 THE COURT: So that's above the thousand. And the
21 statute doesn't really say, but it seems to me that I have
22 some discretion.

23 The Court will approve the payment of
24 Dr. Wells.

25 MR. DeARMOND: Thank you, Your Honor.

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1 THE COURT: In the amount of \$2,017.64.

2 In connection with the issue before the Court,
3 it was reasonable to present such an expert, and had the Court
4 not ruled the way it did, I don't know whether we would have
5 needed him for two days, but certainly his testimony would
6 have been necessary. Why was he here for two days, by the
7 way?

8 MR. DeARMOND: I think there was a day he was here
9 first in preparation with Mr. Taseff. If the Court recalls,
10 he was the one presenting the motion. And then the day he was
11 here for purposes of his testimony. The determination, I
12 don't believe, was made until fairly late in the day.

13 THE COURT: Okay. The Court will approve it.

14 MR. DeARMOND: Thank you, Your Honor. If I may,
15 Your Honor, in that regard would you care to have me tender
16 vouchers of the other experts for whom we'll be requesting
17 fees?

18 THE COURT: Well, before they -- actually that
19 probably should have been done in this case because for
20 Dr. Wells you're still going to have to submit a voucher on
21 the form provided by the CJA, and I'm going to have to sign
22 off on it.

23 MR. DeARMOND: Yes, sir.

24 THE COURT: So at the point you ask for payment of
25 the other experts it would be helpful if you had the CJA form

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1 there.

2 MR. DeARMOND: I have all of those for all of the
3 experts upcoming that have already been signed off on. What
4 I'm asking about, though, perhaps to accompany my request for
5 the Court's consideration of approval of funds in excess of
6 the minimum, would you like to see the bills that were
7 presented at the first trial to give you some idea of what
8 you're looking at?

9 THE COURT: That would be helpful.

10 MR. DeARMOND: All right.

11 THE COURT: That would be helpful, Mr. DeArmond.

12 MR. DeARMOND: Thank you.

13 THE COURT: Give me some idea.

14 Now, the only -- the other motions that leaves
15 us pending is item 175, the motion about the hearsay and other
16 evidence implicating other suspects. The motion to exclude
17 testimony concerning the type of engine. The motion to
18 exclude evidence of forensic severance of victim's hand. And
19 the motion to redact the written statement of the defendant of
20 certain information. And the government hasn't responded to
21 all those; is that correct, Mr. Beaumont?

22 MR. BEAUMONT: Of those I've only responded to the
23 motion about hearsay. The last three I have not. I could
24 tell the Court that the redacting the portion of the statement
25 we agree. I mean, the appellate opinion is clear that those

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1 other murders cannot be referred to in this trial. And we
2 intend to work out with the defense how physically we do that,
3 but we do have no intention of offering evidence on those
4 other murders.

5 THE COURT: Then the Court will grant that
6 motion -- item 187 -- and direct counsel to see if they can't
7 agree on the -- on that process, and if not then I'll have to
8 decide it, but the Court will grant that motion. And the
9 other two, Mr. Beaumont?

10 MR. BEAUMONT: I will try to get a response by
11 tomorrow. I could tell the Court in essence what my response
12 will be if you want to hear it, but the other two are fairly
13 simple, I think. But if not, I can get my response.

14 THE COURT: Well, I haven't read them so I don't
15 know anything about them because I just got them back today.
16 I've just been on vacation until today.

17 MR. PARSONS: Your Honor, if I may interrupt. Maybe
18 one of these can be taken care of in just one minute, the one
19 about the hands.

20 THE COURT: Yes.

21 MR. PARSONS: While you were gone Mr. Beaumont and I
22 tried to work on stipulations to cut down the length of trial.
23 If I could just speak to him one minute while you're still on
24 the bench maybe we can do something about that motion on the
25 hands, too.

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1 Your Honor, I think what we'll try to do
2 between the time between now and when we reconvene, we'll try
3 to work out the wording of the stipulation that the Court is
4 not aware of yet because we haven't put it to writing yet, but
5 we'll try to work that out that perhaps this motion with
6 regard to the hands moot. We'll make every effort, Your
7 Honor. So maybe we should table that, and since the
8 government hasn't had a chance to respond, either, I think in
9 the spirit of cooperativeness that we'll probably get rid of
10 that.

11 THE COURT: All right.

12 MR. PARSONS: I hope.

13 THE COURT: Well, it looks like it's all we can do
14 right now. And we'll start back at 9 o'clock tomorrow morning
15 with Dr. Ofshe's testimony, and if time permits, and if we
16 have the government's response, we might can take up the
17 remaining motions. Okay. So recess until tomorrow morning.

18 MR. PARSONS: Your Honor, would you like to get back
19 with the hearsay motion this afternoon? It appears that the
20 Court has allowed all day, and so have we. What I am getting
21 is that we're available if you'd like for us to be.

22 MR. BEAUMONT: As are we, Judge, if you want us to
23 be. I'm not going anywhere today.

24 THE COURT: Let's take it up at 2 o'clock then.

25 MR. PARSONS: That's the hearsay?

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1 THE COURT: The hearsay motion.

2 (A recess was taken from 10:19 A.M. until 2:10 P.M.)

3 THE COURT: All right. The record will show the
4 presence of the defendant and all counsel for defendant and
5 also government counsel. This is a hearing on the motion by
6 defendant to allow hearsay and other evidence implicating
7 other suspects.

8 THE CLERK: It's No. 175.

9 THE COURT: Docket entry No. 175. And in that
10 regard in addition to the motion there is a memorandum. Well,
11 I guess the memorandum and motion, all one document, I guess
12 that's the 175. And the government's answer to it. And I
13 think I will need some argument on this. So, Mr. Mote, you
14 may go first.

15 MR. MOTE: Thank you, Your Honor. As set forth in
16 the motion there's information regarding another -- a number
17 of other people who were in a couple cases, suspects in this
18 case. I will talk, first of all, about Keith Goble. Keith
19 Goble is an individual that the police department during their
20 investigation -- I should say he came to their attention
21 because he went to the funeral home, Mr. Goble did, where
22 Jessica Roach's body was being prepared for burial and
23 indicated or made a request to see the body. They declined
24 his request at the time but told him when visiting hours would
25 be, and they notified the police that he had been there and

1 might be coming back.

2 The police came. When he came back, they asked
3 to talk to him. He was taken down to the station. And he, in
4 fact, confessed to picking up -- there are little differences
5 in the accounts but he -- he admitted to picking up Jessica
6 Roach, driving her to Indiana, attempting to get her to have
7 sex with him, and said that he dropped her off at a cornfield
8 in Indiana.

9 The government's response indicates that it at
10 most proves he was psychotic, but in fact they had him down at
11 the police station, it's our understanding, for five or six
12 hours until his mother obtained an attorney who went and
13 demanded that he be released, and after he was released the
14 police went out and searched the residence he stayed at with
15 his mother. They point out that they took things out of
16 Mr. Goble's car. They vacuumed, checked for hair fibers, and
17 that there was no evidence found, and say that shows it's
18 unreliable. That's exactly --

19 THE COURT: Let me stop you to get something. My
20 understanding here --

21 MR. MOTE: Okay.

22 THE COURT: -- you want -- you want to admit in the
23 defendant's case the testimony of Mr. Keith Goble?

24 MR. MOTE: Yes.

25 THE COURT: That wouldn't be hearsay then.

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1 MR. MOTE: Well, I want to be able -- his own
2 testimony would not be hearsay. I would also like to be able
3 to bring out through the officers that got the confession from
4 him the details of how that interrogation was done and show
5 how it is, in fact, very similar to the circumstances, the
6 circumstances with Mr. Hall.

7 THE COURT: Well, how would that be relevant?

8 MR. MOTE: Well, it's relevant in a couple of ways,
9 Your Honor. One thing is they point out -- they point out the
10 lack of physical evidence regarding Mr. Goble's evidence that
11 it's irrelevant, but in fact they don't have any more physical
12 evidence as to Mr. Hall.

13 THE COURT: So what?

14 MR. MOTE: So what it shows is there is as strong
15 case to be made that Keith Goble is responsible for the
16 Jessica Roach killing as there is that Mr. Hall is.

17 THE COURT: Except Mr. Goble is not on trial for it.
18 All right.

19 MR. MOTE: That is true.

20 THE COURT: Okay. And you're asking me to allow you
21 to put on hearsay statements that Mr. Goble told someone
22 wherein he admitted to some involvement with Jessica Roach?

23 MR. MOTE: That is correct.

24 THE COURT: In other words, I guess what I'm saying
25 if when defense puts on its case you're going to offer

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1 Mr. Goble as a witness and have Mr. Gobble say, "I killed
2 Jessica Roach.'t That's not what you're asking me about,
3 though, is it?

4 MR. MOTE: I don't expect that he would admit that
5 he killed Jessica Roach.

6 THE COURT: Okay. So what is it you want? You're
7 going to be offering in connection with Mr. Goble that you
8 want me to give you some ruling as to how I will decide it?

9 MR. MOTE: Well, I guess in terms of the basis
10 where -- that we feel that this should come in under, and this
11 is the case both with Mr. Goble and the Lester O'Toole, who's
12 the other main person concerned here. The Seventh Circuit has
13 said in Lee versus McCaughtry, which we cite on page 5 of our
14 memorandum, paragraph 7. The Seventh Circuit states in that
15 case that "if a confession is sturdy enough for the state to
16 use it in its own case, if it is the sort of evidence that
17 prosecutors regularly use against defendants, then defendants
18 are entitled to use it for their own purposes." That's a 1991
19 case out of the Seventh Circuit.

20 THE COURT: All right. Let's stop right there. It
21 seems to me that those cases that you cite, particularly in
22 the Rivera case, which apparently is cited in this Lee case,
23 that's not our situation at all. The facts scenario of those
24 cases were whereby in connection with a defendant who was
25 convicted there was a confession, and that confession was used

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1 to convict him. A subsequent person was tried, who wanted to
2 use part of that confession to exonerate him. And the Seventh
3 Circuit says if it's good enough to convict somebody, it ought
4 to be good enough to exonerate somebody. Right?

5 MR. MOTE: Well, the language quoted, they aren't
6 talking about it's good enough to convict. They're quoting
7 it's good enough for the prosecution, that that's the type of
8 evidence.

9 THE COURT: Now, wait a minute now. The language
10 you quote on page 5 is "if a confession is sturdy enough for
11 the state to use it in it's own case." So if the state was
12 going to use the confession of Mr. Goble, then to me the
13 Seventh Circuit is saying if Mr. Goble says something that
14 will exonerate the defendant, that should also be used. But
15 we don't have that case.

16 MR. MOTE: I don't think they're just saying you can
17 only use it if the state uses it. What they're saying is if
18 it's sturdy enough for the state to use it, and then they go
19 on.

20 THE COURT: How could the state use it?

21 MR. MOTE: If they were prosecuting Mr. Goble, they
22 can clearly use it as a statement against interest by
23 Mr. Goble.

24 THE COURT: That's right. Well, if that's your only
25 reason, I don't think those cases -- I don't think these cases

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1 you cite support your position you're taking here, because
2 Mr. Gable, if I understand it, has not been charged and his
3 confession has not been used by the government. And you don't
4 want to -- you don't anticipate he's going to come to court
5 and admit to kidnapping Jessica Roach, but you want to
6 introduce through somebody else that he said he kidnapped
7 Jessica Roach, which would be hearsay. And you're trying to
8 avoid the hearsay by citing a case such as Rivera, which
9 involved a fact situation different from our situation. I
10 mean I have that Rivera case here, and it seems to me that a
11 Richard Norman confessed to beating up this Simmons woman.
12 And in his confession he apparently said he did it by himself.
13 Later on the defendant Rivera was prosecuted for that murder,
14 and at his trial a third person said that he saw Rivera beat
15 this Simmons woman. Rivera wanted to use the Norman guy's
16 confession where he said he did it, and he didn't implicate
17 anybody else to offset this testimony by this third party that
18 the defendant was involved, Rivera was involved. And the
19 Court said he should have been allowed to put on that
20 testimony.

21 MR. MOTE: I see Your Honor's point about that being
22 a different kind of scenario. I believe our factual scenario
23 is the one closer the Supreme Court addressed in the Chambers
24 versus Mississippi case which we also quote on page 5. And in
25 Chambers versus Mississippi, what happened was Mr. Chambers

1 was on trial for a shooting that happened, to the best of my
2 recollection, at night in the midst of a crowd in the street.
3 And Mr. Chambers wanted to put on evidence that another man
4 who was in the crowd had made statements to being the shooter.
5 And the state of Mississippi, the trial court would not let
6 that evidence in from these other people saying that this
7 other man said he was the shooter on the basis of hearsay.
8 And then in the language we quote on page 5, the Supreme Court
9 said, "The testimony rejected by the trial court here bore
10 persuasive assurances of trustworthiness and thus was well
11 within the basic rationale of the exception for declarations
12 against interest. That testimony also was critical to
13 Chambers' defense." And then the last part of what they say
14 is "the hearsay rule may not be applied mechanistically to
15 defeat the ends of justice."

16 We have a very similar situation here. What we
17 want to put on is evidence in regards to Mr. O'Toole from
18 other people who say that Lester O'Toole told them that both
19 ahead of time that he was going to get Jessica Roach, and
20 afterwards that he had killed Jessica Roach. The statements
21 -- and attached to our motion are transcripts of statements
22 taken of three people; Nancy Dison, who is Lester O'Toole's
23 sister, Greg Dison, who is Mr. O'Toole's brother-in-law, and
24 Eduardo Vela, who is a friend who was there with Mr. Dison.
25 And the statements are all very similar and thus they lock

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1 together, they support each other, and it gives them an extra
2 degree of trustworthiness. And the -- as in one of the cases
3 cited, the statements here, as in the Green case, which we
4 cite on the bottom of page 4, Green versus Georgia. There
5 they note that the statement was made "spontaneously to a
6 close friend." Here what we have is statements by Mr. O'Toole
7 made to a sister, a brother-in-law, and someone else who's
8 present at the time. And, therefore, there is as much reason
9 to believe that these statements are reliable that Mr. O'Toole
10 made as to believe that the statements were reliable in the
11 Green case.

12 In the Green case, they note in addition to who
13 the statement was made to and its spontaneous nature the fact
14 that the nature of the statement, it's a statement against
15 interest, there's no evidence of an ulterior motive this
16 person would have in making a false statement. And the Green
17 case relied on the Chambers versus Mississippi case which --

18 THE COURT: In the Green case wasn't there
19 corroboration, too, substantial corroboration?

20 MR. MOTE: They make reference to substantial
21 corroboration, but I think, well, there is as much
22 corroboration for Mr. O'Toole's statement as there is for
23 Mr. Hall's statement. I know the government in its response
24 indicates that there is no corroboration. In fact, as the
25 government's aware, like Mr. Hall, Mr. O'Toole owned a two-

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1 tone brown van. This court heard at a prior hearing Monte Cox
2 testify, Monty Cox was the individual --

3 THE COURT: Was Mr. O'Toole seen in the vicinity of
4 Jessica Roach's presence on the day in question as the
5 evidence is in this case against the defendant?

6 MR. MOTE: I would say that Mr. O'Toole was the
7 individual seen coming out of the cornfield rather than
8 Mr. Hall. And in support of that, Your Honor, Your Honor is
9 before --

10 THE COURT: Who's going to testify to that?

11 MR. MOTE: Excuse me?

12 THE COURT: Who's going to testify to that?

13 MR. MOTE: Well, we have the sketch prepared with
14 the assistance of Monty Cox, and we have a photograph of how
15 Mr. Hall looked at the time. Mr. Hall at the time had
16 muttonchops, long hair, full head of hair, mustache, didn't
17 wear glasses. Your Honor may recall from the sketch, the
18 sketch was of a balding man initially described as six foot or
19 taller, a mustache, no beard, no muttonchops.

20 We have a mug shot we just received today of
21 Lester O'Toole, and I can show it to Your Honor. It looks
22 very close except for the glasses which Monty Cox says he
23 wasn't sure whether there were glasses or not, it looks very
24 close to the sketch he helped prepare of the man coming out of
25 the cornfield. It's of an individual who is bald on top, has

1 hair on the sides, just like the sketch. And from the, I
2 don't know what they call it, the height chart behind the mug
3 shot, Mr. O'Toole appears to be about six-foot four-inches
4 tall, which makes him a lot better match to this description
5 of a bald person over six-feet tall shown as clean shaven than
6 Mr. Hall who's five-foot five or less. And I believe we would
7 bring that out -- we could bring that out through Monty Cox,
8 just showing him the pictures, which one more closely matches
9 the sketch he helped prepare.

10 THE COURT: Well, maybe I'm getting off the subject,
11 but I assume you admit that this is hearsay testimony unless
12 there's an exception found for it?

13 MR. MOTE: Yes.

14 THE COURT: Okay. And what would be the exception
15 you would assert?

16 MR. MOTE: Well, I would assert three exceptions.
17 One is, I think, the Chambers versus Mississippi case and the
18 Green versus Georgia case don't rely on this falling under one
19 of the exceptions in the hearsay rule. I believe that what
20 they stand for is the proposition that if there is some degree
21 of reliability or trustworthiness to the evidence, that the
22 due process clause will override the hearsay rule and entitle
23 the defendant to put on that evidence.

24 THE COURT: What's trustworthy about either
25 statements by Goble or O'Toole?

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1 MR. MOTE: Well, the statement by Goble was taken by
2 officers investigating this case, and it would be considered
3 trustworthy, I think, for the same reasons that confessions
4 are generally considered trustworthy. They're admissions
5 against interests. It would also be relevant.

6 THE COURT: No, no, I won't buy that.

7 MR. MOTE: Okay.

8 THE COURT: Because if you are a party, if you are
9 the defendant, I think there's a difference between someone
10 who is the defendant and someone who is not the defendant. So
11 what's trustworthy about this fellow Goble's statements or
12 O'Toole's statement? What's inherently trustworthy about
13 that?

14 MR. MOTE: O'Toole's statement is more trustworthy
15 if we're just going to look at the statements themselves, and
16 part of what makes O'Toole's statement trustworthy is the fact
17 that it is repeated. It is not a one-time statement. There
18 is also evidence that -- I mentioned Mr. O'Toole had a two-
19 tone brown van. The police interviewed somebody who said that
20 Mr. O'Toole disappeared for three days in September with no
21 explanation.

22 THE COURT: Which three days?

23 MR. MOTE: I don't think they -- they don't say what
24 three days. But there is a woman who says that the day after,
25 a day or two after Jessica Roach was missing, Mr. O'Toole was

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1 packing up his van and made a statement that, "I have to get

2 out of town before the shit hits the fan." There's a
3 statement from Eduardo Vela, and I don't know if this would be
4 considered some type of corroboration or not, that Mr. O'Toole
5 had a dog that disappeared about the same time Jessica Roach
6 disappeared.

7 THE COURT: What's significant about that?

8 MR. MOTE: I think it's suspicious, but it's
9 speculation that there would be a connection between the two.

10 THE COURT: I don't understand that.

11 MR. MOTE: Well, I guess to my mind, and like I say,
12 this is purely speculation.

13 THE COURT: I understand, but that's what I'm asking
14 you about, your mind.

15 MR. MOTE: It occurred to me that if he had this dog
16 he got rid of in some fashion right after Jessica Roach was
17 abducted, if he abducted Jessica Roach, had the dog in the
18 van, he was -- that he could have been concerned about the dog
19 going back there. Like you say, it's purely speculative, but
20 it was just a very odd coincidence that stood out to me.

21 There are statements -- there's other
22 statements that are hearsay, and this one -- and this one I
23 don't know if this statement should come in or not.
24 Mr. O'Toole was friends with an individual, a younger man who
25 dated Jessica Roach at one point, and that man, Marcus

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1 Carpenter, stated that he had heard that Lester O'Toole had
2 had Jessica at his apartment.

3 THE COURT: Let me get this straight. You are not
4 suggesting that you are going to put these declarants on the
5 witness stand. You're suggesting that you want to put on the
6 police officers who took statements from these people and have
7 the police officer testify to what they said these other
8 people told them; is that correct?

9 MR. MOTE: Actually I had thought of it in terms of
10 putting these people who say that Lester made the statement to
11 them on the stand.

12 THE COURT: Okay.

13 MR. MOTE: As an alternative, this is something that
14 we could bring out through the officers.

15 THE COURT: Okay. And you're saying that Green
16 versus Georgia and Chambers versus Mississippi are the
17 authority for allowing you to do this, because these people's
18 testimony is inherently trustworthy, and period, or is there
19 something else I'm missing?

20 MR. MOTE: Well, I think the Seventh Circuit case,
21 this Lee versus McCaughtry that we've talked about that's on
22 the bottom of page 5, and part of the language we quote they
23 say "if it is the sort of evidence that prosecutors regularly
24 use against defendants, then defendants are entitled to use it
25 for their own purposes."

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1 I think my interpretation of that was that what

2 they were saying is if this is the kind of evidence that due
3 process would allow the state to take and use against the
4 person who made the statement, if that person was on trial,
5 then it's good enough that a defendant should be allowed to
6 put forth that statement. It seems to me it would be -- it
7 would be unfair to the defendant to say that that statement,
8 had it come from Mr. Hall, would have been good enough to use
9 to try to convict Mr. Hall, but if Mr. Hall is defending
10 himself the fact that somebody else made that statement should
11 be kept from the jury, but I think factually the case that is
12 closest to ours is Chambers versus Mississippi, Your Honor.

13 THE COURT: So you are not relying upon any
14 exception to the hearsay rule set out in the Federal Rules of
15 Evidence?

16 MR. MOTE: Well, I think the due process is the most
17 important part, but I think it also could fall under two
18 exceptions to the hearsay rule, the first one being the
19 exception for excited utterances. These --

20 THE COURT: Excited utterances?

21 MR. MOTE: -- excited utterances, which is Section
22 I, it's Rule 803 subsection 2. And the law on excited
23 utterances is not real definite. There are cases that talk
24 about if a statement is made as a result of the stress of the
25 event, it can qualify as an excited utterance even if it's not

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1 immediately after the event. That could well cover
2 Mr. O'Toole's statement a day after the disappearance of
3 Jessica Roach when he's loading up the van.

4 THE COURT: Are you serious about that?

5 MR. MOTE: Yes.

6 THE COURT: That's an excited utterance a day later
7 while he's loading up the van?

8 MR. MOTE: There are cases that say if it is caused
9 by the stress of what happened, so it doesn't have to be
10 immediately after. But that, of course, as the Court
11 realizes, puts it in a judgment call area.

12 THE COURT: Okay.

13 MR. MOTE: If we get into the statements he made to
14 Nancy Dison, his sister, and his brother-in-law and
15 Mr. Vela, there might be a question there about what had been
16 talked about that might make him excited and get him to make a
17 statement about this. I believe Nancy Dison says that they
18 were talking about Georgetown at the time that he talked about
19 having killed Jessica Roach. I should also mention in terms
20 of things that make Mr. O'Toole's statement's trustworthy,
21 there is a witness who states that the weekend before he was
22 loading up the van Mr. O'Toole had been in Georgetown, was
23 going to Georgetown for that weekend. The other exception
24 which this might fall under would be 803(24), which is
25 referred to more generally as the hearsay exception, and it

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1 just indicates that if there are sufficient indicia of
2 trustworthiness, and if it is consistent with the spirit of
3 the rule and in the interest of justice, the Court can let in
4 something that would otherwise be excluded by the hearsay
5 rule. I think it is clearly in the interest of justice to let
6 in Mr. Hall's defense, let us put on testimony regarding
7 admissions to the crime made by a person who was, according to
8 the statements, statements by other people, who was in the
9 Georgetown area that weekend who made statements that he
10 killed Jessica Roach, and who far more closely resembles the
11 only contemporary description of Jessica Roach's killer, if
12 that's what in fact the man coming out of the cornfield was,
13 than does Mr. Hall.

14 THE COURT: All right. Have you covered everything
15 you want to cover, Mr. Mote?

16 MR. MOTE: The only other thing I would add, I
17 believe that Mr. Goble's testimony, if we were allowed to call
18 Mr. Goble, or if we were allowed to explore the subject of his
19 confession, and how it was -- particularly how it was
20 obtained, the confession, the fact that there was a confession
21 obtained, already came in in the first trial, I'm not aware of
22 there being a question about whether that should come in
23 again. But being allowed to explore the circumstances of
24 Mr. Goble's confession would be important to our case in that
25 the government now takes the position that Mr. Goble's

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1 confession was a false confession. And it is significant that
2 Mr. Goble shares many characteristics with Mr. Hall. He is
3 evaluated of being below average intelligence, maybe having
4 some mental problems, and I am not sure if any of the same
5 officers were present when they obtained his confession, but
6 that certainly would tie into the testimony by Dr. Ofshe in
7 support of the other part of the defendant's theory of the
8 case in terms of this being a false confession. Thank you,
9 Your Honor.

10 THE COURT: Mr. Beaumont.

11 MR. BEAUMONT: Thank you, Your Honor. First of all,
12 I would suggest that Mr. Goble's testimony -- Mr. Goble is
13 psychotic. I don't think he's competent to testify. I don't
14 know if he would testify now in fact he killed Jessica Roach.
15 I don't know what his current mental capacity is. But it's
16 clear there is no sense of reliability about that statement,
17 "I killed Jessica Roach." It was investigated. The rules
18 that apply, if Mr. Goble is not going to say on the stand I
19 killed Jessica Roach, he's unavailable presumably because of
20 the Fifth Amendment, the rule that pertains to these hearsay
21 statements in that instance and the same rule that would
22 pertain to the hearsay statements in Mr. O'Toole's case is
23 Rule 804 (b) (3) . And that's 804(b) (3) applies if a declarant
24 is unavailable, and it says the following: "A statement which
25 was at the time of its making so far contrary to the

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1 declarant's pecuniary or proprietary interest, or so far
2 tended to subject the declarant to civil or criminal
3 liability," which I would suggest obviously the statement I
4 killed Jessica Roach would be one that would subject somebody
5 to criminal liability, "or to render invalid a claim by the
6 declarant against another, that a reasonable person in the
7 declarant's position would not have made the statement unless
8 believing it be true." But then this is the key part, and the
9 point I'm trying to get, "A statement tending to expose the
10 declarant," Lester O'Toole or Keith Goble, "to criminal
11 liability and offered to exculpate the accused is not
12 admissible unless corroborating circumstances clearly indicate
13 the trustworthiness of the statement." And that does not
14 indicate just saying the statement itself makes it admissible.
15 The corroborating circumstances must clearly indicate the
16 trustworthiness of the statement. And, Your Honor, I would
17 submit there's been no suggestion to this court that
18 the -- other than saying the statement that is trustworthy.

19 Counsel cites the Chambers v. Mississippi. The
20 hearsay statements involved in the Chambers case were offered
21 under circumstances which provided considerable assurances of
22 reliability. Each of the declarant's confessions were made
23 spontaneously to a close acquaintance shortly after the murder
24 occurred. Each statement was corroborated by some other
25 evidence in the case. The declarant's sworn confession, the

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1 testimony of an eyewitness to the shooting. The testimony
2 that declarant was seen with the gun immediately after the
3 shooting and proof prior ownership of a .22 caliber revolver
4 and subsequent purchase of a new weapon. The sheer number of
5 the independent confessions provided additional corroboration.
6 And then the confessions were against the interests obviously.

7 And then finally declarant present in the
8 courtroom under oath and could have been cross-examined and
9 his demeanor and response waived by the jury. None of those
10 factors are present in the current case.

11 This business about Nonty Cox and the sketch,
12 they didn't tell you the whole testimony. Monty Cox testified
13 specifically that the sketch did not, I repeat that, did not
14 look like the person he thought he saw. Kept saying that
15 sketch isn't good. It isn't right. It's never been our
16 position that the sketch really looks like the person he saw.
17 Monty Cox isn't going to come in here and say the person I saw
18 coming out of that cornfield isn't Lester O'Toole. He's going
19 to come in here and say the person I saw coming out of the
20 cornfield is the defendant. So I suggest in the defendant's
21 statement there's corroboration, but there's no such
22 statements for corroboration for the Lester O'Toole
23 statements. They're all clearly hearsay. They fall within
24 that rule.

25 The other rule, if the declarant is available

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1 and Mr. Goble is available and is going to testify, the rule
2 that perhaps would apply would be the catchall hearsay
3 exception, 803(24), Section 24. But there again that states a
4 statement not specifically covered by any of the forgoing
5 exceptions but -- and this is an important part -- having
6 equivalent circumstantial guarantees of trustworthiness. And
7 again I would suggest there's been no suggestion to this court
8 of any circumstantial guarantees of trustworthiness. They
9 want the Court to believe that the fact of the statement
10 itself is said, that in and of itself is good enough, and
11 that's not what the rule says. It has to be signed, then it
12 has to be equivalent circumstantial guarantees of
13 trustworthiness. This business about Lester O'Toole having a
14 brown and white van is meaningless. The only reason the brown
15 and white van comes in is because the defendant admitted in
16 his statement that he drove a brown and white van. There is
17 no witness that picked out a brown and white van. No witness
18 said they saw a brown and white van in the area.

19 The Lester O'Toole's statement, there's no
20 suggestion of when he allegedly made this. These people
21 don't know when he made the statement exactly. They were
22 reporting these statements a year later. They're saying, by
23 the way, Lester O'Toole said this, Lester O'Toole said that,
24 Lester O'Toole said this. Lester O'Toole denies, adamantly
25 denies making the statement in the first place. He was

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1 investigated. Of course this came on long before the
2 defendant came on the scene as far as a suspect, and the
3 police investigated those statements, investigated Lester
4 O'Toole's possible connection with the case, and there is no
5 evidence, none whatsoever, to suggest he's in any way
6 connected with the case. And, in fact, there's evidence to
7 suggest he's not connected with the case.

8 THE COURT: At the first trial did -- were the
9 investigating officers asked about other suspects beyond the
10 defendant?

11 MR. BEAUMONT: I don't recall, they may have. I
12 don't recall. They may have. I think I would have objected,
13 and I think it was sustained because it wouldn't have been
14 relevant. I don't see the relevance if there's other
15 suspects. In any police investigation you have many suspects
16 until you focus on the individuals guilty of the crime. So I
17 don't want to I'm not sure, I believe that there was
18 questions about it. I would have objected and I believe they
19 were sustained, because there certainly was no evidence
20 presented of the fact of there being other suspects in the
21 case.

22 THE COURT: Well, suppose other suspects confessed
23 to the offense, would that be relevant?

24 MR. BEAUMONT: It would be relevant, but it would be
25 hearsay. It would be the specific rule that would apply in

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1 that case would be 804(b) (3) because --

2 THE COURT: Okay. And defense argues that the
3 Supreme Court cases Green and Chambers and the Seventh Circuit
4 case of Lee says that due process consideration should
5 override the hearsay objections in a situation where had the
6 government chose to view these two people as likely culprits,
7 they would have used those statements against them.

8 MR. BEAUMONT: In Lee I would suggest the statement
9 as the Court interpreted the case, I don't think it suggests
10 that, because a statement may be admissible as a statement of
11 a defendant, may be admissible, not that it was used and
12 admissible as a confession of the defendant. That it somehow
13 can be used against. I don't read that case to say that.

14 In Chambers, though, the very big difference
15 between Chambers in a due process claim is what we have here
16 is there was corroborating facts, corroborating evidence of
17 the truthfulness of the statements. And I'm saying here, I'm
18 suggesting here, there is no corroborating facts or evidence
19 of the truthfulness of these statements. All they have is
20 these statements were allegedly made by these individuals.

21 THE COURT: What about this statement, "it comes
22 harvest time a body be found in a cornfield." Is there
23 something like that, similar?

24 MR. BEAUMONT: I think that's one of the alleged
25 statements. It's not -- I'm sorry, Judge.

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1 THE COURT: Is that corroboration?

2 MR. BEAUMONT: It was not -- it was well-known that
3 her body was found in a cornfield.

4 THE COURT: At the time this fellow made the
5 statement?

6 MR. BEAUMONT: The question is, I don't think there
7 was any -- no, as far as I know, as far as I understand the
8 evidence, the people that this Dison, Eduardo Vela, and the
9 other person, they're saying -- they're not sure when he
10 specifically -- they don't give a date and time when he gave
11 the statement because they're reporting these statements a
12 year later in '94. They're saying I remember way back when in
13 the Jessica Roach case and Lester O'Toole said A, and then the
14 other guy said Lester O'Toole back in the Jessica Roach case
15 back then said B and C, but they're not saying on September,
16 for example, September 2, 1993, Lester O'Toole said this or
17 Lester O'Toole said that --

18 THE COURT: Okay.

19 MR. BEAUMONT: -- is my understanding of the
20 statements. I would also suggest that this Keith Goble, I
21 suggested earlier, I don't think he's competent to testify.
22 don't know what he's going to say right now. I know -- and I
23 present evidence that he is psychotic, and I don't think
24 anybody's going to question that. I would suggest under Rule
25 403 if nothing else it's going to mislead the jury, which is

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1 basically the scenario, because he came to the funeral parlor,
2 he said he killed Jessica Roach and had sex with her, the
3 police obviously took him and talked to him and they say,
4 Well, where did you have it? Where did you kidnap her from?
5 She was from the west side or was she from the west side of
6 Georgetown? Yes, it was from the west side of Georgetown.
7 And they say was it from, you know, they make up things that
8 were totally false, and he'd just repeat them. He'd just say
9 whatever. There was no validity to it. They purposely,
10 consciously, and intentionally discerned what he was saying,
11 and it didn't match the evidence in the case, but they still
12 further investigated. They did a search of his car, of his
13 vehicle, to see if there would be any connecting physical
14 evidence, and there was none. And it was clear at that time
15 there was no question in anybody's mind that he was psychotic,
16 that he's just strictly psychotic, and he would basically say
17 anything. And the feeling was if they asked him he was
18 responsible for the Kennedy assassination he would probably
19 say he did it, so they just ignored it after that point.

20 THE COURT: So in summary the government's position
21 is that if Goble and Dison are available, the applicable
22 exception would be 804 (b) (3)

23 MR. BEAUMONT: If they're unavailable, yes.

24 THE COURT: If they are unavailable?

25 MR. BEAUMONT: Yes.

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1 THE COURT: And if they are available, the
2 applicable exception would perhaps be the catchall of 803(24)?

3 MR. BEAUMONT: Correct.

4 THE COURT: But under both provisions there need to
5 be some circumstances that clearly corroborates their
6 statements in order for them to be considered sufficiently
7 trustworthy that the Court should let them in; is that
8 correct?

9 MR. BEAUMONT: Correct. And I would cite the Court
10 to United States versus Silverstein, which is in my
11 memorandum, 732 F.2d 1338, pages 1346-47, a Seventh Circuit
12 case. And in that case the facts were it was a murder
13 prosecution of an inmate. The defendant was accused of
14 murdering an inmate in a federal prison. The defense called
15 an individual declarant and they on -- in the trial, and the
16 question was, "Mr. So and so, do you recall the date the
17 inmate was killed?"

18 And he says, "Yeah, I remember that date
19 clearly."

20 They said, "Why do you remember that date?"

21 And he said, "Because that's the day I murdered
22 the victim."

23 At that point after making that statement, the
24 judge informed the declarant on the stand that perhaps you
25 should consider your Fifth Amendment rights, that you do have

1 the Fifth Amendment right not to incriminate yourself, at
2 which point the declarant said, "You' re right, Judge, I think
3 I better not say that." So the judge instructed the jury to
4 disregard that testimony.

5 Now this same individual had given a written
6 statement of the same, "I, the declarant, killed" that victim
7 to the police. They had a written statement. So at this
8 point the declarant became unavailable because the judge
9 instructed him and the Fifth Amendment and the defendant at
10 this point in time said, "That's fine, Judge," we want to
11 offer, as they're doing in this case, "we want to offer his
12 written statement of admitting this crime."

13 Arid the Seventh Circuit said that there hasn't
14 been a showing of substantial -- clear showing that it's
15 clearly trustworthy, and the judge refused and the Seventh
16 Circuit affirmed that refusal.

17 So I would suggest there's in that statement we
18 have a man admitting under oath he did it, and then saying he
19 didn't do it. And then the other evidence is apparently the
20 declarant had access, he was in the prison at the time, and he
21 had access to the victim. There was the facts that he was out
22 of his cell at the time that the victim indeed was murdered,
23 but the Court still held even in that scenario there was not
24 sufficient corroboration to suggest the statement was truthful
25 and sustain the Court in refusing to admit the written

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1 confession of murdering that particular victim, and I would
2 suggest that in this particular -- in the instant case, in our
3 case, again, the only thing that it's offering to you is that
4 he supposedly made these statements on more than one occasion.
5 And I would suggest we need much more than that to have them
6 be sufficiently reliable.

7 THE COURT: What about the defendants argument with
8 reference to the due process argument that these type of
9 hearsay statements is the type of information that the
10 government would rely upon and use if they were prosecuting
11 those people, so why can't the defendant use them to show his
12 innocence?

13 MR. BEAUMONT: Because I would suggest that we
14 couldn't prosecute somebody that allegedly made that kind of a
15 statement without corroborating evidence. I mean I couldn't
16 stand here and prosecute Lester O'Toole because supposedly he
17 said to Dison, Vela, and this other individual, "I killed
18 Jessica Roach." I mean, I think that would get directed out,
19 because there has to be corroborating evidence that the
20 statements were made. And that indeed the due process cases
21 that counsel cites, Chambers versus Mississippi and Green
22 versus Georgia, there is present corroborating evidence of the
23 truthfulness of the statements.

24 THE COURT: Well, wouldn't that be admissible as
25 admission by a party opponent, though?

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1 MR. BEAUMONT: It definitely is an admission. There
2 is no question, admission against interest. It would be
3 admission of a party opponent.

4 THE COURT: So could he use it if you were
5 prosecuting Dison, you could use these statements that he made
6 to his sister and brother-in-law, right, as admission by the
7 defendant?

8 MR. BEAUMONT: I would theoretically, yes.

9 THE COURT: Wouldn't have to show corroboration to
10 get them admissible, would you?

11 MR. BEAUMONT: No. Theoretically, yes.

12 THE COURT: Under 801(d) (2), admission by party
13 opponent. Right?

14 MR. BEAUMONT: Correct.

15 THE COURT: Okay. And the defendant argues that
16 under Seventh Circuit law and perhaps the two Supreme Court
17 cases he cites that since the government could use these
18 statements in prosecuting those persons if they were
19 defendants, the defendant ought to be able to use them,
20 despite the hearsay objections, to prove his innocence. And I
21 guess I'm saying, though, that I guess I want you to comment
22 on is that the difference there is that the rules allow for
23 the use of admission by a defendant without corroboration, but
24 it doesn't allow for the use of a statement by someone else
25 without corroboration.

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1 MR. BEAUMONT: I think that's what the rules imply.
2 I don't believe the Seventh Circuit is interpreted correctly
3 by the defense. If the Seventh Circuit says if the statement
4 is admissible, would be admissible by the defendant, therefore
5 it's admissible -- its hearsay character is ignored. I don't
6 think that's what the Seventh Circuit says. In that
7 particular case the facts were that one defendant was
8 convicted with the statement -- with the statement, and my
9 understanding is that they attempted -- the defense wanted to
10 use in its separate case, different defendant, use that
11 statement that was already used and the Seventh Circuit says
12 well it was good enough to convict party A, it should be now
13 good enough to exculpate party B, but I don't think that's
14 what we have here at all. I think what we have here is
15 clearly false, within the rules I've cited, and I don't think
16 what we have here falls within the exception of Chambers, the
17 due process claim, because in Chambers makes it very clear of
18 the corroboration. In Chambers there's no question that the
19 Court -- the Supreme Court relies upon the fact that these
20 statements were indeed corroborated.

21 THE COURT: All right.

22 MR. BEAUMONT: There's one last thing I would like
23 to speak to, if I might. There's also -- they're apparently
24 seeking to enter evidence that somebody named Gloria Dill
25 reported seeing Jessica and a white male with black hair on

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1 bicycles shortly before Jessica's disappearance. Well, the
2 shortly before Jessica's disappearance was at 2:30 in the
3 afternoon a witness says she saw Jessica and another
4 individual on a bicycle. The problem is the evidence will be
5 at 3 o'clock she was home with her sister and her father
6 alone, this other person on the bicycle was not present, and
7 I'm sure -- she may have been with people all morning or for
8 14 years prior to this incident, but it clearly has no
9 relevance to this case. She was alone when she was kidnapped,
10 before she left to be kidnapped in this case.

11 This stuff about Lester O'Toole and bringing
12 children into the -- bringing a girl into the basement and
13 then suggesting that there's no clear evidence as to when
14 Jessica was murdered. They ignore the testimony of Monty Cox,
15 who testified that he saw the perpetrator come out of the
16 cornfield on September 20, 1993, there is no question. The
17 entomologist will say there's a three day -- the entomologist
18 can come down with examining the blood larvae and so forth, a
19 three-day window. But that ignores the testimony of Monty Cox
20 who was positive on the night of September 20 that, I believe
21 he said, 1:30 P.M. or 12 o'clock at night is when he saw the
22 perpetrator come out of that specific cornfield where her body
23 indeed was. So I don't think there's much dispute at all to
24 the fact she indeed died, was dead on September -- the night
25 of September 20, 1993.

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1 This stuff about the dog sitting and whining
2 next to a car, the sheriff's dog, I just suggest that's all
3 irrelevant also.

4 The fact that Mr. Smith paid ~20 for a \$7 item
5 at a bake sale, I think it's irrelevant.

6 The statement about the unknown trucker who
7 made a statement about hitting somebody. Again, that rule, we
8 don't know who the trucker is or apparently presumably
9 unavailable. I would suggest Rule 803(b) (3) would apply, and
10 again there's been no clear showing of the truthfulness of
11 this statement.

12 MR. BEAUMONT: I guess that's all I have to say,
13 Judge. I just don't think they've made the showing to get
14 these things in evidence. I think they clearly should all be
15 barred.

16 MR. MOTE: Could I respon~ briefly, Your Honor?

17 THE COURT: Mr. Mote.

18 MR. MOTE: I recognize, a~d Mr. Beaumont is right,
19 that Monty Cox said he wasn't satis~ ied with the sketch. He
20 also testified he couldn't tell the~n how to improve on it.
21 That's as close as he could get. And in terms of
22 corroboration, if we could, if I could submit two exhibits,
23 just photocopies of the mug shot of Mr. O'Toole and a
24 photocopy of the sketch by Monty Cox, I think the Court will
25 be able to see a similarity there that certainly had they

1 charged Lester O'Toole they would say that's corroboration,
2 that's him. May I have leave to submit those as exhibits?

3 THE COURT: Any objection, Mr. Beaumont?

4 MR. BEAUMONT: No, sir.

5 THE COURT: All right. May I see them?

6 MR. MOTE: Yes, Your Honor. I'd like to touch on a
7 couple other things. I don't think Tom Smith is real
8 important here. But Mr. Beaumont says Mr. Smith's -- it's
9 irrelevant what the dog did. Well, they had the dog,
10 basically bloodhound, they had a smell of what they referred
11 as a scent aid from Jessica's home, I believe. They
12 acknowledged then they had that dog sniff around Tom Smith's
13 car, and that dog, essentially he lighted on both doors and
14 the trunk. They can say now, well, that doesn't make any
15 difference.

16 THE COURT: Which one of these guys did it,
17 Mr. Mote, if it wasn't your defendant? Was it Mr. Smith or
18 was it Mr. Goble or was it Mr. Dixon? Or you want to put in
19 20 other people?

20 MR. MOTE: If I was going to argue one of these
21 people did it, I think the evidence is far stronger that
22 Lester O'Toole did this than that Larry Hall did this.

23 If I could talk about some of the evidence,
24 some of the statements regarding Mr. O'Toole, since the
25 question came up regarding the dates of the statements. And

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1 we have, as Your Honor is aware, attached to the motion
2 transcripts of the interviews of those people.

3 Start with Nancy Dison. Nancy Dison indicates
4 that she moved from the Danville area, the address is given as
5 104 Tennessee, to Terre Haute, Indiana, on November 1 of '93.
6 If Your Honor could flip back to Nancy Dison's statement, this
7 is on page 2 of her statement towards the top. They ask her,
8 "And when did you move from 104 Tennessee to Terre Haute?"
9 She says, "November 1 of 1993." They establish that Lester
10 O'Toole, her brother, lived with her off and on while she
11 lived at 104 Tennessee. So we know that statement is made
12 prior to November 1 of '93. Her body is found, I believe it
13 was, November 8 of '93.

14 About halfway down the page they ask Nancy
15 Dison, "Do you remember approximately when this conversation
16 took place?"

17 "Answer: In about August, September.

18 "August or September?"

19 "Yes.

20 "Of 1993?"

21 "'93." That's on page 2 of her statement.

22 On page 4 of her statement, and I think this
23 would go to whether there was a motive for him to make a false
24 statement, whether he was just kidding around. On page 4 of
25 her statement, little more than halfway down, they asked Nancy

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1 Dison, "Okay. Has he ever threatened to hurt you?
2 "Yes.
3 "What did he say to you?
4 "He said he would kill me, and he would kill my
5 husband if we said anything.
6 "Question: Said anything about Jessica Roach?
7 "Answer: Yes.
8 "Do you think that Lester would kill you if he
9 knew you were telling?
10 "Answer: Yes, I do."
11 Going to Mr. Dison's testimony on page 2. "And
12 exactly what did he tell you about the Jessica Roach case?
13 "He said that Jessica Roach needed dead, and he
14 wanted to kill her.
15 "Did he give a reason why?
16 "No."
17 On the next page they ask him to try to
18 establish a time for that statement that Jessica Roach needed
19 killing. This is presently March 1994 when they're talking to
20 him. "Was this in 1993 or 1994, this conversation took
21 place?"
22 MR. BEAUMONT: Judge, I'm going to object because
23 he's misreading. He's skipping out parts, and I think if hers
24 going to inform the Court and make a record he should read the
25 whole part. Before that it says, "And about what date did

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1 this conversation take place with Lester O'Toole?" And the
2 answer was, "I don't know." That's on page 2 at the bottom
3 three lines.

4 MR. MOTE: We've got the tapes. We've actually got
5 a tape recorder here, Your Honor. We can play the whole
6 thing, where the interviews are five to ten minutes apiece.

7 THE COURT: Well the transcript says what?

8 MR. MOTE: Yes.

9 THE COURT: What Mr. Beaumont says it says?

10 MR. MOTE: And I don't have any disagreement with
11 that.

12 THE COURT: And his point was that you skipped that
13 sentence which, of course, I read, so I knew you had skipped
14 it.

15 MR. MOTE: And I wasn't -- I shouldn't say -- I
16 wasn't intending to mislead you at all. I was just going to
17 when they are estimating dates.

18 THE COURT: I'm sure that's true. Go ahead.

19 MR. MOTE: It says, "1993.

20 "And was it warm out? Do you remember the
21 weather?"

22 And he says, "Yes, it was nice and warm out."

23 Let's see.

24 THE COURT: What's the point of this?

25 MR. MOTE: Well --

1 THE COURT: You're suggesting that these statements
2 were made?

3 MR. MOTE: I'm trying to establish the time frame a
4 little bit. Mr. Beaumont suggested that while afterwards
5 everybody knows she's been found in a cornfield. She was
6 found on November 8. These statements take place at 104
7 Tennessee in Danville, which they moved away from November 1
8 of 1993. As Your Honor recalls in Mr. -- it was Mr. Vela's
9 statement, he said that Mr. O'Toole said that Jessica would be
10 found at harvest time. And if that statement is made prior to
11 November of 1993, it's not Lester doesn't know it because it's
12 been recorded, and that statement about harvest time is on
13 page 4 of Mr. Vela's statement, and I can go over some more of
14 this, if Your Honor wishes, but that's the point I'm trying to
15 make. In terms of corroboration, in addition to
16 the -- Mr. O'Toole's resemblance to the sketch, and I've
17 mentioned a statement by another person other than these
18 three, I believe it was a Grace who was referred to in here,
19 but I'm not sure that's who it was, but there's a report of a
20 statement that he said that weekend that he was going to
21 Georgetown. Beyond that, it might be considered corroboration
22 that Mr. O'Toole's record includes similar offenses. He was
23 convicted in 1984 for raping his 14-year-old sister, which was
24 an offense that took place out in the country along a river
25 bank.

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1 THE COURT: Now, Mr. Vela said the statement was
2 made in December of '93.

3 MR. MOTE: Yes.

4 THE COURT: That's on page 2.

5 MR. MOTE: Yes. And you know Mr. Beaumont is
6 completely correct, they're not certain on dates. He says
7 December of '93, and then they ask him around the time she
8 disappeared, and the person says yes. And of course it was
9 September 20 when she disappeared, but given where he says the
10 conversation took place, well, and as importantly that he says
11 it's around the time of her disappearance that would --

12 THE COURT: What does that mean?

13 MR. MOTE: Well, I think it shows he's -- he's not
14 certain of certain -- of exact dates. They ask him, Mr. Vela,
15 on page 2, when was that, you know, he says that was in
16 December of '93. Then they ask him was it around the time of
17 her disappearance, which was September 20 of '93, and he says
18 yes.

19 And if we read on, I'll skip to the top of the
20 next page. I guess I'll just read this. "How did you know of
21 her disappearance?

22 "Through hearing it on the radio.

23 "All right. Where were you at when you heard
24 it on the radio?

25 "418 Chandler.

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1 "And who was present then?

2 "Me and him?"

3 THE COURT: So you're saying he's with O'Toole at
4 the time he hears over the radio of Jessica's disappearance?

5 MR. MOTE: "Question: What he say about that?

6 "Answer: Well it come over the radio of her
7 disappearance, and he pointed at himself and he said that he
8 did -- that he had to do with it.

9 "Did you ask him what he meant by that?

10 "No, but I more or less, knowing him, I
11 understood what he was saying.

12 "Question: All right, did he ever go into any
13 other detail with you about this?

14 "Later on he told me that he took her over to
15 Indiana and disposed of her.

16 "Okay, disposed of her. Those were his exact
17 words?

18 "Yes."

19 THE COURT: Do any of these people appear to be
20 reliable people to you? Mr. and Mrs. Dison, would you vouch
21 for their trustworthiness?

22 MR. MOTE: These are not upstanding individuals, but
23 these are not -- I mean these are people when we try to find
24 them they moved and not left forwarding addresses. At the
25 same time Nancy Dison is speaking about her brother. And they

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1 ask her, you know, do you believe when he threatens you, do
2 you believe he'd actually kill you, and she says yes. There
3 is nothing to suggest that they have any reason to make this
4 up.

5 THE COURT: Well, she'd like to get rid of him.

6 MR. MOTE: That's true, and they would not be alone
7 in that.

8 THE COURT: Would you agree, Mr. Mote, that the
9 issue in this trial is not who killed Jessica Roach but
10 whether or not the defendant killed her?

11 MR. MOTE: I would.

12 THE COURT: Kidnapped, isn't that the issue?

13 MR. MOTE: I would say the question is whether it
14 can be established beyond a reasonable doubt that Larry Hall
15 killed her, and I think it is very important when the jury
16 assesses that that they, you know, if they know, yeah, he may
17 have made a statement when after being interrogated by the
18 police and having pressure put on him in a statement that they
19 wrote out, but you've got somebody out here who has a history
20 of this kind of offenses, at least in terms of raping girls of
21 about that age, who made statements to many people that both
22 before time -- before her abduction and afterwards that he did
23 it. I think frankly by itself the fact that there is to my
24 mind more evidence against Lester O'Toole than there is
25 against Larry Hall is reasonable doubt by itself, and I don't

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1 think that should be kept from the Jury.

2 THE COURT: Did Mr. Hall take a polygraph exam?

3 MR. MOTE: Yes, he did.

4 THE COURT: Did he pass or fail?

5 MR. MOTE: They said he failed.

6 THE COURT: And what about Mr. O'Toole?

7 MR. MOTE: They said he passed, and that is the
8 basis, I've been told, for why they dropped him as a suspect.
9 I have seen -- we've been given a copy of the questions and
10 answers on Mr. O'Toole's polygraph exam, and I am certainly
11 not an expert on polygraph exams, but I've done some reading
12 on it, and one of the things that they consistently say is
13 there should only be two or three critical questions to what
14 you're trying to find out. And what I saw immediately on
15 Mr. O'Toole's polygraph exam is that there were maybe six or
16 eight questions, and they were all critical to the issue they
17 were trying to find out, which is not considered, from what
18 I've read of present polygraph techniques, a valid approach.
19 But it is also well-established and, you know, I think
20 polygraphers recognize this, police officers recognize this,
21 that a person who is a sociopath, and from my own reading,
22 although this certainly isn't admissible regarding serial
23 killers, those kind of people will often either have
24 inconclusive results or pass because what it's measuring is,
25 of course, the truth, it's your physical response to being

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1 deceptive. And if you're not uncomfortable lying, if you're
2 not uncomfortable being deceptive, if you don't have the
3 normal guilt about what you've done, you're going to pass.
4 Likewise, if you're somebody, and this Court has already heard
5 that Larry Hall has this dependent personality disorder, if
6 you are somebody who even if you had nothing to do with it, if
7 somebody comes up and accuses you of something, you're going
8 to feel guilty and uncomfortable. There are people who will
9 fail. There's a lot of documentation of people failing
10 polygraph tests and later being cleared.

11 THE COURT: Okay. Have you finished?

12 MR. MOTE: That's what I wanted to cover, Your
13 Honor. Thank you.

14 MR. BEAUMONT: Judge, just for the record, I would
15 like to suggest that his representations of polygraph tests
16 are totally wrong. I happen to be a licensed polygraph
17 examiner. I've been a polygraph examiner for 20 years. And
18 I'm just telling the Court his representations about being
19 feeling guilty are wrong or being a sociopath are wrong,
20 because built within the polygraph technique, and I reviewed
21 the technique in both of the polygraph tests in this case,
22 built within the technique are control questions, and in order
23 to pass a polygraph test you must respond to control questions
24 and not respond to relevant questions in order to pass. To
25 fail a polygraph test you must respond to relevant questions

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1 and not respond to control questions. You cannot turn it on

2 and off at will. It's an autonomic nervous system response,
3 s~ it has very little to do with feeling guilty or being a
4 sociopath and not caring, because the truth of the matter is
5 you would not, if you didn't care, for example, if as counsel
6 suggests you' re a sociopath, if you did not care, you would
7 not respond to the control questions. I saw Mr. O'Toole's
8 polygraph charts, and he's clearly responding to control
9 questions, and hence the report that's truthful of these
10 questions, and it is not true that you can only ask three
11 questions on a polygraph test that is not true. You can ask
12 up to five or six questions on a polygraph test and have it
13 not affect their results.

14 THE COURT: All right. Thank you, Mr. Beaumont.

15 That's not a critical issue, and the Court -- I
16 was just curious.

17 All right. I'll try to have a decision on this
18 tomorrow on this issue, this motion. And can we start at 9:00
19 with Dr. Ofshe?

20 MR. BEAUMONT: Yes, sir.

21 MR. DeARMOND: Yes, sir.

22 THE COURT: Okay.

23 MR. DeARMOND: Your Honor, could I take just a
24 moment of the Court's time to address a problem that Mr. Hall
25 has brought to our attention?

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1 THE COURT: Yes.

2 MR. DeARMOND: Mr. Hall called me Saturday very

3 upset because the fact that upon moving him to Peoria they
4 moved him into apparently what they call here a pod, which I
5 assume is something equivalent to a cell block, and he's been
6 having some difficulty with other inmates when they find out
7 who he is and what he is here for. And he has previously on
8 other occasions been placed in solitary confinement, which he
9 would prefer to be.

10 Tn addition, he has expressed to me having
11 observed correctional officers or persons who he subsequently
12 sees as correctional officers don prison garb and spend time
13 in that cell block or pod with him asking him questions,
14 trying to get him to talk to them. He has been instructed and
15 has assured us that he has not talked with anyone about
16 anything about the case, but I am concerned about both issues.
17 No. 1, his possible harassment and possible physical harm at
18 the hands of other inmates that has occurred elsewhere in
19 places where Mr. Hall has been when they find out what he is
20 in there for. And arrangements have been then made to place
21 him into some form of solitary confinement, which he's
22 perfectly willing to experience during the course of the
23 trial.

24 The other part that does concern me, however,
25 is that he pointed out that even as late as today he said that

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1 one of the persons who was pretending to be an inmate was, in

2 fact, this morning working at the front desk of the facility
3 that he was being brought from today for purposes of court.
4 don't know whether these sorts of things go on over here or
5 not, Your Honor. I'm not familiar with that type of thing
6 happening in facilities that I've dealt with and inmates that
7 I have dealt with over quite a few number of years, but I am
8 concerned, that issue was brought to my attention, and we are
9 requesting if at all possible some assistance by the Court
10 perhaps to get the U.S. marshals, perhaps to get the Peoria
11 authorities, to place him into solitary confinement so that he
12 can be away from other inmates. And obviously if there is
13 such a practice going on of sending people in to try to get
14 him to talk to them, that that practice be stopped.

15 I wanted to bring it to the Court's attention
16 as soon as it had been brought to mine. We didn't really get
17 a chance to get into it this morning before, Your Honor, and
18 so I assured Mr. Hall that I would bring it to the Court's
19 attention when I could.

20 THE COURT: All right. Mr. Beaumont?

21 MR. BEAUMONT: Judge, I know nothing about it. I
22 certainly am not having people talk to Mr. Hall. I don't even
23 know what jail he's in. My understanding it's the marshal's
24 responsibility to keep him secure, and as I understand they do
25 just that.

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1 THE COURT: Have there be any incidents,

2 Mr. DeArmond, where he has been assaulted or he's just fearful
3 that he will be?

4 MR. DeARMOND: His representations to me have been
5 that it's been a matter of people making statements and making
6 threatening gestures and movements. I don't believe he's
7 actually been physically assaulted. All we're asking
8 is -- and he's not accusing the U.S. marshals of doing
9 anything. This is all happening within the confines of the
10 Peoria Jail, I guess is where he's at. All he's asking is
11 that if there's any way possible to have him placed into
12 solitary confinement that would be both preferable, and from
13 my past practice over the last several years with Mr. Hall we
14 are aware of there having been incidents in the past where he
15 did have problems with other inmates once it was learned who
16 he was and what he was there for.

17 THE COURT: All right. I'll talk to the marshals
18 about it.

19 MR. DeARMOND: Thank you very much.

20 THE COURT: Recess till tomorrow morning.

21 (The hearing adjourned at 3:23 P.M. to
22 reconvene at 9:00 A.M. on August 12, 1997.)

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CERTI FICATE

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4 I certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.

6
7 e LaBerdia, RDR Date
8 Illinois CSR No. 084-001506

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

| | | |
|---------------------------|---|------------------|
| UNITED STATES OF AMERICA, |) | Criminal Docket |
| | | No. 94-20036 |
| Plaintiff, | | |
| vs. |) | Peoria, Illinois |
| | | August 12 1997 |
| LARRY D. HALL, |) | 9:20 A.M. |
| Defendant. | | |

PENDING MOTION HEARING -- VOLUME 2 OF 3

BEFORE THE HONORABLE JOE B. McDADE
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript
produced by computer.

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1 THE COURT: All right. The record will show the
2 presence of defendant and counsel and also government counsel.
3 And this is a continuation of the evidentiary hearing in
4 connection with the proffer of expert testimony on the issue
5 of false confessions. And I believe, Mr. DeArmond, you wanted
6 to continue with your examination of Dr. Ofshe?

7 MR. DeARNOND: Yes, sir. Your Honor, if the Court
8 please, what we would like to do first is move to supplement
9 the record with Defendant's Exhibit No. 37, which was referred

10 to at the previous hearing. The paper that Dr. Ofshe had
11 prepared for the Denver University Law Review, which he said
12 was in the process of being completed, has now been completed,
13 and I'd like to tender Defendant's Exhibit No. 37 as the
14 exhibit to which he referred.

15 THE COURT: Okay. Be admitted.

16 (Defendant's Exhibit 37 admitted into evidence.)

17 MR. DeARMOND: Thank you. Your Honor, the next
18 matter I would like to ask the Court's indulgence to address
19 is, and this is maybe as much for my understanding as
20 anyone's, in discussions with the government and their
21 representation yesterday that they were not going to call
22 Dr. Kassin, I understand that their objection now is to the
23 relevance prong of Daubert. If that's true, and that we are
24 here today as I understand it for the purposes of addressing
25 the issue of relevance, as I've indicated in the memorandum in

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1 support of our response that we filed on the 11th, what I'd
2 like the Court to consider doing is making its determination
3 with regard to the scientific knowledge prong of Daubert and
4 addressing that aspect of the Daubert hearing so that we now
5 know exactly where it is that we are, in fact, supposedly
6 going.

7 The reason I bring that up is as the Court will
8 recall at the previous hearing, at the outset of the hearing
9 it appeared that everyone was of the understanding that we
10 were here to address the scientific knowledge prong of the

11 Daubert hearing, and that the issue was whether there was
12 scientific validity for Dr. Ofshe's testimony. And the Court
13 even quoted the reference to the Hall Seventh Circuit opinion
14 where it appeared to indicate that the Seventh Circuit had
15 already made a judgment with regard to relevance. As the
16 Court will recall, that's an argument that I maintained
17 throughout the proceeding when we were here last.

18 At some point then there appeared to be, and
19 the government acknowledged, at that point at least at the
20 outset of the hearing, that their position was there was no
21 scientific basis for testimony, and that that's basically what
22 we were here to decide, and the Court indicated that's what
23 the Court understood their position to be, and everyone seemed
24 to be of agreement that we were going to address the
25 scientific prong.

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1 Once that testimony was completed, the
2 government's cross-examination immediately began on the
3 relevancy issue, and as the Court will recall that's when
4 there was some degree of confusion because that had not been
5 the issue, as we understood it, framed by the pleadings that
6 the government has filed in response, I'm sorry, that the
7 government had filed in their request for the 104 proffer, and
8 that we weren't prepared to proceed in that fashion, and
9 that's one of the reasons why we're back here today.

10 Now, I understand that the government's only

11 reason or purpose in calling Dr. Kassin is to address the
12 relevancy issue. And if that's true, then we're asking the
13 Court to make it's determination with regard to the first
14 prong, whether there has been sufficient evidence of a
15 scientific basis for Dr. Ofshe's opinions. And then we would
16 begin the determination with regard to relevance, because I
17 have some matters I'd like to bring to the Court's attention
18 in that regard, as well. I guess I'm asking for the Court's
19 direction at this point. We would like to have a ruling on
20 the first prong, because as I understand it that's really not
21 in contest.

22 THE COURT: Mr. Beaumont.

23 MR. BEAUMONT: He understands wrong, Judge. I have
24 evidence to present on the first prong that's not scientific.
25 I've been saying from day one these opinions are not -- they

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1 are not based on science, and they do not fit the facts of
2 this case. I don't know what else to say. In that sense,
3 it's not relevant because the -- first of all, he didn't
know
4 -- at the last hearing he didn't know what the facts of this
5 case were, but his opinions do not fit the facts of this
case.
6 There's two prongs. One, it's not based on science
itself,
7 nothing more than pseudoscience fancy phrases for common

8 sense, that's been our position, and we intend to present
9 evidence on both of those points when they're done with
10 Dr. Ofshe.

then 11 THE COURT: Well, I prefer to hear everything
12 make my decision.

13 MR. DeARMOND: Yes, sir. I call Dr. Ofshe.

14 THE COURT: Would the clerk please swear in Dr.
15 Ofshe again.

16 RICHARD OFSHE, WITNESS, SWORN

17 DIRECT EXAMINATION

18 BY TAR. DeARMOND:

your 19 Q. Doctor, would you please state your name, and spell
20 last name again for the record?

21 A. Richard J. Ofshe, O-F-S-H-E.

22 Q. And, Doctor, you are the same Dr. Richard Ofshe who
23 testified previously in the hearing before this court; is
that 24 correct?

25 A. That's correct.

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1 Q. Doctor, would you describe, please, what is involved in
2 analyzing a fact situation which is presented to you that
3 includes an alleged confession and the interrogation process
4 in order to form your opinions regarding the impact of the
5 interrogation on the decision making made to result in an

6 alleged confession?

7 A. Well, first thing would be to become generally familiar
8 with the facts of the case by reviewing police reports and
9 related documents that would lay out what the undisputed facts
10 are, the evidence in the case and so on. Second would be to
11 become familiar with exactly what happened during the
12 interrogation, and this would be by reviewing reports of what
13 occurred, or video and audiotape recordings, if there are
14 such, and transcripts of them, and to become familiar with
15 what actually happened in the interrogation.

16 In the event that recordings are not -- have
17 not been made, then it becomes necessary to try to reconstruct
18 what occurred during the interrogation, and one step in doing
19 that involves debriefing the person who was interrogated as to
20 what happened during the interrogation, as well as reviewing
21 any debriefings or testimony given by the interrogators as to
22 what they did during the interrogation. The next step would
23 be to evaluate that material with respect to the first
24 question, which is the analysis of the motivation for the
25 person to make a statement.

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1 Q. What do you mean by analysis of motivation?

2 A. Well, in everything other than a voluntary -- well, first
3 of all, if an interrogation occurs, it occurs because the
4 person initially says "I didn't do it." And at some point in
5 an interrogation, one that culminates in a confession, the

6 person makes an admission, at which point they essentially say
7 "I did it." That point of making an admission of commission
8 of the crime, it marks a dividing line in the interrogation.

9 Having obtained the admission, the next thing
10 that happens is an interrogator will try to get details of
11 what happened during the crime, what I refer to as collect the
12 post admission narrative of the crime, and that typically
13 happens after the admission is given. It's the post admission
14 narrative that transforms what is otherwise simply an
15 admission into a confession. The statement "I did it" is not
16 a confession in substance or in the law. It is an admission.
17 In order for somebody to be realistically considered a
18 confession, it needs to include more description of what the
19 person did so that it's a full statement of their involvement
20 in the crime. That full statement of their involvement in the
21 crime is actually the basis for distinguishing between whether
22 a person has or does not have actual knowledge of having
23 committed the crime.

24 Q. Why is that important in the analysis?

25 A. Because of the fact that false confessions are possible,

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1 then you can't discriminate between the true and false
2 confession simply based on the fact that someone said "I did
3 it." Something more is necessary. What's necessary is to
4 demonstrate that the person has actual knowledge of the crime.

5 That can occur in several different ways. The best way would
6 be for the person to tell the investigator something that is
7 currently unknown to the police, something that defies any
8 possibility of contamination, such as you can find the murder
9 weapon in such and such a place or the loot from the robbery
10 can be found in such and such a place. Something that has not
11 yet been discovered by the police forecloses any possibility
12 of contamination and demonstrates at least on that point,
13 certainly, actual knowledge of the crime.

14 There are a number of ways in which police
15 routinely seek to get demonstrations of actual knowledge.
16 That whole process is what I referred to as gaining the post
17 admission narrative.

18 By evaluates the post admission narrative, both
19 in terms of whether it produces corroboration, independent
20 corroboration unknown to the police, whether it fits the facts
21 of the crime, so that it is a possible explanation, and
22 assuming that contamination can be ruled out, that's evidence
23 indicating that the person has actual knowledge. And if on
24 the other hand the post admission narrative fails to fit the
25 facts of the crime, and/or contamination cannot be ruled out,

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1 but also contains errors in statements that can be disproven,
2 then that would be evidence, depending on which way it goes,
3 it would be either evidence tending to indicate actual

4 knowledge of the crime or evidence tending to indicate lack of
5 knowledge of the crime.

6 So by evaluating the post admission narrative
7 one gets indicators of the person's actual knowledge of the
8 crime or lack of actual knowledge of the crime, and that
9 information can then be very useful for someone who has to
10 make the decision as to how much weight to give the
11 confession. In other words, to decide whether to classify it
12 as a true confession or a false confession, whether to be
13 impressed by the confession or whether to disregard the
14 confession, or whether to use the confession as evidence
15 indicating possible innocence as opposed to possible guilt.

16 Q. Is it your position that all coerced confessions result
17 in false confessions?

18 A. No. It's perfectly possible to coerce a true confession.

19 Q. And by coercion, are you talking necessarily about
20 something that is wrong or illegal from the standpoint of what
21 the investigating agents or officers may do?

22 A. In my own work I use a standard of threats and promises
23 or physical assault to define coercion. I tend to restrict
24 that word in my use of it to those circumstances, because the
25 word itself is capable of multiple meanings. It's possible to

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1 pressure someone. It's possible to intimidate them, to do
2 things that in another setting it might be perfectly
3 reasonable to call coercion or coercive. But in the setting
4 of analyzing an interrogation, mindful of the fact that it's

5 being done for legal purposes, I restrict my use of the term
6 coercion to threats of harm, offers of benefit, offers of
7 leniency, and then also recognize that for some individuals
8 the literature indicates that an interrogation can become so
9 particularly stressful for them as individual personalities
10 that they may have an unusual sensitivity to pressures in an
11 interrogation that might otherwise be considered strong but
12 nevertheless not sufficient to coerce a -- to be considered
13 coercive. That takes into account really special properties
14 the person may have, such as limited intelligence.

15 It's generally recognized that some individuals
16 who are mentally impaired develop very submissive styles of
17 interacting simply because they are wrong so often that they
18 comply when confronted strongly with disagreement, that
19 becomes a tendency for them because they're simply confused.
20 Or other people may have a pathological sensitivity to stress
21 for one reason or another. They may be phobic, they may be
22 fearful of small spaces, they may be fearful of heights.
23 There may be all sorts of things which could introduce an
24 unusual stress element into an interrogation. While that's
25 possible, I think that that's very rare, and I've never seen,

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1 if I'm remembering correctly, I've never seen an example of an
2 interrogation of someone I would consider or who is judged to
3 be psychologically normal that produced a false statement
4 responsive to stress, although it may happen for certain
5 categories of individuals.

6 Q. In your experience in performing the analysis that
7 includes both the alleged confession and the interrogation
8 process, are you then always able to form an opinion as to
9 whether the confession may be classified under any known
10 classification scheme?

11 A. No. It happens more than half the cases that I'm asked
12 to evaluate that I'm unable to reach, to classify it in this
13 way, and I simply categorize these as -- I simply don't
14 categorize them. I can't tell they actually -- they're either
15 voluntary statements, there's no evidence that anything
16 improper was done, or it's impossible for me to tell, so
17 anything that I can't tell on gets left in the voluntary
18 category certainly.

19 Q. Is there a known or recognized classification scheme
20 within your field of study that involves the different types
21 of interrogations that are found to exist once this analysis
22 of the influence factors is performed?

23 A. Yes.

24 Q. And what is that scheme?

25 A. Well, there's originally a classification scheme proposed

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1 by Kassin, Kassin and Wrightsman in the middle '80s, I think,
2 or middle '80s, and I recently modified that because I find it
3 limited in certain regards and simply extended it so that it
4 applies to both true and false confessions and also
5 distinguishes between classical or legal coercion, threat, and
6 promise coercion versus stress-induced statements. I find

7 that more helpful, and in fact it better fits with the theory
8 of how false confessions or how interrogation, in general,
9 works. Category schemes should be related to some larger
10 understanding of the process. They're not entirely arbitrary,
11 and as understanding of the process developments the category
12 schemes get more refined because they reflect important
13 theoretical distinctions as they develop and are understood.

14 Q. What's the classification scheme of Dr. Kassin that
15 you're familiar with?

16 A. The one that was originally published, the substance of
17 it, he identifies voluntary false confessions, coerced false
18 confessions, where he uses coerced to apply to both stress and
19 threat generated false statements. And also what he calls
20 coerced internalized false confessions where the person under
21 his notion actually comes to believe in a profound sense that
22 they have committed the crime. I've never seen an example of
23 that, and in fact don't believe any example exists, so what I
24 have seen I indicate -- I classify as a persuaded false
25 confession where the person comes to the conclusion, they form

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1 the opinion that it's more probable than not that I committed
2 this crime.

3 Q. Under his classification scheme of the coerced compliant
4 false confession means what?

5 A. It means the person gives a false confession to a crime
6 knowing full well that they did not commit the crime. They
7 are brought to that point because they're motivated to do that

8 because of the stressers, the coercion factors that Kassin
9 identifies, and the only difference in your scheme and his is
10 that is simply that I distinguish into two categories the
11 kinds of motivators that might be used. One being classically
12 coercive motivators and the other being psychological or
13 interpersonal motivators, such as pressure, stress, anxiety,
14 and so on.

15 Q. Based upon both the literature, the research, and your
16 experience, are there commonly recognized factors which are
17 found to exist in false confessions?

18 A. Yes.

19 Q. What are they?

20 A. Well, first, if there's a record then false confessions
21 will tend to be produced through the use in most cases of some
22 improper interrogation procedure. That is to say in the
23 records of full interrogations that I've seen, when a false
24 confession occurs it occurs in response to threats and
25 promises of leniency that would generally be recognized as

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1 illegitimate, and they have the effect of inducing a person
2 either to avoid the punishment or to gain the benefit of
3 giving a false statement.

4 Q. Is that the maximization/minimization scheme that you
5 referred to at the previous hearing?

6 A. Well, I was referring to examples in which the full-blown
7 threat, for example, if you don't confess I'll make sure you
8 get the death penalty is said, versus situation, and also

9 including situations in --

10 THE COURT: Mr. DeArmond, I don't want to interrupt,
11 but I don't want to hear everything that this witness has
12 testified to before. I thought the purpose here was to have
13 him indicate those factors in the Hall interrogation which he
14 considers to be productive of a false confession, in other
15 words, the fit. I thought we were at that point. I thought
16 you had put on the evidence you wanted to put on about the
17 scientific knowledge aspect because you wanted me to make a
18 ruling based on what I already heard.

19 MR. DeARMOND: Right, I was only I'm sorry, go
20 ahead.

21 THE COURT: So to be frank with you, you fellows
22 have put so many motions before me I need some time, and I
23 don't want to just sit here and hear a lot of stuff that I
24 already heard.

25 MR. DeARMOND: Perhaps I misunderstood. I put the

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1 basic scientific knowledge information before you. I didn't
2 really believe we had laid the foundation for how he's capable
3 to form his opinions from the facts of this case, but if the
4 Court is comfortable with the information provided, as with
5 regard to his capability to form those opinions, we're ready
6 to proceed right into the facts.

7 THE COURT: Well --

8 MR. DeAB.MOND: I tried to generalize it first to
9 show that there was a body of knowledge out there, and then I

10 thought that before I could actually get him to give the Court
11 his impressions and opinions it might be necessary for me to
12 lay the foundation for his specific methodology that he would
13 apply in such cases and then his application in this case.
14 But if the Court is comfortable with his explanations of
15 methodology previously, I have no problem with proceeding with
16 the facts.

17 THE COURT: Well, I'm not so sure I understand the
18 distinction you're making, so proceed the way you want to.

19 MR. DeABMOND: I'll try to short-circuit a little
20 bit.

21 Q. Doctor, in this case did you have information made
22 available to you from all of the various police reports that
23 were provided to us pursuant to discovery?

24 A. Yes. I reviewed the Vermilion County police reports.

25 Q. Did you also have FBI investigative reports?

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1 A. Yes, I did.

2 Q. Did you also have transcripts of the motion to suppress
3 and the trial?

4 A. Yes, I did.

5 Q. Did you have the tapes of conversations with Mr. Hall on
6 March 12 and 13, 1995, that were taken at your request?

7 A. Yes.

8 Q. Did you use all of that information for the purposes of
9 conducting the analysis that you previously described as being

10 necessary to form conclusions or opinions about the nature of
11 a confession in the interrogation process?

12 A. Yes.

13 Q. Can you describe to the Court, please, just briefly how
14 it is you go about performing that analysis once you've been
15 given, and once you were given in this case, that particular
16 information?

17 A. In this particular case the first thing would be to start
18 collecting the information that I mentioned before. In this
19 particular case, as soon as that's undertaken, problems begin
20 to arise which require some comment. First problem that
21 arises is that there is an almost complete disagreement.
22 There is some points of agreement that I can point out, but
23 there's almost a complete disagreement between the testimony
24 given by Gary Miller and Agent Randolph as to what happened
25 during the interrogation and the account of the interrogation

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1 provided by Mr. Hall. These are to say, the least, world's
2 apart.

3 Q. Is that necessarily unusual in your experience?

4 A. It happens. I've seen it happen before in cases in which
5 -- yes, I've seen it happen before in cases in which I've
6 worked.

7 Q. Go ahead.

8 A. Given that, it's really necessary to -- because these

9 differences cannot be reconciled, it's necessary to really
10 conduct two separate analyses of what happened. One,
11 presuming the statements made by Mr. Hall; the other presuming
12 the statements made by the interrogators Miller and Randolph.

13 Q. What do you mean by when you say that you're presuming
14 the statements made by one versus presuming the statements
15 made by another?

16 A. Well, the statements are so diametrically opposed that
17 when in comparison, when comparing them, one would look at the
18 statements and essentially say somebody's lying. There's no
19 way in my judgment to avoid that. These are two separate
20 accounts of an interrogation utterly -- except as I said for
21 certain points of agreement, certain factual agreements as to
22 this statement was made, that statement was made, and this is
23 principally about what happened in the interrogation up to the
24 defining point that I call the "I did it" statement; in other
25 words, the present post admission narrative portion of it.

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1 The part of it in which the person is being gotten to the
2 point at which they acquiesce or they confess, whichever it
3 is. Up to that point there's a radically different account of
4 what goes on. Subsequent to that, there is -- there are a
5 series of statements that are attributed to Mr. Hall about
6 what he said during the debriefing done by or the post
7 admission narrative portion done by Gary Miller after the
8 first statement was completed when he continues on to get more

9 information. And in fact even the first statement itself in
10 terms of how that was constructed is in some degree of
11 dispute. But the post admission narrative provides a series
12 of statements that can be separately analyzed with respect to
13 the question of whether or not they demonstrated actual
14 knowledge of the crime or indicate or fail to indicate actual
15 knowledge of the crime.

16 Q. Why in a situation where you have diametrically opposed
17 versions of what may have occurred during the interrogation is
18 it so important to pay attention then to the post admission
19 narrative?

20 A. Well, if the post admission narrative -- the assertions
21 made in the post admission narrative stand up, in other words,
22 if, for example, the extreme case, the person tells the police
23 you can find the victim's blouse in this particular part of
24 these woods stuck into this hollow tree, and the police had
25 not yet found that, and assuming that, and then they go out

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1 and look and they find it, that tells you something about the
2 person's actual knowledge, and it's an independent question of
3 the question of how the person was motivated to make that
4 statement. A person who was, in fact, guilty, not -- had in
5 fact committed the crime, but had been brutally threatened or
6 beaten and contributed that information would nevertheless be
7 demonstrating actual knowledge, even if the way in which it

8 was obtained might be considered improper. So one can look at
9 the post admission narrative independent of the question of
10 motivation.

11 Q. How did you go about analyzing the post admission
12 narrative? Are you just taking what the defendant says as
13 gospel for purposes of what happened in the interrogation?

14 A. No. You prefaced your question with how did you go about
15 analyzing the post admission narrative. In the post admission
16 narrative I'm relying principally on what the interrogators
17 say was said, not what the defendant says was said. So I'm
18 looking at that principally in the post admission narrative.
19 The defendant's -- my recollection is that the defendant's
20 comment on that more than anything else had to do with the
21 language that he used, the fact that things were conditioned
22 and hedged rather than stated directly. But principally what
23 I looked at in the post admission narrative were those things
24 came from the testimony of the interrogators.

25 Q. Okay. So I want to make sure I understand. You have in

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1 analyzing this particular case, you have, for lack of a better
2 description perhaps, the Miller/Randolph version, would that
3 be correct?

4 A. That's correct.

5 Q. And what would you call that, what information was that?

6 A. That would be based on their reports, their suppression
7 hearing testimony, and the trial testimony.

8 Q. And then we have the Hall version. From where did you

9 get that?

10 A. In part from his trial testimony, but principally from
11 the debriefing interview that was done at my request.

12 Q. With regard to the basis or source of your information
13 for the post admission narrative, where does that come from?

14 A. The files, the totality of the information that I'm able
15 to glean as to the facts of the case.

16 Q. In this particular case, based upon your analysis of the
17 Miller/Randolph version, did you find or observe any factors
18 which you commonly recognize or see in interrogation?

19 A. Yes.

20 Q. Was there anything about their version that -- was there
21 anything that appeared to be lacking in their version of the
22 interrogation process from what you have seen in most normal
23 interrogation proceedings?

24 A. Yes.

25 Q. What was that?

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1 A. Well, because this was not a voluntary statement, and I'm
2 using -- let me make sure I'm clear about what I mean by
3 voluntary here. This was not a statement in which Larry Hall
4 or some -- Larry Hall presented himself at the police station
5 and said "I committed this crime" and, therefore, did not need
6 to be interrogated. So it was not a voluntary true or
7 voluntary false confession in the sense it was -- Kassin uses
8 the term or I would use the term. In other words, a statement

9 that was not produced in response to interrogation, so not
10 meaning to invoke the legal meaning of voluntary here.

11 This was clearly a statement that was produced
12 after a period in which the -- Mr. Hall denied that he had
13 committed it -- any crime in connection with Jessica Roach.
14 That he resisted. His position of no involvement had to be
15 changed from no involvement to making admissions. The
16 Randolph/Miller account of this does not include an
17 explanation for how that happened. He just simply said that
18 it happened.

19 Q. Why is that unusual in your experience?

20 A. Well, if someone initially takes the position I did not
21 commit this crime, interrogation is about how to shift that
22 person from that position to a willingness to make an
23 admission, that's what all interrogation training is about.
24 There are numerous tactics that are introduced in order to do
25 that. Those tactics can have that effect and they can be done

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1 quite properly. But there is no explanation in the Miller!
2 Randolph account. All I'm able to glean from it is that
3 Mr. Hall initially refused the polygraph. There was a
4 discussion with Mr. Randolph which was not taped and no
5 contemporaneous notes were taken. And then at a certain
point
6 Mr. Hall now is said to suddenly be willing to make admissions

7 about the Roach killing without any explanation developed
8 anywhere I've been able to find as to what interrogation
9 tactics and skills Agent Randolph used to change Mr. Hall's
10 motivation. And that's -- I find that puzzling because that
11 is, after all, the mark of a good interrogator being able to
12 do that and something that I would anticipate an interrogator
13 would be forthright about.

14 THE COURT: Doctor, let me ask you this. Do you
15 expect to see in the police report of interrogation some
16 explanation of the interrogator's strategy so he's going to
17 explain to you how he shifted gears to get over a denial?

18 THE WITNESS: Not necessarily, Your Honor, but
I'm
19 drawing on the police reports together with the testimony at
20 the suppression together with the testimony at the trial and
21 I'm unable to find an account of this.

22 THE COURT: I don't know what you mean, an
account.

23 THE WITNESS: An explanation for the way in which
it
24 developed. All Agent Randolph says, if I recall, is he
25 developed a rapport. I mean he talks about developing a

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1 rapport as a tactic that he used. But all that appears to
2 happen is that Mr. Hall then shifts without any further
3 explanation. Well that -- there's no linking between initial
4 denial, engaging in certain interrogative moves, and producing

5 a change from -- there is no account of perhaps being first
6 tentative and developing it or the crucial thing that led to
7 the shift. It's just -- the record is silent on that. And,
8 therefore, it's puzzling to me. And Mr. DeArmond asked me to
9 comment on the record with respect to what I ordinarily see
10 and what's different here, and I'm simply pointing out that
11 this is quite different.

12 Q. Now, does that omission in and of itself then cause you
13 to form a conclusion or an opinion as to whether this was some
14 sort of coerced confession?

15 A. No.

16 Q. What, if any, significance is there in that omission when
17 you couple it with the fact that the testimony with regard to
18 the November 2 interview was that Mr. Hall could provide no
19 information concerning the Roach disappearance?

20 A. Well, if he had committed the crime and was denying it on
21 November 2 we wouldn't expect him to provide any information,
22 whereas if he changed his position on November 15, and had now
23 decided to be very cooperative with the interrogators and tell
24 the story of what happened, we would now expect to find a
25 different set, very different set of statements about his

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1 knowledge of the kidnapping and murder.

2 Q. What, if anything, of significance about the fact that
3 according to both Miller and Randolph there was approximately
4 a two-hour period of time that passes during which there is no

5 discussion or admission by the defendant of any type
6 concerning Miss Roach, but after approximately 20 to 30
7 minutes with Investigator Randolph there is then the supposed
8 desire to provide a written statement?

9 THE COURT: Listen, this isn't helping me. I
10 thought this witness was going to tell this Court what it was
11 about the Hall interrogation that in his expert opinion would
12 lead to a false confession. And I'm not hearing him testify
13 about that. And to that extent he's not helping me. I mean
14 if he does have the information I'd like to know it. And I'm
15 sorry, but what I'm hearing now isn't helping me make that
16 decision. I thought that's where we were.

17 Q. Can you answer the Judge's question as he's formulated
18 it?

19 A. Yes I can, Your Honor. Or yes I can, Mr. DeArmond, in
20 answer to His Honor's question.

21 Q. Go ahead.

22 A. It comes -- we begin with the debriefing interview, which
23 it's my understanding that has not been yet entered into the
24 record.

25 THE COURT: Now what is this debriefing interview?

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1 Who debriefed whom?

2 THE WITNESS: At my request Mr. DeArmond conducted a
3 tape recorded interview with Mr. Hall during the period when I
4 was investigating the case. Ordinarily I would do that but I
5 was unable to make the trip, and so I instructed Mr. DeArmond

6 to debrief Mr. Hall as to the events of the interrogation and
7 to do it on tape so that I could review that so that I would
8 thereby gain Mr. Hall's account of what happened during the
9 interrogation. This is a standard procedure that I engage in.

10 MR. BEAUMONT: Judge, I need to -- I need to point
11 out for the record we have no debriefing tapes of the
12 defendant. We've never heard of any debriefing tapes of the
13 defendant. They were never provided to us. If this is a
14 basis for this man's opinion, I would think the government
15 would be entitled to review those.

16 MR. DeARMOND: First of all, it's not true they've
17 never heard them. You look at page 921 of the trial
18 transcript there is a specific question by the judge with
19 regard to the basis of Dr. Ofshe's proffer. And he makes
20 reference in there to the debriefing interview conducted of
21 Mr. Hall. It may have been referred to in the opinion by the
22 Seventh Circuit, as well.

23 MR. BEAUMONT: Judge, we have no tapes. We have no
24 debriefing of the defendant. It seems to me there is a duty
25 to disclose, a continuing duty to disclose such matters,

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1 certainly if they form the basis, as this witness testified,
2 of his opinion. We have not seen that. We've seen -- we've
3 heard no tapes. We've seen no transcripts of any tapes.

4 MR. DeARMOND: And we haven't got to that point yet.
5 He's now referred to them. I have them available to mark as
6 exhibits.

7 THE COURT: Doesn't Rule 16 in connection with an
8 expert witness require the defendant to disclose to the
9 government anything that the defendant tends to use under Rule
10 702, 703, and 705?

11 MR. DeARMOND: And that was disclosed at the first
12 trial. He specifically testified to the existence of the
13 tapes at the first trial.

14 THE COURT: Did you give the tapes to the
15 government?

16 MR. DeARMOND: No. I didn't have the tapes,
17 Dr. Ofshe had the tapes.

18 THE COURT: Well, I guess the question I'm asking
19 you, Counsel, under Rule 16 were you required to disclose to
20 the government the tapes?

21 MR. DeARMOND: I thought we did. I mean we told
22 them about the tapes. They were aware of the tapes. They've
23 been aware of the tapes since the first trial. The transcript
24 was just done a matter of a day or two ago.

25 THE COURT: What I mean is that if this expert is

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1 basing his opinion upon a taped interview of the defendant, it
2 would seem to me the government would be entitled to have that
3 information because it's part of the information the expert's
4 basing his opinion on. Is that --

5 MR. DeARMOND: And I have the information available
6 for them. The transcripts were just done. I never had the
7 transcripts. We couldn't give them something we didn't have.

8 The transcripts were provided through the assistance of the
9 federal defender's office who had the resources to have
10 someone spend the time to transcribe two very lengthy tapes.
11 Those were never possible before.

12 THE COURT: Well, I take it the government would
13 like to see them before you cross-examine this man?

14 MR. BEAUMONT: I would like to see them. I'd like
15 to have copies, yes, clearly. I mean they form the basis of
16 his opinion, and I perceive more objections being filed with
17 the Court. Were you going to play these tapes to the jury?
18 There is problems, evidentiary problems with that.

19 THE COURT: This is an interview of the defendant
20 we're talking about?

21 MR. BEAUMONT: Yes, the answer to your question is,
22 I'm sorry, Judge, yes.

23 BY MR. DeARMOND:

24 Q. I mark as Defendant's Exhibit No. 38 a series of pages 1
25 through 51, and, Doctor, I'd ask if you recognized that

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1 document?

2 A. Yes.

3 Q. What do you recognize it to be?

4 A. It's a transcription of the interviews that were done by
5 you of Larry Hall on May 12 and 13, 1995.

6 Q. Now, have you had occasion to listen to the original tape
7 recordings of that conversation?

8 A. Several times.

9 Q. And did you retain the original copies of those tape
10 recordings until bringing them with you for this proceeding?

11 A. Yes, I did.

12 Q. And have you had occasion to review the transcription,
13 Defendant's Exhibit No. 38?

14 A. Yes.

15 Q. Does the transcription truly and accurately reflect the
16 questions asked and answers given on May 12 and 13, 1995, by
17 Mr. Hall as recorded in the tape?

18 A. It appears to. I have not sat down with headphones and
19 checked it word by word, but it appears to be an accurate
20 transcription.

21 Q. Now, you're answering the Court's question with regard to
22 how you went about analyzing a particular interrogation in
23 this case to form opinions or conclusions, and you were
24 beginning to make reference to Defendant's Exhibit No. 38.
25 Could you proceed, please.

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1 A. In this interview, beginning principally at page 19, I'm
2 sorry, at page 17, Mr. Hall begins to speak about the
3 interview on the 15th of November, and that's the principal
4 interview that I was concerned with. I can go through it step
5 by step and indicate what's significant in his rendition of
6 it, or I can summarize it. I would like direction as to how
7 to approach it.

8 Q. Perhaps if you summarize it, at least at this point, and
9 then if there are particulars that are being requested I'll
10 ask those.

11 A. Mr. Hall describes an interrogation that begins -- I use
12 the marker of the beginning of the interrogation, as being
13 picked up or being informed that he should come down to the
14 police station by Officer Witmer. It begins with threats that
15 he will be arrested on felony stalking charges if he does not
16 show up for the interview, because Gary Miller has returned to
17 town.

18 It continues with Mr. Hall arriving at the
19 station and being introduced to Mr. Randolph, and over the
20 course of their interaction Mr. Hall reports that he
21 repeatedly requested to be allowed to contact the attorney who
22 had been appointed for him or to be allowed to contact his
23 father. Those contacts are denied.

24 He also reports that he repeatedly said that he
25 wished to leave but was told that he could not leave. So he

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1 repeatedly indicated a desire not to be interrogated and was
2 told that was not possible.

3 He then reports what happened, or his version
4 of what happened when Mr. Miller joined the interrogation
5 after Mr. Hall refused to undergo the polygraph. He reports
6 certain warnings coming from Agent Randolph about what would
7 happen to him if he did not agree to the polygraph,
8 specifically statements about the agents are going to tear you

9 apart like a school of piranhas if you don't agree to this and
10 there will be nothing left of you when they get through, and
11 I'll guaranty that. So Mr. Randolph is somewhat forceful
12 about wanting to take the polygraph.

13 But the key things begin to happen when
14 Detective Miller reenters the interrogation. Detective Miller
15 now begins to use a strategy to elicit a statement that is a
16 blatant use of coercive tactics where coercion means threat
17 and promise benefit. Mr. Hall reports that Mr. Miller offered
18 to get him the care and treatment that Mr. Miller said he
19 really needed, and that Mr. Miller threatened him with the
20 guaranty of prosecution for murder, conviction, and threatened
21 him with a death penalty following from that should he not be
22 willing to confess.

23 He at the same time balanced that threat with
24 the offer of hospital care in a nonconfined hospital setting
25 if he chose to cooperate. Agent Randolph was present and

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1 supported Mr. Miller's threats, according to Mr. Hall. And
2 eventually Mr. Hall, after resisting, began to comply, and
3 that would be the point at which I would roughly break this
4 and say that's when the "i did it" statement occurred. We
5 then get into the post admission narrative.

6 Q. Now when you compare that version of what transpired
7 during the interrogation with what has been testified to and
8 reported in the police reports, do you just automatically
9 assume that what the defendant's version is saying is true and

10 that the agents are lying?

11 A. No, it's not my job to make the determination of who's
12 telling the truth. That's why I started out saying that there
13 really are two different accounts of this interrogation up to
14 the point at which the post admission narrative begins.

15 Q. So then how do you go about determining what opinions you
16 can form if you have two versions, neither of which you can
17 prove or disprove?

18 A. Well, I can draw the conclusions that would follow from
19 each version and look at those conclusions in light of the
20 post admission narrative and see whether or not the post
21 admission narrative provides any evidence that would be
22 related to which version, whether version A or version B has
23 evidence consistent with it in the post admission narrative,
24 but even then that's only pointing out consistencies or
25 inconsistencies. I don't know that I can provide a basis for

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1 making -- for saying this is true and that is false. I can
2 only point out the consequences of it, one or the other.

3 Q. So in looking at the post admission narrative now in
4 relation to the two versions, can you describe for the Court
5 what it was about the information that you had available to
6 you that caused you to form opinions with regard to the
7 confession or the interrogation process?

8 A. Well, the first thing to consider is the fact that under
9 both versions, by the time the post admission narrative
10 occurs, by the time we get past the "I did it" statement,

11 under both versions Mr. Hall would be motivated to comply and
12 to provide information.

13 Q. How's that?

14 A. Well, if in fact for some reason yet to be specified he
15 was overcome with remorse or something intervened, something
16 occurred during the several hours with Agent Randolph and also
17 with Detective Miller, and Mr. Hall's position changed for
18 some internal reasons to him, overwhelming guilt, for example,
19 would be one possibility, without any interjection of anything
20 particular by the interrogators other than developing a
21 rapport with them. Then he should be motivated now that he's
22 responsive to this overwhelming guilt to cooperate with them.
23 Similarly, if he has been coerced, and in fact is giving a
24 statement that is given in order to obtain the benefit of
25 avoidance of the death penalty and to reduce the stress being

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1 brought directly to bear on him as he indicates the yelling
2 and so on which he found difficult, then he also ought to be
3 motivated. He wants the benefit. He wants the aggression in
4 the interrogation to remain at a low level. And he also wants
5 to receive the benefit of the hospital care and avoid the harm
6 of being arrested, prosecuted, and convicted of a crime that
7 could lead to lifelong incarceration or the death penalty. So
8 under either theory we should have an individual who is
9 motivated, who is complying, who is cooperative with the
10 interrogators. At this point under either theory it should be

11 possible to obtain from him knowledge of his participation in
12 the crime if he has such knowledge.

13 Q. Is his compliance and cooperation borne out by the
14 testimony of both Agents Miller and Randolph?

15 A. Yes.

16 Q. At this point in the process?

17 A. At this point in the process they both describe him as
18 cooperative.

19 Q. So taking that into consideration then, what is
20 there -- what is the significance of what you find or don't
21 find in the post admission narrative?

22 A. Well, here the problem is to find elements that are
23 capable of objective evaluation. Detective Miller indicates
24 that the reason he wanted to go ahead and continue
25 interrogating Mr. Hall was to get precisely these details, and

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1 that's as it should be. He should be looking now for
2 information volunteered by the defendant that corroborates his
3 actual involvement, that would prove his actual knowledge, and
4 would prove his probable virtually certain commission of the
5 crime. And so it's perfectly proper to do that, that's what
6 police are trained to do, and that's what Detective Miller
7 sought to do. And Detective Miller makes a summary statement
8 that first Mr. Hall added nothing verifiable that was not
9 already known, and he makes that statement in his trial

10 testimony. So from the very beginning, according to Detective
11 Miller, there's nothing that Mr. Hall contributes during this
12 post admission narrative period that independently
13 corroborates the statement.

14 THE COURT: Doctor, why is that significant, because
15 why can't the police have the goods on the suspect so that he
16 can't add anything more to what they got because they do have
17 the goods on him?

18 THE WITNESS: If, in fact, let's say that there were
19 the alleged eyewitnesses who don't exist that saw Mr. Hall on
20 the road talking to Jessica that afternoon, the tactic that
21 they used, if they had such evidence, then perhaps the "I did
22 it" statement would be sufficient in the light of the other
23 evidence.

24 THE COURT: That's not the question I asked you. I
25 asked you, you're making something of the fact that apparently

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1 a comment was made by one of the officers that the defendant
2 did not add anything in his post admission narrative which
3 they did not already know. And I'm asking you, so what? Why
4 couldn't it be the case that the police had done an excellent
5 job of gathering evidence against the defendant so they knew
6 everything that happened so he couldn't add anything knew?

7 THE WITNESS: That could be, Your Honor. I didn't
8 understand your question. I think my answer to that would be
9 if that were the case and the defendant described what the
10 police already knew, and that the police have not told him

11 then, I would say that that would be clearly demonstrating a
12 good fit. The fact that they already knew it is not the
13 important part. The important part is whether or not he had
14 been contaminated or had not been contaminated with that
15 information. If they knew it, and he had not been told that
16 by the police, then that's vitally important. That, in fact,
17 would demonstrate independent knowledge of the crime. I'm in
18 agreement with the import of your comment. The question is,
19 is that the case here? And Detective Miller sought to get
20 more details about the crime, and Detective Miller searched
21 for information that would allow for independent corroboration
22 that was part of what he did during his continued
23 interrogation of Mr. Hall, and he was unable to come up with
24 anything. So in light of his attempts it is somewhat
25 significant, having tried to do that he failed, and they wind

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1 up with nothing more than they already knew in a situation
2 that it's unclear how much contamination may have occurred.
3 Q. Do you recall any specific examples of that?
4 A. Yes. For example, Mr. Hall was initially unable to give
5 an accurate description. He misdescribed hair color and he
6 had to be corrected about that. In his description of the
7 point at which Jessica Roach was picked up, he says that there
8 were no homes for -- in the area for a distance of about a
9 mile. And, in fact, there was a house within a quarter of a
10 mile and a trailer and another house less than a half mile
11 away, and as I read the record it seemed that those were the

12 least -- one, if not all of those, were distinctly visible
13 from the pickup point.

14 He describes, he, Mr. Hall, describes the
15 victim as wearing a blue jacket, when in fact she was dressed
16 in a white top, black jeans, and black tennies.

17 Although he claimed to revisit the site where
18 the body was, he couldn't tell Agent Randolph where it was
19 found. So that -- so that's inconsistent with knowing and
20 revisiting the site.

21 In addition, Mr. Hall has significant elements
22 of an alibi that contradict -- very dramatically contradict
23 the narrative of the crime that's provided. The narrative of
24 the crime has him initially at a Revolutionary War reenactment
25 on the 19th, staying in that area that night, and then

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1 contacting the victim in the afternoon of the 20th.

2 Well, first, apparently Mr. Hall was back in
3 Wabash, according to some testimony of his parents, and would
4 have made a payment at the bank, some sort of loan payment, in
5 the mid part of the day on the 20th, according to the payment
6 records. Now, that's completely at odds with the idea that he
7 stayed in the area of Forest Glen and slept somewhere in that
8 area in the van that night. He's back in Wabash the next day,
9 according to some testimony in the record.

10 It's also the case that Mr. Hall was not known
11 to attend Revolutionary War reenactments. He was not known to

12 own any Revolutionary War costume or elements which goes to
13 whether or not he was actually at the Forest Glen reenactment.
14 He describes the victim's hands as having been tied, but there
15 is no evidence that her hands were tied, neither by ligature
16 or by -- there is no ligature remnants found with the body nor
17 are there marks. And he was unable to lead the police to any
18 physical evidence, which according to the story that developed
19 he had kept up until recently. All of those things are
20 inconsistent with the confession and would tend to indicate a
21 lack of actual knowledge. They don't seem to square with the
22 facts of the crime.

23 He was simply unable, and we don't know exactly
24 how many questions Investigator Miller asked him.

25 THE COURT: Let me interrupt again to say this still

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1 isn't helping me. I don't need an expert and the jury doesn't
2 need an expert to tell them whether or not a narrative
3 coincides with the evidence presented. I mean, we don't
4 need -- if that's all he's going to do, I don't see where he
5 can aid the jury. I thought that he was being offered
6 because, one, he could give an opinion that a phenomenon such
7 as false confessions exists and a basis for that opinion, and
8 that there are certain coercive police interrogation
9 techniques which are associated with false confessions, and in
10 this case certain of those techniques were used; namely A, B,
11 C, D, and E.

12 What he's testifying to now is that the post

13 admission narrative does not add anything to the information
14 which was already known by the police, and in some respects
15 information furnished in the post admission narrative is
16 inconsistent with the actual facts known to the police or
17 presented in the evidence.

18 So I'm getting -- I'm getting mixed signals
19 here, Mr. DeArmond. But what Dr. Ofshe's testifying to now
20 seems to me we don't need an expert to make those decisions or
21 those judgments.

22 NR. DeARMOND: If the Court recalls, however, both
23 earlier today and at the previous proceeding he explained that
24 in forming opinions with regard to false confessions and how
25 they occur, this is the method of analysis that's used which

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1 is then coupled with social psychology principles that are all
2 clearly recognized. I thought we had covered the fact that
3 false confessions exist in our last proceeding and what sorts
4 of things may lead to false confessions, and I recall
5 particularly a conversation, a colloquy between the Court and
6 the witness with regard to influences or things which might
7 cause someone to confess falsely. I thought we covered the
8 first two prongs and now we were getting down to the certain
9 types of techniques involved and then what could result from
10 those techniques. And that's what this was foundational for.

11 THE COURT: Okay. Maybe I can explain what I'm

12 asking in a different way. I thought Dr. Ofshe indicated that
13 his approach in this whole area of false confessions is to
14 first determine the possibility that this is a situation of
15 false confession, and mainly he does that by looking at the
16 post admission narrative and then works back. Is that right,
17 Doctor? That's the method in which you determine whether or
18 not this is a case that deserves further investigation?

19 THE WITNESS: The basic principle, you're obviously
20 right, Your Honor, if the defendant contributes something that
21 verifies his actual knowledge, the false confession is ruled
22 out.

23 THE COURT: It's sort of backwards look from the
24 post admission narrative?

25 THE WITNESS: It's a backwards look from the failure

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1 to prove actual knowledge that opens the door to the
2 possibility of a false confession.

3 THE COURT: Does it work the other way, too, whereby
4 there are certain coercive techniques used, and you can say as
5 an expert that if these techniques was used then there is --
6 these techniques have been identified with false confessions?

7 THE WITNESS: Yes, that's possible, but that also --

8 THE COURT: Or does that depend on whether or
9 not -- or can you not disassociate the techniques from the
10 post admission narrative which verifies?

11 THE WITNESS: There are two separate questions, Your

12 Honor. There are certain techniques that are capable of
13 producing a coerced confession. Some coerced confessions are
14 true and some are false. So you wind up with a false
15 confession, you would either in looking only at the coerced
16 case it would have to be an interrogation that included
17 elements sufficient to coerce a statement and the person would
18 have to fail to demonstrate actual knowledge, then one could
19 categorize this as at least consistent with a false
20 confession. Because it's possible for someone to be coerced
21 into giving a true confession what would discriminate the true
22 from the false would be whether or not the person demonstrates
23 actual knowledge, both could be coerced.

24 THE COURT: Are there others who share your approach
25 to false confessions?

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1 THE WITNESS: I think so.

2 THE COURT: Does Kassin share your approach?

3 THE WITNESS: I believe so, I think.

4 THE COURT: By that he would agree with you that
5 simply using certain coercive interrogation techniques does
6 not automatically lead to a false confession.

7 THE WITNESS: I think he would agree with that if
8 the question were put clearly to him.

9 THE COURT: And would he also agree with you that
10 all false confessions involve situations where the post

11 admission narrative fails to corroborate or provide verifiable
12 data that is unknown to the police authorities that fits the
13 crime, or is that just a hypothesis on your part?

14 THE WITNESS: I think he would have to agree with
15 that. Again, laid out if he understand the -- how could a
16 false confession, how could someone who is not there
17 contribute information accurate about the crime absent
18 contamination or absent a lucky guess? If the point of
19 information was the body face up or face down, there is a
20 50/50 chance of guessing right. So that's not a particularly
21 valuable piece of information. Whereas if the information
22 contributed is you can find the murder weapon in a particular
23 place, there might literally be thousands of possible places,
24 millions where it could be found, and getting a hit on that
25 one is extremely dispositive of whether or not the person has

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1 knowledge of this crime. The likelihood of guessing is so
2 small to be ignored. I think Kassin would have to agree with
3 that.

4 THE COURT: Are there any cases where the post
5 admission narrative doesn't provide any verifiable information
6 but the confession still is a good confession?

7 THE WITNESS: That could happen, that certainly
8 could happen. The question is if one wants to analyze a
9 confession, what information is available to do the analysis?
10 There can be circumstances under which the final conclusion is
11 the confession is neither verified nor disconfirmed, and then

12 the fact that the person said "I did it," how to weight that
13 statement, how becomes extremely difficult, because there's
14 nothing objective to allow one to weight that statement. Then
15 it would become even more important to know what techniques
16 were used because some techniques are far more likely to
17 produce a false confession than others. The less we have to
18 go on the more difficult the problem becomes.

19 THE COURT: You mentioned in prior testimony that
20 you would not be comfortable making a determination whether or
21 not the confession in this case was false or true; isn't that
22 correct?

23 THE WITNESS: That's correct, Your Honor.

24 THE COURT: And what was the reason you gave for
25 that?

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1 THE WITNESS: Because in comparison -- well, first,
2 I'm not comfortable doing that under any circumstances.
3 Second, in some fact patterns the answer is much, much, much
4 clearer. I could give you examples of the kind of fact
5 pattern I'm talking about where I might reach that conclusion
6 personally, whether or not I testified to that even if I were
7 permitted to. But some fact patterns are very clear. This
8 particular case is very difficult. It's extremely difficult
9 for me, and I think the rules that I'm trying to articulate
10 are rules that would be helpful, would be an understanding
11 that would be helpful, because it's generally accepted that

12 people presume false confessions don't happen that creates a
13 terrible problem for a juror. Finding out that false
14 confessions can happen, may be helpful. But also perhaps
15 demonstrating the reasoning that one might use that would
16 allow someone to then go and look at the facts of the case,
17 look at the testimony and cross-examination and so on and
18 judge whether or not these facts hold up and, therefore, make
19 a decision. All I'm trying to do at this point is to
20 demonstrate how I would go about doing this, the factors I
21 would look at, the things that would indicate a false
22 confession. So generally speaking a post admission narrative
23 that fails to provide corroboration and contains significant
24 errors would be an indicator of a likely false confession. To
25 go back to what the Seventh Circuit talked about indicators of

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1 false confession, that would be an indicator of a false
2 confession, and I'm simply pointing out what in this case
3 constitutes those sorts of indicators. That together with the
4 fact that the account of the interrogation given by Mr. Hall
5 is an account of an interrogation that is fully capable of
6 producing a false confession, that would also be an indicator
7 if a suspect relates an interrogation that's capable of
8 producing it then it remains within the realm of possibility,
9 absent that, that would decrease the likelihood that it's a
10 false confession.

11 THE COURT: Okay. You may continue.

12 MR. DeARMOND: Thank you, Your Honor.

13 BY MR. DeARMOND:

14 Q. Perhaps just to make sure that the record is clear, I
15 don't have any problem going back and asking you, Doctor,
16 first of all, is a phenomenon known as false confessions
17 something which exists?

18 A. Yes.

19 Q. And can you describe, please, how it is that that --

20 MR. BEAUMONT: Judge, I object. We've been over
21 this. It's been asked and answered.

22 THE COURT: Sustained. You don't have to go back
23 over that.

24 MR. DeARMOND: I misunderstood the Court. I thought
25 you indicated that those were things you weren't hearing from

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1 Dr. Ofshe. I thought we had covered the first two, at least.

2 Q. Doctor, with regard to assessing the effects of the
3 interrogation on Mr. Miller, was there information provided at
4 trial from another investigator describing Mr. Miller's
5 countenance and how he appeared angry or upset with Mr. Hall
6 during his interrogation?

7 A. Yes.

8 Q. And why is that a factor that plays into your
9 consideration of the coercive effects of the interrogation
10 process?

11 A. Well, one of the things that Mr. Hall reports is that

12 Mr. Miller became very aggressive and yelled at him, and while
13 I don't believe that yelling alone or feeling distress from
14 that would produce a false confession, that was one of the
15 factors that heightened the intensity of the interrogation.

16 Q. When Detective Amones indicates that apparently Mr. Hall
17 misidentifies color of the girl's hair and he testifies that
18 Miller says something to the effect that no, no, Larry, that's
19 not right, it was long brown hair, not blond hair, something
20 to that effect, page 882 of the transcript, is that relevant
21 or significant in your analysis of the interrogation process?

22 A. Yes, because that's an indicator of the ease with which
23 Mr. Miller is willing to contaminate a suspect.

24 Q. Were there other indications from your recollection of
25 suggestive questioning by the interrogators?

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1 A. I believe it's testified that what ended up happening was
2 that the statements were presented to Mr. I-iall and then he
3 simply agreed to them. So that how those statements were
4 selected, how those were interpreted and written down, then it
5 culminated, all of that is very much in doubt, and it
6 culminated in a simple acquiescence to a series of statements
7 produced by one of the investigators, so Mr. Hall is just
8 agreeing to that. That's not a particularly good way to do an
9 interrogation.

10 Q. The testimony involving how the actual written statement
11 was produced where it was Agent Randolph who actually
12 constructed the sentences, who wrote the sentences out and

13 then had Mr. Hall merely acknowledge whether or not that was
14 correct, was that a procedure that you took into consideration
15 in assessing the coercive nature of the interrogation process?

16 A. Well, it was a situation that had to do with the way in
17 which the interrogation was going forward. That was not
18 particularly coercive in and of itself, but that was a way of
19 conducting an interrogation that's less than the best.

20 Q. Indications by Detective Ainones that in a previous
21 interrogation Mr. Miller had provided specific factual
22 information in his discussion or description of the Hall case,
23 is that relevant?

24 A. Yes.

25 Q. Why is that relevant when it comes time to determine the

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1 fit of the post admission narrative?

2 A. Because we have the problem of contamination. The more
3 contaminated through the transfer, delivered there
4 inadvertently of information from an investigator to a
5 suspect, the more difficult it is to know what his actual
6 knowledge based on participation versus information that's
7 been acquired from another source.

8 Q. Was it relevant to your consideration of the
9 circumstances surrounding the interrogation that the agents
10 knew what time Mr. Hall would get off work early in the
11 morning and then had him come in for the interview several
12 hours later?

13 A. It would be. It depends on whether this came about by
14 happenstance or whether there was a decision made by someone
15 to deliberately seek him out at a time when he would not have
16 had much sleep.

17 Q. What's the significance of the assertions by Randolph
18 that he admits at trial having told Larry that he would try to
19 help see to it that he could get the best treatment possible?

20 A. That's a point that corroborates at least the fact that
21 there was discussion of treatment. It's one of those points
22 of agreement, to some degree, between the two versions.
23 Obviously Mr. Hall's version of it has that as a much more
24 significant statement and many other statements on the same
25 subject. But at least we know the subject was discussed to

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1 some degree.

2 Q. Did you take into consideration the method of questioning
3 that suggested the answers?

4 A. Yes. Generally leading questions and gaining
5 acquiescence again does not allow you to know whether the
6 person knew it or is just complying.

7 Q. Was it significant or relevant to you that there were a
8 number of areas that Mr. Hall supposedly discussed that were
9 never inquired about in any detail to get more information
10 from him in order to verify or corroborate what he was saying?

11 A. Well, that would be an example of failing to gather

12 sufficient information to make -- obtain corroboration. It's
13 just an example of poor practice.

14 Q. Agent Randolph indicated in his testimony that he didn't
15 make any effort to get Mr. Hall to elaborate on where or how
16 he first saw Jessica. Is that relevant?

17 A. That would be relevant because of the fact that there is
18 a very narrow, very small window of opportunity, and that
19 would have been an opportunity to gather specific information
20 which could have either demonstrated a great likelihood that
21 Mr. Hall had, in fact, been there that day, or could have
22 demonstrated a lack of knowledge of what that window of
23 opportunity was. So that was potentially extremely valuable.

24 Q. Is it particularly relevant to the post admission
25 narrative fit that Agent Randolph acknowledged that he didn't

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1 make any effort to get Mr. Hall to describe the bike, the
2 bicycle she was riding?

3 A. Again, that would be another example of what might have
4 been. There are many things that might have been. The
5 problem is what happened.

6 Q. There are a long list of items that Mr. Randolph and both
7 Mr. Miller testified to having made no effort to obtain
8 descriptions of or obtain corroboration of. Did that play
9 into your analysis of the post admission narrative fit?

10 A. Well, again, that's another example of what might have
11 been. I think it's more significant that Mr. Miller was

12 during the trial asked when you asked him about specific
13 details about places or things or where he went, he was not
14 able to provide those. And Mr. Miller's answer was that's
15 correct. Now, to me that indicates that Mr. Miller did
16 inquire into those subjects, places, things, where he went and
17 50 on, and Mr. Hall was unable to provide that information.
18 That is significant.

19 Q. In looking at that post admission narrative fit then, how
20 would you go about describing or explaining to the Court or
21 the jury what things that they would need to look at to
22 determine the existence of a fit or nonexistence of a fit?

23 A. Well, generally one would look at those things that do or
24 don't produce -- those direct statements that do or don't
25 produce corroboration. One would look at those things that

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1 were asked about that it's reasonable to think a perpetrator
2 would know, and particularly those things that there's little
3 reason to think someone would have any particular motivation
4 to withhold, so mundane as opposed to potentially self-image
5 damaging facts. The mundane facts have just as much
6 information value and are far more likely to obtain. The fact
7 that those things were inquired into and information was not
8 provided, in some cases no answers were given, in other cases
9 information that does not appear to fit was provided, those
10 would be indicators that there's a problem with the quality of
11 this interrogation.

12 Q. After your performance of the analysis of the post

13 admission narrative fit and then coupling it with the two
14 versions that you have been provided, where does that take you
15 from the standpoint of forming any sort of opinions or
16 conclusions?

17 A. Well, the summary of this is according to Mr. Hall's
18 version the tactics that were used during the interrogation
19 would be tactics that would be capable of producing a false
20 confession from someone who was, in fact, innocent. So he's
21 describing an interrogation that has that potential. In
22 addition, he's failing to provide independent corroboration.
23 He's failing to provide indicators of actual knowledge. And
24 although such things were inquired of by Detective Miller, the
25 record doesn't produce evidence supportive of his actual

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1 knowledge of the crime and produces some evidence that's
2 inconsistent with the account of his activities leading up to
3 the crime and so on, and even after the crime that would have
4 to weigh at least in the direction of his lacking actual
5 knowledge of the crime. And those would be the factors that I
6 would look at, and I think generally on one of the other side
7 of the line is how they would add up or would be placed.

8 Q. In this case do you intend on offering an opinion that
9 goes any farther than expressing what you've just indicated to
10 the Court?

11 A. No.

12 MR. DeAP~MOND: Your Honor, with regard to the
13 relevance issue, I think that's all the questions I have at
14 this time.

15 THE COURT: You may cross.

16 CROSS-EXAMINATION

17 BY MR. BEAUMONT:

18 Q. So then when you offered the opinion that this was a
19 coerced, false confession when you testified during the trial,
20 that was an erroneous opinion, I take it?

21 MR. DeARIAOND: Objection, he never testified during
22 the trial, that's why we're here.

23 Q. When you testified in the 104 hearing during the trial
24 and you made the following opinion, which I'll read to you,
25 were you asked this question?

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1 MR. DeARMOND: Excuse me, page please.

2 MR. BEAUMONT: Page 915. "Question: And what is
3 that opinion and upon what do you base it?" And we should
4 back up.

5 Page 914, line 22, were you asked this
6 question? "Question: Do you then form opinions as to what
7 effect these influences may have had on the confession of
8 Mr. Hall?"

9 Did you give the following answer? "Yes."

10 Did you give that answer? Were you asked that
11 question and did you give that answer?

12 A. Without looking at the transcript, I couldn't tell you.

13 Q. Well, you would agree?

14 A. I would agree, yes.

15 Q. All right. And were you asked the following question?

16 "Question: And what is that opinion and upon what do you base
17 it?"

18 And the following answer was given. "Answer:
19 The opinion is that Mr. Hall's statements following the
20 admission or the opinion would be that the admission was
21 brought about through the use of pressure and qualifies as
22 what is called a coerced, compliant, false confession in that
23 the statement that's elicited is a statement that fails to
24 contain any corroboration and is, therefore, unreliable and is
25 contributing -- and that is a contributing factor to the

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1 classification of the confession itself as most likely an
2 influenced, coerced, false confession."

3 Did you give that opinion, Doctor?

4 A. Yes.

5 Q. Did you also give the following opinion on page 916?

6 Question -- you were asked a question. "Based
7 upon the application of these principles and the opinion that
8 you formed with regard to their influence on Mr. Hall during
9 his interrogation, do you form an opinion as to whether the
10 statements given by Mr. Hall are reliable or unreliable, and
11 if so, what do you base that opinion?"

12 And your answer was: "My opinion would be that

13 the statements are unreliable because they appear to be the
14 product of influence rather than the product of actual
15 knowledge of the crime in conjunction with the tactics of the
16 interrogation and the history of Mr. Hall's interrogation
17 experience, that is his prior interrogations as to conduct
18 during those prior interrogations."

19 Did you give that -- were you asked that
20 question and did you give that opinion?

21 A. Yes.

22 Q. And were you asked the following question? "And is that
23 opinion based upon commonly recognized and accepted principles
24 having scientific basis in social psychology?"

25 And did you answer to that "yes"?

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1 A. Yes.

2 Q. Now, are we led to believe, sir, that a basis of your
3 opinion is this recorded interview with the defendant between
4 the defendant and his attorney?

5 A. Yes.

6 Q. And I understand, sir, this was not a recorded interview
7 under oath by any means?

8 A. That's right.

9 Q. And you also -- did you take into account in your opinion
10 that these charges, of placing you in a pool of piranhas and
11 you'll get the death penalty if you don't confess, were never
12 brought up in the suppression hearing?

13 A. I'm aware of that.

14 Q. Does that affect your opinion at all?

15 A. No.

16 Q. Would you not agree with me, sir, that such statements,
17 if in fact were true, would be illegal?

18 A. Yes.

19 Q. Do you not discount those statements by the defendant?
20 Would it not make sense to you as an expert in this field that
21 such allegations would have been brought to the Court's
22 attention in a suppression hearing?

23 MR. DeARNOND: Objection. I think what he's asking
24 him to do now is make some sort of a legal determination and
25 form a conclusion and speculate.

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1 THE COURT: Overruled.

2 A. I don't know, save that interview, whether Mr. DeArmond
3 knew this at the time of the suppression hearing. I don't
4 know what Mr. DeArmond knew short of that interview.

5 Q. That's good.

6 A. I don't know why Mr. DeArmond did not bring that up
7 either at the suppression hearing or, in fact, at the trial.

8 Q. And in fact you do know, do you not, sir, that there was
9 not one mention of that during the defendant's testimony at
10 trial?

11 A. That's correct.

12 Q. Does that not somehow discount your crediting the
13 defendant's version of these events?

14 A. No, because of the explanation given to me by

15 Mr. DeArmond and why that didn't happen.

16 Q. Which was what, sir?

17 A. Which was that Mr. Hall's performance was deteriorating
18 so rapidly at the first trial because of his inability to deal
19 with it that he simply did not do the full presentation.

20 Q. So you accept that opinion by Mr. DeArmond and you accept
21 that as gospel and that contributes to your opinions you're
22 giving here today?

23 A. I'm not accepting it as gospel, I'm simply telling you
24 what he told me, and I'm well aware of the fact that
25 there -- that would raise questions. I'm simply pointing out

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1 how given these records one would analyze this. I'm aware of
2 the things that you're bringing up, but I'm not reaching an
3 opinion. I'm simply indicating what needs to be taken into
4 account.

5 Q. Isn't what you're merely doing is recounting the
6 testimony of witnesses that are presented at trial and giving
7 your unscientific opinion as to the credibility and the weight
8 the jury ought to offer that evidence, isn't that what you're
9 doing?

10 A. No, it is not.

11 Q. How do you account, sir, how did you account for the fact
12 that four individuals identified Larry Hall as being at the
13 Forest Glen reenactment?

14 A. I was waiting to hear the testimony of the eyewitness
15 expert on that subject.

16 Q. Doctor, did you review the testimony of the trial?
17 A. No, not in its entirety.
18 Q. So nothing about the testimony of the four witnesses who
19 specifically identified Larry Hall as being at the reenactment
20 at Forest Glen?
21 A. I'm aware that there is testimony to that effect, and I'm
22 also told that the testimony is unreliable.
23 Q. And that you were told it was unreliable by whom?
24 A. By Mr. DeArmond.
25 Q. So you took Mr. DeArmond's version and you accepted that

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1 as fact and you formed your opinion, isn't that true?
2 A. I can't make -- yes, it's true, in the sense that I'm
3 aware that such testimony exists. I'm also aware that it's
4 someone else's decision how to weigh that testimony. If that
5 testimony is deemed credible, if Mr. Hall is deemed having
6 been there, then that's a major fact, I'm well aware of that.
7 It's not my job in this particular case to solve all these
8 problems.
9 Q. Well then, Doctor, why is it when you testified as to
10 what facts you considered you didn't mention those contrary
11 facts?
12 A. Because I wasn't asked was there disputes about any of
13 this? I was simply asked to indicate those things that ought
14 to be considered.

15 Q. This testimony about him paying the loan payment, are you
16 aware that that evidence was discredited at the trial?

17 MR. DeARMOND: Excuse me, I object. That's a
18 characterization, as well, by counsel.

19 THE COURT: Well, overruled. You both have been
20 making characterizations. This is a fine time to draw a line
21 now.

22 Q. Were you aware that that testimony -- that evidence was
23 discredited at the trial?

24 A. Yes, I'm aware of that and that testimony like the other
25 testimony.

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1 Q. I'm sorry, sir.

2 A. May I finish?

3 MR. BEAUMONT: No, Your Honor, the question called
4 for a yes or no answer. I'd ask that the witness be
5 instructed to answer the question with simply a yes or no.

6 THE COURT: Repeat the question, please.

7 MR. BEAUMONT: I'm sorry.

8 THE COURT: Repeat the question.

9 Q. Were you aware that the evidence about the defendant
10 making this loan payment was discredited at the trial?

11 A. I'm not aware of the specifics. I'm told that the
12 position that it was possibly not accurate has been brought
13 up. I never read that particular testimony. I'm simply
14 trying to point out what things should be considered. If the
15 factual analysis that someone else has to make is that these

16 points hold up, then that will lead the person who makes that
17 analysis to one conclusion. If they decide those facts don't
18 hold up, then they need to consider that. It's not what I'm
19 here to do to tell anyone how to adjudicate this case.

20 Q. Isn't that a fact that should be considered along with
21 the facts that you suggested you considered earlier?

22 A. Yes, it should be considered.

23 Q. Okay. Is not also the fact that the defendant's father
24 falsified phony receipts as an alibi for the defendant should
25 that not be a fact considered?

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1 A. Yes, it should, and I had no awareness of that until you
2 just mentioned it.

3 Q. Does that change your opinion in this case?

4 A. No, because that's another factor that whoever has to
5 make the decision should take into account when evaluating
6 that part of the testimony that has to do with where Mr. Hall
7 was on the morning of the 20th, and if that discredits that
8 testimony and that adds into the mix of things and it's
9 decided to treat this as a true confession, that's the jury's
10 job.

11 Q. Does that fact in any way alter your opinion? Does it
12 alter your opinion?

13 A. Not necessarily.

14 Q. How about the fact that in the defendant's post admission
15 narrative he stated that he saw Jessica Roach walking the
16 bicycle? Is not that a fact which, if true, indicates he has

17 knowledge of this particular crime?

18 A. Not necessarily, and I can explain why.

19 Q. Well, let me ask the questions, Doctor. Is your
20 explanation going to be that one of the officers told him that
21 fact?

22 A. No, it was not.

23 Q. Well, then go ahead, explain it. I'm sorry, I shouldn't
24 have interrupted you.

25 A. If we knew -- my response was going to be we don't know

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1 that she was walking the bike at the time she was contacted by
2 whoever it is who was the perpetrator unless someone saw that
3 contact.

4 Q. Did you -- are you aware of the testimony of Jessica
5 Roach's sister in this case, Mindy Roach, did you review that
6 testimony?

7 A. No.

8 Q. Are you aware that Mindy Roach testified that
9 approximately five or six minutes prior to her being
10 kidnapped, she specifically saw Jessica Roach walking that
11 bicycle, are you aware of that testimony?

12 MR. DeARMOND: That is not the evidence. That's not
13 even close to being the evidence.

14 THE COURT: The problem is I don't know what is or
15 what is not the evidence, and at this stage I'm giving both
16 counsel leeway to ask this witness what you want to ask him,
17 because it's sort of a preliminary thing. This is not the

18 trial, so you'll get a chance to.

19 MR. BEAUMONT: Well, and, Your Honor, I want to be
20 accurate. What specifically --

21 MR. DeAPJ'40ND: She says here five minutes before,
22 doesn't come back home for another half hour. She doesn't
23 know what time anything would have happened. Your question
24 assumes she saw her five minutes before the abduction.

25 MR. BEAUMONT: Okay. Fine.

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1 Q. Are you aware, though, that -- well, it takes two
2 questions to make it clear, I'm sorry, because I don't want to
3 misrepresent the record.

4 Are you aware that the sister testified she saw
5 Jessica Roach walking her bicycle?

6 A. At some earlier point, yes.

7 Q. Are you also aware that within ten minutes, and the exact
8 minute time I'm not clear of, the bus driver drove by and
9 found that same bicycle in the middle of the road and Jessica
10 gone?

11 A. Yes.

12 Q. And would you agree with me then that there is a time, a
13 window of opportunity, to have kidnapped Jessica Roach between
14 the time she was seen by her sister and the time that the bus
15 driver got there?

16 A. Certainly.

17 Q. Okay. And is then the fact that the defendant described

18 her as walking that bicycle, is that not a detail that would
19 suggest that confession is reliable?

20 A. No, because we don't know that she was walking the
21 bicycle at the point at which she was contacted. People walk
22 bicycles, people ride bicycles. I've walked a bicycle prior
23 to riding it. So we don't know what the state was, and there
24 are only two possibilities, she was walking it or she was
25 riding it.

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1 O. The defendant knew she was murdered the same day, are you
2 aware of that fact?

3 A. I don't know that anyone knows what day she was murdered.

4 Q. Doctor, the defendant you will agree with me --

5 THE COURT: Mr. Beaumont, let me ask you this. It
6 seems to me your questions are going to how much weight to
7 give to the doctor's opinion and not whether or not it's
8 admissible. Is that a fair statement?

9 MR. BEAUMONT: Your Honor, it's a fair
10 characterization, because he wants to give weight to other
11 witnesses' testimony, and I'm providing the Court with some
12 sense of --

13 THE COURT: Well, I understand that. But I'm saying
14 that the issue before me is whether or not I shall let him
15 testify at all. And it seems to me your questions are going
16 to you how much weight to give to his testimony if he is
17 around to testify, and you are pointing out these things that
18 he did not consider.

19 MR. BEAUMONT: I will change the line of
20 questioning, Your Honor. I'll go on to something else.
21 Q. Just one final question. You will agree, though, that
22 there are other versions of the facts in this case other than
23 witnesses' testimony?
24 A. Certainly.
25 Q. And you have not reviewed all of those testimonies, I

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1 take it?
2 A. Correct, although I think I've been informed, with the
3 exception of the one thing you mentioned, informed generally
4 of the things that you brought up and informed of the
5 weaknesses thereof.
6 Q. Arid that --
7 A. As to how those should be weighed.
8 Q. And you were informed of those weaknesses and so forth by
9 the defense attorney?
10 A. Correct.
11 Q. You state that you were puzzled by the fact that there
12 was no description of the interrogation tactics used in this
13 particular case. Did you testify to that earlier on direct?
14 A. There was no description given of what would lead someone
15 to reverse their position.
16 Q. Is it not possible, sir, that one of the reasons there
17 would be no description of interrogation tactics used in this

18 case is because there were none used?

19 MR. DeARNOND: Objection. The question assumes he
20 answered his first question in the way the question was
21 worded, and it didn't. He didn't. It assumes a fact not in
22 evidence.

23 THE COURT: I was distracted so I didn't hear it.
24 Do you mind repeating the line of questions, and I'll listen.

25 MR. BEAUMONT: Sure.

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1 Q. Did you not testify on direct that you were puzzled by
2 the fact that there was no account by the police officers of
3 any interrogation tactics used?

4 A. Yes.

5 Q. And that was a series of questions when the Court asked
6 you, so what, basically, that's when that question came up.
7 Do you remember that?

8 A. I don't remember if that's when it came up. I remember
9 discussing the possibility that someone could be moved for
10 entirely internal reasons.

11 Q. Is it not possible, though, that an answer to the fact
12 that there was no discussion of interrogation techniques used
13 is that there were none used?

14 A. Yes, and I think I implied that when I talked about the
15 possibility that for internal reasons someone could change in
16 the middle of it without any interrogation tactics being
17 brought to bear. I already stated that.

18 Q. Okay. And is it not -- are you aware of the fact that

19 Mr. Randolph's interview of the defendant was the goal of the
20 interview was to have the defendant take a polygraph test?

21 A. Well, nominally, yes.

22 Q. And are you aware that a significant rule of
23 administering polygraph tests is you cannot interrogate or
24 accuse a defendant prior to the test?

25 A. That's the way it should be.

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1 Q. Because, of course, if a person were accused in an
2 accusatory interrogation it would lessen the value of the
3 polygraph test, would it not?

4 A. Certainly, it would distress it.

5 Q. Now, you testified about specific personality or
6 characteristics of a defendant may go ahead and confess,
7 something to that effect?

8 A. I believe, yes.

9 Q. Okay. And is it not true what you're referring to is the
10 research done by Gudjonsson?

11 A. Gudjonsson's research is about responsiveness to
12 interrogation not about psychopathology that might produce an
13 extraordinary response to an ordinary interrogation. I was
14 distinguishing between that. Gudjonsson's work is on
15 interrogative suggestibility, and I was speaking about people
16 who were phobic or people who had a pathological inability to
17 deal with interrogation.

18 Q. Well, that leads me to the question, you, sir, are not a
19 psychologist or are not a clinical psychologist and have no

20 specific training in any pathology of any particular
21 individual, do you?
22 A. That's correct, that's why I said in the earlier hearing
23 that the psychiatric testimony is extremely important in this
24 case and that's one of the concerns that I have because
25 there's potentially much about Mr. Hall's conduct outside the

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1 interrogation that I would not regard as ordinary and normal.
2 Q. I understand that, but the answer to the question is,
3 you, sir, have no training or experience in recognizing
4 psychological pathology?
5 A. Correct, no formal training, no experience that I would
6 talk about in a courtroom.
7 Q. Is it -- you also mentioned the fact that the
8 intelligence of an individual has a bearing on whether his
9 individual characteristics will lead him to falsely confess,
10 did you not?
11 A. I talked about intelligence in the non-normal range. I
12 talked about the mentally handicapped.
13 Q. Isn't it true, and the point I'm trying to make is, that
14 the research suggests that retarded people may have difficulty
15 giving false confessions?
16 A. Correct, absolutely, that's what I was trying to say.
17 Q. But there's no research, none, to suggest that a man with
18 an I.Q. of 80, as the defendant, would lead to false
19 confessions?
20 A. I agree with you, and I never suggested anything to the

21 contrary.

22 Q. I just wanted to make clear of that because I must have
23 misunderstood you.

24 Isn't it true, sir, that what was said on the
25 tape of the interview between Mr. DeArmond and the defendant

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1 was entirely up to the defendant, in essence?

2 A. Responsive to the questions Mr. DeArmond asked,
3 certainly.

4 Q. The point I'm trying to make, Doctor, is it not true that
5 the defendant could lie through his teeth to every question?

6 A. Certainly.

7 Q. And you stated you're troubled by the fact that the
8 interviews were not recorded. Is that what you said earlier?

9 A. That's right.

10 Q. Is it not true that the defendant has the power to refuse
11 an interview to be recorded?

12 A. I don't know if that's the case. I've seen plenty of
13 examples of surreptitiously recorded interrogations, so at
14 least in some jurisdictions police will surreptitiously
15 record.

16 Q. Are you aware that in this jurisdiction or in the
17 jurisdiction this was conducted that would have been a crime?

18 A. No, I'm not.

19 Q. Is it not also true that it's entirely up to the
20 defendant what details he wants to give or not give?

21 A. Certainly.

22 Q. He has to switch, he can turn it on or he cannot turn it
23 on at all, turn it off?
24 A. Correct.
25 Q. It's one hundred percent in his -- in this case Larry

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1 Hall's domain as to what he wants to say or what he doesn't
2 want to say?
3 A. With respect to providing details, certainly.
4 Q. So a statement then the defendant couldn't point out
5 something is really an erroneous statement, is it not?
6 A. I think I tried to use failed to in describing, and in
7 fact if you look at the paper I most recently wrote I have a
8 discussion on this very point.
9 Q. Doctor, I don't mean to interrupt, but we're talking
10 about your previous testimony, and you said and you cited to
11 the record, "Question: Isn't it true the defendant could not
12 provide a specific detail, and I don't remember what the
13 detail was offhand."
14 A. I think you're referring to the quote that I read from
15 Detective Miller's testimony, the quote that I wrote down and
16 will read again for clarity.
17 Q. Read it again for clarity.
18 A. "When you asked him about specific details about places
19 or things or where he went, he was not able to provide those.
20 "Answer: That's correct."
21 Q. All right. And would you not agree with me that

22 Detective Miller would have no way of telling what Larry Hall
23 was or was not able to do?

24 A. He failed to do it, that's absolutely correct.

25 Q. Larry Hall failed to do it?

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1 A. Larry Hall did not provide information that gave specific
2 information in the response to questions asking for specific
3 information.

4 Q. And that failure was 100 percent within the power of
5 Larry Hall to decide to do or not do?

6 A. Certainly, and the question is, did he fail to do that
7 because he didn't know or did he fail to do that because he
8 withheld?

9 Q. And you haven't got the slightest notion of which one of
10 those answers it is, do you, sir?

11 A. It's one of those problems that it's like proving a
12 negative. As I indicate in writing, when at the end of a post
13 admission narrative someone has failed to demonstrate actual
14 knowledge, all that one concludes is that would be consistent
15 with someone who has not actual knowledge. You can't make the
16 conclusion that they don't have it. Failing to demonstrate
17 something does not prove that you don't possess it. I'm well
18 aware of that.

19 Q. But you would agree that guilty people fail to provide
20 details all the time in confessions?

21 A. That's correct, and if that's the way a situation winds
22 up, then that goes to the weight that one should give to the
23 admission "I did it," because absent corroboration one is left
24 with the possibility that a particular "I did it" statement
25 could be false or could be true.

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1 Q. And--

2 A. The object in doing the post admission narrative is to
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3 get corroboration.

4 Q. And isn't what you're doing here today is merely
5 suggesting your version of what weight should be attributed to
6 the facts in this case?

7 A. No. I'm pointing out that these are considerations that
8 would go to anyone's attempting to make a judgment as to how
9 to weigh this statement because of the complexities and the
10 particularities of police interrogation poorly done with
11 someone who may have given a false confession and the need to
12 produce actual corroboration and take that into account when
13, making a judgment as to how much weight to give the statement.

14 MR. BEAUMONT: Thank you. I have no further
15 questions, Doctor.

16 THE COURT: Mr. DeArmond.

.17 REDIRECT EXAMINATION

18 BY MR. DeARMOND:

19 Q. Doctor, with regard to your view of the testimony and the
20 reports, your particular focus would be testimony and reports
21 of the investigating officers?

22 A. Yes.
23 Q. The testimony and reports of the interrogators?
24 A. Yes.
25 Q. And the testimony with regard or statements of the

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1 defendant. Correct?
2 A. Yes.
3 Q. Your purpose was to analyze the interrogation process
4 itself; is that right?
5 A. That's correct.
6 Q. Analyze what, if any, factors may exist in the record
7 that could indicate to a fact finder the possibility of
8 coercion?
9 A. Correct.
10 Q. And to look at then the post admission narrative that's
11 provided or lack thereof and the reasons for the lack of a
12 post admission narrative to determine how that may fit with
13 what the supposed statement contains?
14 A. Yes, with both versions of what happened during the
15 interrogation.
16 Q. Using both versions?
17 A. Both versions, certainly.
18 Q. Acknowledging the possible truthfulness of both the
19 police and the defendant?
20 A. Acknowledging within the limit of ordinary error, normal
21 error, that both of these, that one or the other, one or the
22 other of these statements represent something that better

23 approximates the truth than the other. I don't know which one
24 it is.

25 Q. And your analysis of the efforts by the investigators to

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1 get more information was based upon their assertions at trial
2 that they attempted to get more information from Mr. Hall; is
3 that correct?

4 A. Together with the fact that that's standard procedure,
5 that's what they should be doing, that's their job.

6 Q. That's a factor you would normally expect to find in
7 interrogations?

8 A. Yes. In fact, if an investigator did not do that, again,
9 something that I've written about, if an investigator did not
10 do that, then one would want to know why. And the example
11 that I give in my writings on this is if the evidence in the
12 case was so compelling, the independent evidence was so
13 compelling, that merely the admission on top of that, all the
14 interrogator felt he or she needed, then that might be the
15 explanation for it. I would still think that would be a bad
16 decision, but nevertheless that would be the reason why. The
17 point is an interrogator should go forward, should gather the
18 information that links the person to the crime in a way which
19 they will never be able to repudiate. That's the real job of
20 interrogation. It's getting that kind of information that
21 proves the person's actual involvement in the crime.

22 Q. So the dynamics that are involved in getting a person to

23 the "I did it" statement are dynamics that are the subject of
24 a particular area of study in which you're involved?

25 A. That's correct.

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1 Q. And those include aspects of decision making and coercion
2 that may not be within the normal realm of knowledge of the
3 average person; is that correct?

4 A. They're certainly not within the normal realm of
5 knowledge of anyone I've spoken to, and it takes me months, if
6 not years, to train a student to be able to appreciate what
7 goes on. It takes interrogators years to learn how to
8 interrogate.

9 Q. With regard to the attempt to get more information, for
10 example an example was given to us yesterday by Mr. Beaumont
11 of an interrogation of another individual who said he did it
12 in this particular case, Keith Goble, and that there was
13 subsequent questioning of Mr. Goble.

14 MR. BEAUMONT: Judge, I'm going to object because I
15 suggest this is irrelevant.

16 MR. DeARMOND: Well, he's attacked his method of
17 analyzing the facts.

18 THE COURT: The doctor wasn't here for that. Can
19 you just ask him the question without referring to Mr. Goble?
20 You can't ask it any other way?

21 MR. DeARNOND: Yes, sir.

22 Q. The interrogators after taking an "I did it" statement
23 from an individual then asked questions where they put in
24 false facts to see whether the individual might just parrot
25 those false facts back to them. Would that be a technique

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1 that you are familiar with?

2 A. That would be a proper -- that would be a very
3 intelligent thing to do to test the reliability of the
4 statement that something that -- if the interrogator has any
5 doubt should be done. In fact, it's something that one could
6 argue should be done in any interrogation unless the person is
7 providing information that you know to describe the crime and
8 you know that you didn't contaminate. It's a good safety
9 check.

10 Q. And in this situation did either of the interrogators
11 indicate that they made any effort to suggest facts to
12 Mr. Hall which they knew were false to determine how he might
13 respond?

14 A. No.

15 Q. Now, Mr. Beaumont asked you isn't it possible that the
16 reason that there doesn't appear to be any particular
17 triggering mechanism for the "I did it" statement is that
18 there was no use of interrogation techniques. Did the
19 testimony of both of the officers acknowledge using various
20 interrogation techniques?

21 A. Well, certainly acknowledge rapport building. It
22 certainly acknowledged reference to treatment which would be

23 an interrogation technique.

24 Q. The references to invading his space

25 MR. BEAUMONT: Judge, I object to leading the

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1 Witness.

2 THE COURT: Objection sustained.

3 Q. And was there any other testimony from other officers who
4 had witnessed portions of interrogations that included what
5 they observed of interrogation techniques utilized by Agent
6 Miller, for example?

7 A. Yes, that would be the testimony of Officers Amones, and
8 that certainly depended on interrogation techniques.

9 Q. I think the question was, well, isn't it within Larry's
10 power to decide what information he gives and what information
11 he doesn't give, and that's true. Correct?

12 A. Correct.

13 Q. Based upon both your experience, education, and training,
14 however, coupled with the numbers of interrogations that
15 you've been involved in analyzing, once you reach the point
16 where a person appears from the testimony of the agents to be
17 so cooperative and so compliant and to have given the basic "I
18 did it" statement, what would you expect to find in that post
19 admission narrative?

20 A. You would expect to find some degree of cooperation to
21 provide information, to answer additional questions asked. I
22 think I spoke earlier about the distinction between mundane
23 and highly charged, if you will, kinds of information. And

24 that the mundane information for the purpose of demonstrating
25 actual knowledge can be as valuable as the highly charged

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1 information. If someone has given, let's say, let us say that
2 because of being moved by remorse, someone has decided to say
3 "I did it" and then they're asked questions about the
4 circumstances of the events, the fact that they're moved
5 sufficiently to volunteer an admission ought to predict that
6 they are going to -- that they are willing to answer certain
7 questions about what happened, maybe not the most heinous
8 elements of what happened, but they certainly should be
9 willing to give the story at least as the mundane details that
10 goes along with choosing, for internal reasons, to admit to
11 committing a crime. Being cooperative. Answering those
12 questions would be a very routine sort of thing. If someone
13 had been coerced and was desirous of getting a benefit they
14 are also motivated to answer at least that level of question
15 because they need to please the interrogator to get the
16 benefit.

17 Under either theory, one would expect that if
18 asked the story of the crime should be forthcoming to some
19 degree. And a skilled interrogator will seek to get details
20 that can be corroborated, and the more skilled the
21 interrogator, the more mundane details will be appreciated as
22 tremendously valuable as well as the central facts of the
23 crime.

24 MR. DeARMOND: I have no other questions, thank you.
25 MR. BEAUMONT: I have nothing. Thank you, sir.

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1 THE COURT: Thank you Dr. Of she.
2 (The witness was excused.)
3 THE COURT: Mr. Parsons, I believe you mailed to me
4 certain books and publications, and do you want them back
5 because they are not part of the evidence in this case, and I
6 didn't know why you mailed them to me but --
7 MR. PARSONS: They belong to Dr. Ofshe, and I was
8 told that you had asked for them from Dr. Ofshe, that's why I
9 gave them to you.
10 THE COURT: Well --
11 MR. PARSONS: But they belong to him.
12 THE COURT: I think there's a misunderstanding.
13 don't recall asking for them, but let me give them back to
14 you.
15 MR. PARSONS: I'll take them.
16 MR. DeARNOND: Your Honor, outside of moving to
17 admit Exhibit No. 38, we would have no other evidence.
18 THE COURT: Any objection to Exhibit 38?
19 MR. BEAUMONT: No, Your Honor.
20 THE COURT: Be admitted.
21 (Defendant Exhibit 38 admitted into evidence.)
22 THE COURT: And does the government have any
23 witnesses?
24 MR. BEAUMONT: Yes, sir, we have two witnesses.

25

THE COURT: All right. Let's break for lunch and

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1 start back at 1:30.

2 MR. BEAUMONT: Thank you, Your Honor.

3 (A recess was taken from 11:23 A.M. until 1:35 P.M.)

4 THE COURT: All right. The government is prepared?

5 MR. BEAUMONT: Yes.

6 MR. DeARIAOND: Your Honor, if I could indulge the
7 Court for one moment. In Mr. Beaumont's initial questioning
8 of Dr. Ofshe at the last session there were a couple of
9 matters that I wanted to address in rebuttal that I did not
10 when we started out our proceedings. They're not in response
11 to parts of his cross-examination today. They are in response
12 to some initial cross-examination that was begun at the
13 previous proceeding, and I request leave of court to recall
14 Dr. Ofshe's for that purpose.

15 MR. BEAUMONT: Judge, I'm going to object, because I
16 do have to get my witnesses on a plane this afternoon. I
17 don't have -- unless they want to call afterwards, I don't
18 object.

19 THE COURT: Yes, you know, I'm a little bit
20 impatient with this. Let's have the government put their case
21 on. If you haven't asked Dr. Ofshe all you want to ask him
22 now, Counsel, you're in trouble. If there's time after the
23 government, you can call him back.

24 MR. DeARMOND: Thank you.

25 THE COURT: Let's hear so I can at least get both

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1 sides here so I can make a ruling tomorrow morning.

2 MR. BEAUMONT: All right. We call Dr. Frank
3 Horvath.

4 FRANK HORVATH, WITNESS, SWORN

5 DIRECT EXAMINATION

6 BY MR. BEAUMONT:

7 Q. Doctor, would you please tell us your name and spell your
8 last name for the record?

9 A. My name is Frank Horvath. My last name is spelled
10 H-O-R--V-A-T-H.

11 Q. How are you employed?

12 A. I'm professor of criminal justice and criminology at
13 Michigan State University.

14 Q. You have been a professor at Michigan State for how long
15 now?

16 A. I've been on the faculty since 1974.

17 Q. And indeed do you hold a Ph.D.?

18 A. Yes, I do.

19 Q. And what's your Ph.D. in?

20 A. It's a P.L.D., multi-disciplinary Ph.D. in criminal
21 justice and criminology.

22 MR. BEAUMONT: Your Honor, may I approach the
23 witness?

24 THE COURT: You may.

25 Q. Doctor, I'm going to show you what I've marked as Exhibit

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1 No. 3, and I have a copy for the Court which I'll provide to
2 the Court, and I ask is that a copy of your curriculum vitae?

3 A. Yes, it is.

4 Q. And you've had a chance to review it, I take it, in the
5 past?

6 A. Yes, I have.

7 Q. And is it accurate?

8 A. It is.

9 Q. Okay. And I don't want to go through this whole thing,
10 but just a few things. Are you involved in teaching research
11 methods at Michigan State University?

12 A. Yes, I've taught research methods statistics for the last
13 15 years or so.

14 Q. Would that be both at the graduate and undergraduate
15 level?

16 A. Yes, sir.

17 Q. And do you have experience in the field of research, and
18 in particular I would suggest on page 3 of your vitae you
19 state that, I'm sorry, just a second, yes, page 3 you state
20 you were on the advisory committee of the Office of Technology
21 Assessment for U.S. Congress in 1983. Could you tell us what
22 that is, please?

23 A. That was a study that was carried out at the request of
24 Congress by the Office of Technology Assessment to assess the,
25 if you will, the literature with respect to this state of art

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1 regarding polygraph testing.

2 Q. All right. And you indicate that you are involved in a
3 National Institute of Law Enforcement and Criminal Justice,
4 Police Division, LEAA, U.S. Department of Justice, 1978,
5 research evaluation, what was that?

6 A. I regularly carried out as a part of my duty reviews of
7 research proposals that are submitted to various agencies as
8 well as private institutions.

9 Q. You're also on a committee with the American Polygraph
10 Association, are you not? Let me strike that. Are you the
11 Director of the Center on Research and Detection of Deception
12 at Michigan State University?

13 A. Yes, I am.

14 Q. Could you tell the Court what is that exactly?

15 A. It's a small center that was established essentially by
16 funds provided by the American Polygraph Association in
17 connection with funds with the College of Social Science at
18 Michigan State University.

19 Q. And that committee or that program does what? What is
20 the purpose of it?

21 A. We carry out research on topics that are related to
22 detection of deception. The purpose essentially is to
23 interest graduate students in this area to encourage them and
24 provide stipends for their research efforts on topics related
25 to detection.

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1 Q. Has your research been subject -- have you published
2 research?

3 A. Yes, yes, I have.

4 Q. In various journals, accepted journals in your field?

5 A. I've published in a variety of scientific professional
6 journals, yes.

7 Q. Have your publications been subject to peer review?

8 A. Some, but not all.

9 Q. The ones that have been subject to peer review, could you
10 tell the Court just very briefly what is involved in that
11 process?

12 A. The peer review process essentially involves submitting a
13 manuscript to a journal editor. Usually that editor will send
14 that manuscript after his review to one, two, or perhaps three
15 or more outside expert reviewers, each of whom carries on an
16 independent assessment of the quality of their work. They
17 write a report and resubmit that report as well as the
18 original manuscript back to the editor with suggestions that
19 encourage the author either to revise or resubmit or encourage
20 the editor to deny publication of that manuscript.

21 Q. Do you have any idea what the rejection rate has been in
22 some of these things that you've had peer review published?

23 A. Some of my submissions, the rejection rate is around 85
24 to 90 percent.

25 Q. Now, and I -- just one last thing I want to go over,

1 your background. Do you now teach the following current
2 courses? Pro-seminar research utilization?

3 A. No, I'm not teaching that currently.

4 Q. Have you taught it in the past?

5 A. Yes, I have.

6 Q. That was for graduate and Ph.D. students?

7 A. It's essentially a doctoral level course.

8 Q. Pro-seminar and criminal justice systems?

9 A. Yes.

10 THE COURT: Are you reading from this?

11 MR. BEAUMONT: I'm sorry, Judge, page 6 of the
12 curriculum vitae in the middle.

13 Q. Pro-seminar in criminal justice systems for graduate
14 Ph.D. students?

15 A. Yes.

16 Q. Research design and analysis in criminal justice
17 research, master student level course?

18 A. That's a course I would teach this year, yes.

19 Q. Quantitative analysis in criminal justice research,
20 master level course?

21 A. That is not a course I'll teach this year, but I have
22 often done in the past.

23 Q. Pro-seminar in criminal investigation process, graduate
24 master's course?

25 A. I will teach that this year, yes.

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1 Q. And then research methods in criminal justice,
2 undergraduate course?

3 A. I taught that in the past.

4 Q. And are you on the board of any journals as a reviewer?

5 A. I serve as an ad hoc advisor/reviewer for a number of
6 academic journals.

7 Q. Could you tell the Court some of them?

8 A. Some of them are listed in my vitae. They include, for
9 instance, a journal called Psychophysiology, Journal of
10 Psychology, the Journal of Applied Social Psychology, Journal
11 of Criminal Justice, Journal of Forensic Sciences, Journal of
12 Personality and Social Psychology, Justice Quarterly, and so
13 forth.

14 Q. And all those things are contained in the vitae; are they
15 not?

16 A. Yes.

17 MR. BEAUMONT: Your Honor, I move to admit
18 Government Exhibit No. 3 for the purposes of this hearing.

19 MR. DeARMOND: No objection.

20 THE COURT: Be admitted.

21 (Government Exhibit 3 admitted into evidence.)

22 Q. Now, Doctor, you have been present during the testimony
23 of Dr. Ofshe, have you not?

24 A. I believe I have for all the testimony or at least
25 certainly most of it.

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1 Q. And I have provided you with a transcript of the last two
2 days' hearings of -- not today but the previous two days'
3 hearings of Dr. Ofshe's testimony, have I not?

4 A. Yes, I did.

5 Q. And you are aware, are you not, that Dr. Ofshe was
6 requested to provide the Court with three studies that in
7 essence would support his theories or opinions?

8 A. Yes, I'm aware of that.

9 Q. First of all, let's back up a little bit. Are there --
10 is there research that would support the theory that certain
11 interrogation techniques lead to or will lead to a false
12 confession?

13 A. Do you mean in real life circumstances?

14 Q. Yes.

15 A. No. In my opinion there is no research that supports
16 that idea.

17 Q. Could you explain to the Court how you come to that
18 opinion and why?

19 A. I've reviewed the literature, and I believe the same
20 literature that was reviewed by Dr. Ofshe. And I think even
21 he agrees there is no literature that shows a causal
22 relationship between particular interrogation techniques and
23 the production of false confessions.

24 Q. All right. Now, in particular when we're referring to
25 these three studies that Dr. Ofshe provided, one was the Bedau

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1 and Radelet, R-A--D-E-L-E-T, study, was it not?
2 A. Yes, it was.
3 Q. And have you -- you had a chance to review that
4 particular study?
5 A. Yes, I did.
6 THE COURT: What was the name of the study again?
7 Q. It's -- was that titled "Miscarriages of Justice in
8 Potentially Capital Cases"?
9 A. Yes.
10 Q. And it was written -- authored by a Bedau, B-E-D-A-U, and
11 a Michael Radelet, R-A-D-E-L--E-T?
12 A. Yes, that's correct.
13 Q. All right. And you have reviewed that study, have you
14 not?
15 A. I have.
16 Q. Now, in researching that particular study, did
17 you -- were you also made aware of a published response to
18 that particular study?
19 A. Yes, I'm aware that there was a rejoinder published to
20 that article.
21 Q. By the way, the Bedau and Radelet study was published
22 originally in what, do you recall?
23 A. I believe it was Stanford Law Review.
24 Q. Okay. And in a later issue of the Stanford Law Review
25 there was a response, and it's titled "Comments Protecting the

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1 Innocent, A Response to the Bedau and Radelet Study," and it's
2 authored by a Steven Markman, M-A---R-K-M-A-N, and a Paul
3 Cassell, C-A-S-S-E-L-L?

4 A. Yes, that's correct.

5 Q. All right. And I'm going to show you Government Exhibit
6 No. 4 and ask you if you can -- is this the response that was
7 published regarding the Bedau and Radelet article?

8 A. Yes, it is.

9 MR. BEAUMONT: Your Honor, I am going to move to
10 admit No. 4. I'll have to make copies. This is the only copy
11 I have, but I give it to the Court now, and I don't know that
12 -- we're really going to just refer to it generally, so I
13 don't think we really need too many copies of it.

14 Q. Please begin by telling the Court very basically what did
15 the Bedau and Radelet study consist of?

16 A. The Bedau and Radelet study was essentially an assessment
17 of what they refer to as "Miscarriages of Justice," that is
18 persons who had been wrongfully convicted in the court system
19 in the United States. They were able to locate over the last
20 century 350 such cases, some of which they maintain involved
21 the death penalty, some of which involved capital offenses
22 where the death penalty was not applied. They tried to
23 account for the reasons that these miscarriages occurred in
24 this descriptive piece.

25 Q. Okay. Was there -- I'm sorry, go ahead.

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1 A. One of the features of their assessment was a description
2 of the cases that produced these alleged miscarriages relative
3 to the reasons that the miscarriages occurred, relevant to
4 this particular inquiry. What they found was of the 350 cases
5 they were able to identify that they said were miscarriages of
6 justice, there were 49 of them that they maintained were
7 miscarriages as a result of false confessions. Some of those
8 false confessions were confessions that occurred early in the
9 century, essentially by what they maintain were brutal third
10 degree methods. Some were confessions that occurred more in
11 -- more recent contemporary times. And there were also of
12 those 49 confessions, as I recall 17 of them that were in
13 their words false but in fact were voluntary confessions that
14 were eagerly given by the confessor. So they found that the
15 very small proportion of their supposed miscarriages occurred
16 as a result of false confessions; however, there was nothing
17 in this article and there is nothing in this article that
18 relates to particular interrogation methodology, tactics, or
19 techniques to the production of false confessions unless one
20 wants to assume that brutal abusive methods that were known to
21 have been used in the past refer specifically to some kind of
22 interrogation technique that is currently used today.

23 Q. And do you have any support for the concept that indeed
24 brutal interrogation techniques are being used today?

25 A. Well, my understanding is that that is no longer the rule

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1 or the practice anywhere in the U.S.

2 Q. Okay.

3 A. But I'm certainly not willing to say that it is never
4 done today.

5 Q. But indeed that's the subject of suppression hearings?

6 A. Yes, I believe so.

7 Q. All right. Now, what generally did the response to the
8 Bedau and Radelet article state? That would be in the next
9 Government Exhibit No. 4.

10 A. What Mr. Markman and Mr. Cassell have done in their
11 rejoinder to the Bedau and Radelet study is something that I
12 think has been necessary in literature, and that is they call
13 to task Bedau and Radelet for the way in which they produced
14 these alleged miscarriages of justice. Some of the cases that
15 are cited by Bedau and Radelet, for instance, as having been
16 miscarriages are shown in my opinion, at least, by Markman and
17 Cassell to not have been miscarriages at all. That is in some
18 cases some of the alleged false confessions were, in fact,
19 true confessions and were decided so by a jury and by several
20 trials and by judges and so forth. What Bedau and Radelet
21 have done is taken cases where in the parlance of this field
22 where ground truth was not known and made assumptions about
23 what ground truth really was.

24 Q. And is that a research method, approved method of doing
25 such a study?

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1 A. Yes, it is. The problem of ground truth is a severe one
2 that limits what can be done in this field.

3 Q. The bottom line, is there anything about that particular
4 article that supports the concept that certain interrogation
5 techniques will or are likely to lead to false confessions?
6 A. There is nothing in that article that even relates
7 remotely to that issue.
8 Q. Now, you also heard Dr. Ofshe cite research done by
9 Professor Kassin. Are you familiar with that research?
10 A. I'm familiar that Professor Kassin has done a number of
11 pieces of research on this area.
12 Q. In particular, the research cited by Dr. Kassin was a
13 specific research involving college students, was it not?
14 A. He's done a number of studies. In fact, I think all of
15 his major studies have involved college students.
16 Q. All right. One of them involved a scenario of looking at
17 transcripts, did it not?
18 A. Yes, it did.
19 Q. And that was a study cited by Professor Ofshe, was it
20 not?
21 A. I believe so, yes.
22 Q. Could you tell the Court very basically, briefly, what
23 was that, did that study involve, and what were the
24 conclusions drawn?
25 A. What Kassin and McNall did in the research that I'm

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1 referring to was essentially they have college students review
2 transcripts of an actual interrogation that they collected, as
3 I recall, from New York. They altered the words that were in

4 this transcript in order to assess the effect of those
5 alterations on students' views relative to what might happen
6 in terms of a sentencing or a punishment that would be given
7 to the defendant who was involved in the interrogation. So we
8 had students evaluating written transcripts, making decisions
9 or judgments about the merit, if you will, of the
10 interrogation that was being carried out.

11 Q. And what were the conclusions of the authors in that
12 study?

13 A. I think what Kassin's conclusion, Kassin/McNall's
14 conclusion was essentially that by this process of what they
15 refer to as pragmatic implication, the idea of minimization
16 and maximization as viewed as interrogational techniques has
17 some negative impacts on people in the real world as they
18 might undergo an actual interrogation. However, I should
19 point out that, and I believe this was mentioned either
20 earlier today or at the last hearings that I attended, Kassin
21 is very clear in his article in pointing out that there is
22 very little, if any, what's referred to as external validity
23 in his study. That is we cannot generalize from what college
24 students would do in reading a transcript to what might
25 actually take place and might motivate an actual criminal

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1 suspect, he or she, is undergoing interrogation in the real
2 world.

3 Q. Why is that?

4 A. Again, it's a common problem because we're dealing with
5 college students who behave perhaps differently than people in
6 a real interrogation would behave. We have to be extremely
7 cautious about jumping from the one setting to the other
8 setting.

9 Q. Okay. And indeed that's expressly written in the article
10 itself, is it not?

11 A. Yes, it is.

12 Q. Now, the final research cited by Dr. Ofshe of those three
13 that I spoke of was research conducted by himself. Are you
14 familiar with that?

15 A. I believe it was an article that was done jointly between
16 him and Richard Leo.

17 Q. Okay. And tell us about that, please.

18 A. Essentially this was a study that was very similar to the
19 Bedau and Radelet study. Leo and Ofshe were able to identify
20 60 cases in which they alleged false confessions occurred.
21 They then categorized those false confessions by the certainty
22 with which they decategorized, so there was one group of 60,
23 as I recall, there were 30 or 32 cases where they said that
24 confessions were definitely false and another group where
25 there was less certainty about the falsity of the confession

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1 and so forth. So essentially they tried to describe what
2 Radelet and Bedau did by pointing out that false confessions

3 occur, and then they try to relate the reasons those false
4 confessions occurred to what they could glean from the case
5 studies.

6 Q. Okay. And in your opinion did that study support this
7 concept that certain interrogation techniques will lead to a
8 false confession?

9 A. There is nothing in that study, in my opinion, that
10 supports a specified relationship between any interrogational
11 techniques and the production of false confessions.

12 Q. And what leads you to that opinion? Can you explain it
13 to the Court?

14 A. There are several reasons why this is the case. One of
15 those reasons is that in both the Bedau and Radelet study, and
16 in the Leo and Ofshe study that I referred to, we have cases
17 where we have identified -- allegedly identified false
18 confessions. If one were interested in whether or not
19 particular techniques produced false confessions, you have to
20 look at, if you will, the other side of the coin. That is if
21 we have a particular interrogation technique that is present
22 in every false confession that we can identify, that wouldn't
23 necessarily mean that that technique or that tactic led to the
24 false confession. And the reason for that is we may have
25 hundreds or thousands of cases where innocent people were

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1 confronted with the same tactic and technique and did not

2 confess. So all we can say is that we have some cases perhaps
3 where false confessions occurred, but we don't know exactly
4 why that took place.

5 Q. So is it fair to say that there is no question that
6 indeed there are false confessions? Is that --

7 A. I think everyone in the scientific community, everyone in
8 the legal community, every criminologist that I know
9 understands and recognizes there are false confessions, yes.

10 Q. But determining specifically what will or will not cause
11 a false confession is not a question that's been answered?

12 A. Not in my opinion, no.

13 Q. And being able to recognize after a confession is given
14 as to whether or not it is false or true has not been done?

15 A. I'm sorry, would you repeat your question?

16 MR. BEAUMONT: Didn't make sense to me either,
17 Judge.

18 Q. To be able to look at a confession and suggest it is
19 either false or true, there is no research to support such an
20 opinion as that?

21 A. I'm not sure exactly what you mean by research. I am
22 sure that in some cases it is possible to look at a confession
23 that has been given by a particular criminal suspect and
24 determine with a relatively high degree of certainty that it
25 is a false confession or likely to be false confession. To my

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1 knowledge, however, there is absolutely no scientific
2 literature whatsoever that supports the idea that this can be

3 done systematically or that it has been done systematically in
4 any way.

5 Q. So is what you are saying then basically what can be used
6 in that process is simply common sense?

7 A. I'm not sure how you use that term common sense, but,
8 yes, there's nothing scientific involved if that's what you're
9 referring to.

10 Q. Okay. To determine that indeed a confession was or was
11 not false?

12 A. Yes.

13 Q. All right. Now, you have prepared an analysis of false
14 confessions in the sense of in the literature, have you not?
15 I'm going -- do you have Government Exhibit No. 5?

16 MR. BEAUMONT: Your Honor, could I approach the
17 witness again?

18 THE COURT: Yes.

19 Q. I'm going to show Government Exhibit No. 5. Could you
20 please tell us, what is that exhibit?

21 A. This is a paper that I prepared, a short document that I
22 prepared as a result of my interest that was piqued at the
23 last hearing that I attended regarding the frequency of
24 occurrences of false confessions. One of the common
25 statements that's made in the literature in this field is

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1 particularly by scientists is that we do not know the actual
2 frequency of false confessions, and there is no way to
3 estimate what that frequency is. And I happen to agree that

4 we don't know but not that we may not estimate under some
5 conditions what the frequency of those confessions might be.

6 Q. And was that interest piqued when the Court had asked
7 Dr. Ofshe to design a study, in essence, or the problem with
8 designing studies?

9 A. That was part of it.

10 Q. And could you take us through the Government Exhibit No.
11 5 and help us to understand what this says~

12 A. Yes. What I've done in this paper is to pull together
13 some actual crime statistics as well as some assumptions about
14 certain kinds of occasions, certain kinds of events. For
15 instance, in 1995 we know from a document produced by the FBI
16 called the Uniform Crime Reports that in the United States
17 there were 18,324 homicides that were reported. Of those
18 homicides, 64.8 percent of them were cleared by the police.
19 When we talk about the police clearance, what we're referring
20 to is that the police have identified the person or persons
21 that they believe are responsible for this particular crime.
22 So it has nothing to do with any other processing in the
23 criminal justice system. It has only to do with police record
24 keeping, in a sense.

25 Q. Okay.

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1 A. I was curious about homicides because if interrogation is
2 used by the police as a predominant mode of investigation, and
3 it is by the way in almost all cases that I'm aware of, but
4 the cases where police would be most apt to bring their

5 resources to bear on trying to get a confession from a suspect
6 would occur during homicides, because those are the kind of
7 cases that they are most likely to want to resolve. So in
8 these cases I assumed that if there were 18,324 total
9 homicides investigated, I then looked at the proportion of
10 those homicides that were actually cleared by the police, that
11 is where they had probable cause to believe that a particular
12 person did this homicide. That meant there were 11,874
13 homicides that were cleared. There was 6,459 that were not
14 cleared where the police were not able to identify a suspect,
15 either, because they couldn't locate a reasonably identifiable
16 suspect or Miranda was invoked or some other reasons. But of
17 those 11,874 crimes that were cleared by the police, if we
18 assume that they interrogated only one suspect per case --

19 Q. That's a pretty broad assumption.

20 A. Which is an unlikely assumption, but if we make that
21 assumption then the police actually interrogated in these
22 homicides 11,874 persons. Further, if we assumed because
23 we're talking about police clearance here, not about
24 conviction in court, that 80 percent of those people that the
25 police arrest for these homicides are factually guilty, that

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1 is really did the homicide in question, and 20 percent are
2 factually innocent, then we have 9,499 who are factually
3 guilty, 2,375 who are actually innocent. So those are the
4 people that the police are going to focus on. So if they

5 interrogate those people, we would ask what is the rate at
6 which police would produce confessions by means of normal
7 police interrogation? In this case I've used an actual
8 statistics drawn from a survey I did and completed two years
9 ago where I asked, essentially surveyed 3,517 interrogators in
10 the United States and got a response from 1,326 of them, and I
11 asked them what their average rate of confession was in the
12 cases where they interrogated. That statistic was 42.8
13 percent. These are, by the way, in my view at least, expert
14 interrogators, so on average what we have is statistics that
15 shows about 43 percent of the times when the expert
16 interrogator interrogates a criminal suspect that that will
17 produce a confession.

18 So if we take 9,499 guilty persons, 42.8
19 percent of them are going to confess, that's 4,066, the
20 remainder do not confess, now we have some people who we have
21 identified in these crime cases who are actually factually
22 innocent but who also get interrogated because the police
23 believe they are the actual suspect. If we assume that 10
24 percent of those factually innocent persons make false
25 confessions, that gives us a number of 237.

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1 Q. And is that a broad assumption? Are you being extremely
2 liberal in that?

3 A. I think that's extremely broad, even the severest critics

4 of police interrogation assume that the interrogate -- the
5 false confession rate is around one in every 200 cases, .005,
6 so that's much, much smaller, than what I have assumed here.
7 But of those innocent persons we find 237 actually make a
8 confession falsely, 90 percent don't confess, so if we take
9 the 4,303 persons who confess, that's 4,066 actually guilty
10 persons who confess and 237 factually innocent persons who
11 make a false confession, then we find that 237 of all
12 confessors are false confessors, which is a rate of 5.5
13 percent. Those confessions are confessions that would occur
14 at the police stages of investigation, that is before they're
15 screened by the prosecutor, before they're screened in a
16 preliminary exam, before they're screened by hearings at a
17 lower court, or before they're screened in court by a trial
18 judge or by a jury. So that's an outside statistic, if you
19 will.

20 Q. So --

21 A. I also in this document at the bottom I have looked at
22 the statistics produced by Ofshe and Leo in their article that
23 we referred to earlier. They claim they did an extensive
24 search of as many public documents as they could locate to
25 identify false confessions. I pulled from their study the

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1 number of false confessions that they maintained they were
2 able to identify in 1995, which is the same year for which we
3 have these crime clearance statistics. They located what they

4 claimed were two definite false confessions. Two out of the
5 2,375 cases that I referred to earlier would produce a false
6 confession rate of .0008. They, in addition to those two
7 definite false confessions, also said there were two other
8 cases in 1995 that occurred where they were less sure about
9 the falsity of the confessions. So we have a total of four
10 identifications of possible false confessions in 1995, that
11 produced a false confession rate of .0016. So in general,
12 although I think this is a reasonable way of trying to look at
13 this issue, we can see that the probability that in any
14 particular case that a confession is false is very, very
15 small. It doesn't mean that we can talk about any particular
16 case based upon the statistical analysis. It just shows that
17 the likelihood that that's going to occur after going through
18 all these processes is extremely limited. In addition to
19 that, I want to point out that it is not only homicides where
20 police interrogate criminal suspects, they interrogate people
21 involved in or suspected of, involved in burglary and
22 robberies and rapes and so forth, and I did not include those
23 numbers and, of course, that would raise the base false from
24 which we would calculate these statistics.

25 Q. Now, is it fair to say that the practical effect of this

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1 is that it's very difficult to actually study false
2 confessions in the field?

3 A. In my view, yes. These statistics would support the idea
4 in order to locate false confessions to study adequately one

5 would have to screen through a large number of confessed
6 criminal cases to locate those that are false, and then you'd
7 have the problem that I mentioned before. That is if you were
8 able to only identify the false confessors without comparing
9 or without evaluating the innocent people who were
10 interrogated who did not confess, it would be impossible to
11 attribute a false confession to a particular kind of technique
12 or particular event in question.

13 Q. Okay. And hence is that, in your opinion, the reason
14 that there is no such research to support those conclusions?

15 A. It certainly is one of the reasons.

16 Q. Now, are you familiar with this, Dr. Ofshe's concept of
17 post admission narrative?

18 A. Yes, I am.

19 Q. Is there any scientific validity to the idea that a
20 defendant will or will not provide details in a post admission
21 narrative?

22 A. I know of no scientific research whatsoever that supports
23 the general premise that that is based upon.

24 Q. And is it fair to say the premise that is based upon is
25 really nothing more than simple common sense?

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1 A. Again, I'm not sure how you classify common sense, but in
2 a way I would assume that that's correct. I should also point
3 out that my experiences have involved practical experiences in
4 interrogation, in interviewing and so forth. While I would
5 agree that it is possible that a match between a confession

6 and the facts of a case could reasonably be used to determine
7 that, in fact, we have a true confessor, the absence of a
8 match has no necessary relationship to false confessors or a
9 false confession.

10 Q. And why is that?

11 A. Because people who confess to crimes oftentimes do not
12 include details that would be useful for that purpose.
13 Sometimes they may include things that are inserted falsely,
14 but perhaps more important than that, it's got to be
15 understood that most criminal cases, particularly most
16 homicides, do not necessarily involve the kind of evidence on
17 which this post admission narrative would be based. That is
18 we know that about 20 percent of serious criminal cases
19 involve the use of some kind of scientific evidence, that
20 means in 80 percent of those serious cases the kind of detail
21 that I heard Dr. Ofshe talk about is just simply not available
22 in the real world.

23 MR. BEAUNONT: Thank you. I have no further
24 questions.

25 THE COURT: You may cross, Mr. DeArmond.

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1 MR. DeARMOND: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. DeARIAOND:

4 Q. Doctor, so that I understand, we don't have any

5 disagreement, meaning you and I or you and Dr. Ofshe, that
6 false confessions do occur?
7 A. I know of no one who would disagree with that.
8 Q. And did we agree or disagree that there are methods of
9 psychological coercion which can be utilized in an
10 interrogation process?
11 A. I'm not sure I understand what you're asking.
12 Q. Okay. I'll break it down. Do we agree or disagree that
13 there are methods of psychological coercion which may occur in
14 an interrogation process?
15 A. Well, it would certainly be my view that that does occur,
16 yes.
17 Q. Okay. And in fact that is a concept which is taught
18 through some of the various leading interrogation technique
19 manuals; is that not correct?
20 A. That's not correct.
21 Q. Okay. What they do, in fact, by they I'm referring to
22 things like Reid, you're well familiar with the John Reid
23 Association. Right?
24 A. Yes, I am.
25 Q. You've been connected with the John Reid people since

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1 1964, I believe; is that correct?
2 A. I'm not sure what you mean by connected. I was employed
3 there from '64 until 1970, yes.
4 Q. Okay. Then you've had some association with them in some

5 capacity either as research consultant, personnel selection,
6 and things of that nature up to as late as 1988. Correct?

7 A. The answer is yes, but actually there are two companies
8 there. One is called Reid Psychological Systems and the other
9 is John Reid and Associates.

10 Q. And they're all -- they both were spin-offs of the
11 original John Reid Association?

12 A. Yes, that's correct.

13 Q. And yourself and Mr. Buckley, you both have worked for
14 the John Reid Association?

15 A. Yes.

16 Q. And Reid's probably one of the largest leaders of police
17 interrogation techniques in the United States today; isn't it?

18 A. Again, I'm not sure about your characterization, but,
19 yes, John Reid and Associates, I believe, probably is more
20 heavily involved in training regarding police interviewing and
21 interrogation techniques than any other firm in the U.S.

22 Q. And they teach, do they not, that there is no such thing
23 as psychological coercion?

24 A. Not that I'm aware of, no.

25 Q. Okay. So if Mr. Buckley has testified previously that

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1 they teach that there is no such thing as psychological
2 coercion, then you would not agree with that?

3 A. That wasn't the question that I thought you asked

4 earlier, but maybe I should clarify. I do not believe that
5 Reid and Associates teaches coercion in the sense that you're
6 using it or in the sense that it is meant to connote something
7 that would be illegal, unethical, or immoral to carry out, if
8 that's what your implication is. But clearly there are
9 psychological methods, in a sense, that are involved that from
10 my point of view are not coercive in the sense that I just
11 characterized.

12 Q. Okay. So if you limit your definition of coercion to
13 things involving force, violence, or the things which would
14 otherwise perhaps be considered illegal by a court, then those
15 things aren't taught?

16 A. Well, those things are not taught nor are there
17 psychologically coercive methods of the sort that I have in
18 mind. I'm not sure what you have in mind.

19 Q. Okay. They do not teach and you do not subscribe to the
20 nine steps of the interrogation process?

21 A. They do teach nine steps of an interrogation process,
22 yes.

23 Q. You don't consider any of those steps to involve degrees
24 of psychological coercion?

25 A. The difficulty I'm having is what you mean by coercion.

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1 When you say degrees, I think that in some sense all
2 interrogation involves some kind of pressure, if will you,
3 some sort of psychological pressure in some way, yes.

4 Q. Okay.

5 A. But I'm not sure I characterize them as coercive in the
6 sense that it is commonly used in the legal context, for
7 example.

8 Q. Do you know Dr. David Raskin?

9 A. Yes, I do.

10 Q. Have you had occasion to be confronted by Dr. Raskin in
11 the recent past concerning manipulation of data?

12 A. No.

13 Q. If I understand correctly, your particular field does not
14 involve any form of social psychology; is that correct?

15 A. I'm not sure how to answer that.

16 Q. You're not a psychologist?

17 A. I don't see myself as being a social psychologist, if
18 that's what you mean.

19 Q. You're not a psychologist?

20 A. No, I'm not.

21 Q. You have no form of degree in psychology, be it clinical
22 or social?

23 A. Part of my multi-disciplinary degree was a study of
24 organizational of sociology and psychology. So it was like a
25 cognate that I studied, yes.

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1 Q. I understand we all have classes in different types of
2 studies, but the fact that you might have taken religion
3 doesn't exactly make you a cleric?

4 A. This is not a class. It was a cognate area. It was a
5 required area.

6 Q. Your degree --

7 A. My degree was a multi-disciplinary degree that emphasized

8 criminal justice and criminology.

9 Q. Did it also emphasize social psychology?

10 A. No, it did not.

11 Q. Did it emphasize clinical psychology?

12 A. No, it did not.

13 Q. Have you published in any of the leading social

14 psychological journals? Let me back up. Do you even know any

15 social psychological journals?

16 A. I do know the one that I mentioned that I've done reviews

17 for the Journal of Social Psychology, as I recall, but I don't

18 know how you would characterize a journal like the Journal of

19 Applied Psychology. To me that would not be social

20 psychology, but there are articles that get published in there

21 that deal with that general topic.

22 Q. And do your articles involve research in the areas of

23 influence and decision making?

24 A. Oh, no, they did not.

25 Q. Do your articles involve research in the areas of

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1 coercion, psychological coercion, or otherwise?

2 A. Other than if one characterized interrogation in a

3 general way, in that way, the answer is no.

4 Q. Do any of your articles involve themselves in the

5 analysis or investigation of false confessions?

6 A. That's a difficult question for me to answer, because

7 they don't look at that specifically, but that is part of what
8 I do in my research undertakings, yes.

9 Q. Well, let me back up. Did anything that you publish
10 involve itself with false confessions?

11 A. Specifically with that topic?

12 Q. Yes.

13 A. No.

14 Q. The various items of literature that were presented to
15 the Court in Dr. Ofshe's first presentation, were you familiar
16 with those?

17 A. With most, perhaps not all.

18 Q. And is it your testimony that those are not treatises
19 that are normally recognized and accepted within the field of
20 social psychology?

21 A. I didn't try to characterize each one of them. I'm
22 certain that some of those that I heard mentioned would be
23 generally recognized publications in the community, the
24 academic community, yes.

25 Q. I notice that you've done research on behavior provoking

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1 questions; is that correct?

2 A. Yes.

3 Q. So I take it then that as part of your study you
4 recognize that there are questions or techniques that can be
5 engaged in by interrogators that will, in fact, then result in
6 certain behaviors?

7 A. Well, that's not quite correct. The idea is to schedule

8 an agenda of questions or to ask an agenda of questions to
9 determine whether or not certain behavioral mannerisms are
10 provoked by the way in which the question's presented and in
11 the way in which it's answered.

12 Q. And your understanding of that process is that there are
13 such things that the investigator must take into
14 consideration, like timing of certain aspects of his
15 questions, and correlate that timing with what behaviors he
16 sees being exhibited by the suspect; is that correct?

17 A. Timing is one of the elements, yes.

18 Q. Okay. And these all have to do with some of the various
19 psychological, I think your reference was, pressures that
20 might come to bear on a suspect who's being interrogated; is
21 that correct?

22 A. No, I don't think that the timing issue necessarily has
23 to do with that. It has to do with cognitive processing of
24 the information more than it does necessarily with the
25 pressure.

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1 Q. But you teach the interrogators, don't you, that as a
2 result of some of the observed behaviors then there's a
3 certain scenario or pattern which they should then engage in
4 to take advantage of that observed behavior. Right?

5 A. Only in a very general way. The idea behind using those
6 kinds of questions is to help an investigator determine the
7 actual status of the person that is being interviewed. That
8 is by status I'm referring to whether or not it is likely or

9 unlikely that this is a correct suspect in this particular
10 case.

11 Q. Could you describe for the Judge what the nine steps of
12 the interrogation process are?

13 A. I couldn't tell you off the top of my head because I
14 don't know.

15 Q. Would step one involve developing a psychological theme
16 that justifies or excuses the crime?

17 MR. BEAUNONT: Judge, I'm going to object. He says
18 he doesn't know. I object. I don't think -- I think he's
19 already answered and said he doesn't know what the steps are.

20 MR. DeARMOND: He's supposed to be the countering
21 expert on interrogations.

22 THE COURT: And he apparently doesn't know. Do you
23 want to refresh his memory? You can do that, but if he
24 doesn't know he doesn't know. Do you want to refresh his
25 memory with something?

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1 MR. DeARiMOND: I'll try. Thank you, Your Honor.
2 Maybe I misunderstood.

3 Q. Is it my understanding that you just don't recall what
4 they are, but you knew what they were at some time?

5 A. No, sir, I do not teach interrogation.

6 Q. Okay. Were the interrogators to whom you referred in
7 your survey all polygraphers?

8 A. Most were, not all.

9 Q. And you got a response of less than 50 percent?
10 A. The response rate, as I recall, was around 60 percent.
11 should correct that to tell you that there were various
12 categories of respondents in that survey, some of whom were
13 members of the American Polygraph Association, some who were
14 nonmembers, so the response rate really differed by category.
15 Q. Maybe I was -- maybe I misunderstood. I thought you said
16 the survey was of 3,517 interrogators and you got 1,326
17 responses~
18 A. Yes, that's correct, that's what I said.
19 Q. I'm horrible at math, but wouldn't that be less than 50
20 percent?
21 A. As I said, that there were different categories of
22 respondents. As I recall, the members of the American
23 Polygraph Association, the percentage of respondents was
24 around 60 percent. But if you divided 1396 by 3517 then if
25 you're asking me was that the actual total response rate, the

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1 answer would be yes.
2 Q. Okay. I'm just going by what your testimony was.
3 A. Yes, I understand.
4 Q. Now, if I understood Government Exhibit No. 5 is
5 something you generated and created here just since the last
6 hearing; is that correct?
7 A. Yes, it is.
8 Q. Okay. And if I understand correctly, what you're
9 attempting to show by this document is besides the fact that

10 you can make statistics say anything you want them to, that in
11 your opinion false confessions are very infrequent?

12 A. Actually I think it's the consensus view. That's one of
13 the reasons why they're so difficult to study.

14 Q. I take it that your interpretation of scientific study is
15 limited to part empirical studies in the laboratory; is that
16 correct?

17 A. I'm not sure I understand.

18 Q. Well, you've made reference to that there's no way to
19 scientifically validate certain aspects of false confessions
20 and the interrogation process. Correct?

21 A. I didn't say there was no way. What I said was that
22 whatever is possible has not yet been done to relate
23 particular interrogation techniques to particular outcomes.

24 Q. In other words, if you limit the question to can you
25 point to a specific technique and say that that technique will

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1 result in a false confession, then the answer to that question
2 is no, you can't?

3 A. That's true for any interrogation technique, yes.

4 Q. If the question is, are there interrogation techniques
5 which may, in fact, have an impact on or which may lead to
6 false confessions, your response to that question would be
7 what?

8 A. Again, I'm not sure I understand exactly what you're
9 driving at. If you're asking me is there any research?

10 Q. No, I'm not asking -- I'm asking you first, based upon

11 your knowledge are there any interrogation techniques
12 whatsoever from your opinion?

13 THE COURT: Wait a minute, wait, wait a minute. You
14 don't mean his own personal research as an expert?

15 Q. His particular expertise, anything and everything he may
16 base his opinion upon. I don't mean just maybe deep down
17 personal opinion. Based upon all of your experience,
18 education, and training, is it your testimony that there are
19 no interrogation techniques whatsoever which could lead to
20 false confessions?

21 A. Well, there are many interrogation techniques that one
22 could use that could produce false confessions.

23 Q. Okay. Thank you.

24 A. But most of those are illegal or immoral.

25 Q. Okay. Most of them?

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1 A. Yes.

2 Q. So there are some which even in your opinion would not be
3 illegal or immoral?

4 A. That is probably true.

5 Q. Okay.

6 THE COURT: Dr. Horvath, name me one technique that
7 will lead to a false confession.

8 THE WITNESS: If I pointed a gun at your head and
9 said to you, "If you don't tell me the truth or tell me that
10 you did this crime I'm going to pull the trigger," clearly
11 that is an interrogation technique that I know in some

12 countries has been used and probably still is being used but
13 in this country would not be permitted.

14 THE COURT: Okay. Well, I guess I can understand
15 that, but I'm trying to understand not just your answer but
16 also the suggestion by the question, and other than that
17 example, which I think the jury is capable of judging, it's
18 effective, also, are there some other interrogation techniques
19 which you think, in your opinion, would lead to a false
20 confession.

21 THE WITNESS: I wouldn't say would, Your Honor, but
22 I would say could. For instance, if I promised that you would
23 not be tried for a particular offense, if you were to tell me
24 that you did this offense, now that could clearly lead to
25 someone to confess falsely.

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1 THE COURT: But there is no cause and effect
2 relationship, though, between that promise and a false
3 confession?

4 THE WITNESS: It could.

5 THE COURT: Just a possible.

6 THE WITNESS: It's a possibility. Not everyone
7 would succumb to that ploy.

8 THE COURT: Okay. And I take it you're saying that
9 -- and no one can say in any particular case that such a
10 technique led to that false confession.

11 THE WITNESS: I'm not sure that no one can say, but
12 I'm saying that there is no scientific basis whatsoever that
13 relates particular interrogation techniques to particular
14 outcomes, false confessions, if you will, other than the
15 things that we're talking about. Now, obviously people in the
16 scientific community don't do research on these kinds of
17 topics because they aren't normally practiced, so the kind of
18 research that most of the people in the scientific community
19 are interested in are those kind of things that are
20 permissible under the law or under our moral code as such, and
21 so they tend to focus on what I would characterize as
22 acceptable interrogation ploys or tactics, and again there is
23 no scientific basis that relates these accepted practiced
24 interrogation techniques to the production of false
25 confessions in the real world.

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1 THE COURT: Well, you heard Dr. Ofshe testify that
2 his methodology was to determine instances of false
3 confessions. I think based on post admission narrative and
4 making that judgment, and then he looked back to see what the
5 interrogation was like, and he's associated that false
6 confession with certain interrogation techniques, do you have
7 any problems with that?

8 THE WITNESS: Yes, serious problems.

9 THE COURT: What are your problems with it?

10 THE WITNESS: Well, as I testified to earlier, if I

11 screen through all the confessions that occurred in the United
12 States in, say, the last year, and I was able to locate, say,
13 out of 60 or a 100 or 200 false confessions, and I found in
14 every single one of those there was a single particular
15 interrogation technique that accompanied these false
16 confessions, that would not document the notion that this
17 technique produces or leads to false confessions. And the
18 reason for that is because thousands upon thousands of other
19 innocent people may have been presented with those same
20 techniques and not made a false confession. So the mere
21 correlation between this technique and a false confession is
22 not enough to scientifically document that the technique
23 produced the false confession.

24 THE COURT: What is the most you could say about
25 that type of study?

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1 THE WITNESS: Well, actually the most that you can
2 say is that we found some instances where people succumbed to
3 interrogation, and we believe that their confessions were
4 false. The difficulty in addition to the one that I mentioned
5 in dealing with that is that this is not a random sample of
6 all persons who are interrogated. This is a highly selective
7 sample. It's those cases that we are able to identify as
8 having been false confessors. And so we don't know if we can
9 generalize from them to other people in other circumstances,

10 and that's a serious deficiency in the research.

11 THE COURT: Okay. Go ahead, Counsel.

12 MR. DeARMOND: Thank you, Your Honor.

13 BY MR. DeARMOND:

14 Q. So if I understand correctly, you also in your research
15 is that what you were just referring to, your own research in
16 response to the judge's question?

17 A. No.

18 Q. Okay. You said something about we have been able to
19 identify cases where false confessions occurred, and there
20 were particular interrogation techniques utilized; is that
21 correct?

22 A. No, I said if we were able to do that.

23 Q. Okay. I'm sorry. What you refer to as there being no
24 scientific basis then, as I understand it, is that there is no
25 hard empirical direct cause and effect study available on that

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1 particular aspect of behavior; is that correct?

2 A. That's true, there are none.

3 Q. Okay. Is it your testimony that all forms of behavioral
4 science studies rely only upon direct cause and effect
5 empirical data?

6 A. No, of course not.

7 Q. Okay. The studies of psychology, psychiatry in general,
8 don't all rely for purposes of the formation of their theories

9 on direct cause and effect empirical data; isn't that correct?
10 A. That is correct.
11 Q. In fact, there are forms of syndrome type evidence and
12 testimony that's admitted that doesn't have anything to do
13 with direct empirical studies. Correct?
14 A. I'm not sure.
15 Q. By direct, I mean immediate cause and effect empirical
16 data.
17 A. Yes, some forms of research do not involve causal
18 relationships.
19 Q. In your opinion, are there any legal techniques that
20 increase the chance or the potential for a false confession?
21 A. I can't say that there are not. I can't think of
22 anything off the top of my head that would suggest to me that
23 that would be the case, unless I take into account the nature
24 and the character of the suspect who is being interrogated and
25 the relationship between the interrogator and the suspect. If
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1 you're asking rue, however, is there just a technique that
2 would work universally on any particular innocent person, I
3 can't think of anything.
4 Q. Okay. I understand. In each instance you have to look
5 at the relationship of the suspect and the interrogator.
6 Correct?
7 A. I'm not sure what you mean.
8 Q. In assessing the possibility of a technique leads to a

9 false confession, you have to look at the relationship between
10 the interrogator and the suspect?
11 A. Oh, no, I think that's one of the problems. You see the
12 difficulty is sorting the techniques and their use from the
13 nature and the character of the situation and the
14 circumstances. I think it is quite possible to say that if we
15 look at the totality of circumstances, that is we take into
16 account the interrogator, the circumstance of the setting, and
17 the person who is being interrogated, that we might find that
18 there are some unique sets of circumstances, that given all of
19 those things that were, produced a false confession. But
20 that's not to me what the issue is that we were talking about.
21 The issue is whether or not if I do this particular technique
22 A, that I'll produce this outcome B, a false confession. The
23 second question that I just talked about is much different
24 than the one that I'm just referring to.
25 Q. Right. The second question deals with the dynamics of

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1 that particular case. Right?
2 A. Yes, as case by case decision, correct.
3 Q. And your testimony is that anybody can look at the
4 process of an interrogation and glean from it what aspects of
5 it may be coercive, I'm sorry, may be pressure causing, I
6 guess for lack of a better term since you don't believe in
7 coercion, that might cause pressure and what aspects may not?

8 A. No, I do not believe anybody can do that.

9 Q. Okay. But that's something that's taught to
10 interrogators; isn't it?

11 A. Which piece?

12 Q. Well, you teach interrogators the various things that
13 they can do that might assist in causing some degree of
14 pressure to be applied to the person being questioned in order
15 to get them to a particular result?

16 A. Sure, that's true, in the context of that circumstance.

17 Q. And in the context of that circumstance the average
18 person wouldn't necessarily know anything, such as the nine
19 steps of the interrogation process, would they?

20 A. You mean the average suspect or the average interrogator?

21 Q. No, I'm sorry, the average juror.

22 A. I would assume that the average juror does not know
23 something about the nine steps that you're referring to, yes.

24 Q. Nor would the average juror be likely to know what effect
25 or impact one step may have on the next?

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1 A. I think that's also true for the average juror.

2 Q. Nor would the average juror be likely to know how an
3 interrogator might go about developing a rapport with an
4 individual?

5 A. I would guess that that would also not be the case.

6 Q. By not being the case meaning that's something that an
7 average juror would not know?

8 A. The average juror would not know that, yes.

9 Q. And has it been your experience that the -- strike that.
10 As part of the interrogation process with which
11 you're familiar, is it not frequently -- does it not
12 frequently include what you've referred to I think even in
13 your own testimony as the maximization/minimization approach?
14 A. That's a recharacterization, I think, of how I would
15 understand the process. The maximization/minimization
16 terminology I believe was applied by Professor Kassin in the
17 article I mentioned earlier, the Kassin/McNall article.
18 Most -- I'm not sure this is true, but I suspect this is
19 probably generally the case, most courses in which persons are
20 taught interrogation involve -- if it's based somewhat on the
21 Reid methodology, involve the presentation of alternatives,
22 and I believe that's how Professor Kassin uses the idea of
23 minimization versus maximization. So most interrogations
24 probably at some point would involve the presentation of
25 alternative courses of action.

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1 Q. And it is a frequent technique, is it not, that there
2 will be some sort of implication, either direct or otherwise,
3 that one explanation of an offense could lead to a lesser just
4 result versus another explanation of that offense?
5 A. It's hard for me to respond to that directly because I
6 see the situation different in a real world context. The
7 presentation of alternatives is meant to leave up to the
8 suspect, if you will, how to interpret the situation.

9 Professor Kassin presents it as if a person is offered a
10 threat of punishment or a promise of leniency, something of
11 that sort. That's not how I interpret it in the real world.
12 In the real world, for instance, an alternative that might be
13 presented would be something -- was this a deliberate act for
14 you to shoot this person or was it accidental? Whatever
15 implication there is from that alternative I think depends
16 upon who it is that's the listener in that case.

17 Q. And the premise behind your perspective on that
18 particular scenario, what we'll refer to as the accident
19 scenario, would that be fair?

20 A. I think it's the alternatives that are presented that are
21 important.

22 Q. Right. But the actual accident scenario is one which
23 both yourself and Mr. Buckley are well familiar?

24 A. Yes.

25 Q. Your perspective is that whatever the implication is in

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1 the mind of the person, you really don't have any direct
2 control over, if he perceives it to be something which would
3 give him a more lenient sentence, well that's his problem,
4 that's not something that you're saying outright?

5 A. Well, I can't tell you how that person perceives it.
6 This is part of where Professor Kassin comes up, I think, with
7 the terminology of pragmatic implication. He suggests that by
8 implication the suspect interprets this to mean -- well, it's
9 punishment or leniency and both your and Mr. Buckley's

10 perspective would be well whatever is in the mind of the
11 suspect that's his particular problem. I'm not coming right
12 out and saying anything other than maybe there's an accidental
13 explanation to this, and if he wants to assume that is
14 something better for him then that's his particular problem.

15 Q. Right.

16 A. I don't know what Mr. Buckley would say but, yes, I would
17 say that it is in the mind of the beholder in this case, if
18 you will.

19 Q. You don't take into consideration maybe what would be,
20 for lack of a better term, some basic concepts of social
21 psychology in that the perception of the person is as real as
22 the desk, if it's the perception of the person?

23 A. When you say that we don't take it into account, of
24 course we do.

25 Q. Your position is, however, that so long as you don't

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1 verbalize something which a court might find to be an improper
2 coercion, what you create in the mind of the suspect is his
3 problem. Right?

4 A. No, that's not quite a fair characterization of my
5 position. I believe it is entirely acceptable to present
6 these kinds of alternatives. What differentiates how the
7 alternatives are perceived is whether or not the suspect is
8 factually guilty of an offense or factually innocent. In my

9 opinion, to an innocent person the alternatives bear no
10 implications, to the guilty person they do. And that's
11 precisely why in some cases that procedure seems to elicit
12 from the suspect who is guilty an admission of involvement of
13 some kind.

14 Q. And one of the -- one of the premises upon which that
15 conclusion is based is the fact that you believe that innocent
16 people just won't accept that alternative scenario?

17 A. I believe it is unlikely that that would happen. I
18 don't -- I can't say that that has never happened.

19 Q. Okay. You've referred to Dr. Kassin, so I assume that
20 you are familiar with his work to some degree?

21 A. Some of it, yes.

22 Q. Are you familiar with his article on the "Psychology of
23 Confession Evidence"?

24 A. If that relates to the article that was tendered by the
25 government, American Psychologist, 1997, I'm generally

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1 familiar with it.

2 Q. The one that starts out with the three basic premises:
3 (A) that police routinely use deception, trickery, and
4 psychologically coercive methods of interrogation; (B) that
5 these methods may lead to confess; and (C) that when coerced
6 self-incriminating statements are presented in the courtroom
7 jurors do not sufficiently discount the evidence in reaching a
8 verdict -- that particular study, are you familiar with that

9 one?

10 A. I wouldn't characterize it a study. I'm familiar with
11 generally with what you just said, yes.

12 Q. You don't call it a study because it's an observational
13 study?

14 A. It's more of a position paper, I think, if you will, an
15 expression of how he sees the state of the art.

16 Q. He did refer to studies that were done with college
17 students, and in the the earlier study with college students
18 but one dealing specifically with making them think that they
19 had punched the alt. key on the computer when in fact they
20 hadn't. That's a different study, isn't it, the one you're
21 referring to?

22 A. Yes, it is.

23 Q. Are you familiar with that one, also?

24 A. Excuse me. Which one is a different study?

25 Q. Bad question, I apologize.

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1 You made reference to a study by Dr. Kassin, to
2 which study were you referring to?

3 A. The one that I referred to earlier was the Kassin/McNall
4 article. I believe that was the one that was mentioned as one
5 of the three that the judge should review.

6 Q. And the study that Dr. Kassin refers to in "Psychology of
7 Confession Evidence," is that the same study?

8 A. I can't tell you for sure, I don't know.

9 Q. Okay. If he makes reference to a study involving college

10 students being asked to type out on a computer and then
11 they're told to hit, if they hit the alt. key then the whole
12 thing will crash?

13 A. That was a different study he did than what I referred
14 to.

15 Q. Are you familiar with that study?

16 A. In a general way, yes.

17 Q. Okay. And in that study was the conclusion reached by
18 the -- by Dr. Kassin that it is, in fact, possible to obtain
19 false confessions from individuals where they are met with
20 various types of information or evidence, if you will, and
21 that that was repeatedly shown through their examples with the
22 college students?

23 A. I believe that was the general conclusion that he drew
24 with the case. It was a laboratory study and it didn't occur
25 in the real world and these were not criminal suspects.

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1 Q. That's right. He made it very clear that you can't just
2 make it a direct one, the one correlation with that because
3 obviously the implications of crashing a computer aren't the
4 same as being charged and suspected of first degree murder?

5 A. Yes, that's true.

6 Q. Okay. You accept, do you not, the fact that the social
7 psychologists realize that they can't study each of the
8 dynamics involved in the confession interrogation scenario in
9 a laboratory with a direct one-to-one correlation because of
10 the fact that it would be impossible to subject persons to the

11 same kind of pressures and influences that they might if
12 they're a suspect in a criminal case. Right?

13 A. I believe that my response is consistent with what you
14 said, however, there are limitations in all kinds of research
15 endeavors and, yes, these are general limitations that
16 confront this field.

17 Q. So what they do, don't they, and this -- tell me if this
18 is not accepted and recognized within the field of scientific
19 research. What they do then is they break down that real
20 world phenomenon into various portions, and then they study
21 that portion of the phenomenon and see if they can relate it
22 to the real world model in any way. Is that an accepted form
23 of study?

24 A. I think in general that's true. Again, the people who do
25 this research have a clear understanding that the external

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1 validity, that is the ability to generalize to what happens in
2 the real world is severely restricted.

3 Q. Right. But it is a recognized form of studying these
4 real world phenomenon to break them down, study their
5 individual portions?

6 A. Yes, I think that's true.

7 Q. That's what Dr. Kassin does in the computer study; isn't
8 that correct?

9 A. I think he makes an attempt to try to understand that
10 phenomenon, yes.

11 Q. What he does is show that if you confront people who are

12 otherwise truly innocent with information including things
13 such as "I saw you do it," they may very well over time change
14 their perception for one reason or another and acknowledge
15 that they did, in fact, commit the offense?

16 A. I think in a general way that's what he found in this
17 laboratory study involving college students.

18 Q. And he found that if you -- that they could change some
19 of the variables which then would change the result. Right?

20 A. Yes, that's true.

21 Q. In fact if a person was confronted with just someone
22 saying it crashed therefore you had to have done it, they
23 might not be as likely to decide that they had, in fact,
24 committed the offense than if they were confronted with a
25 compatriot who says, "Well, I happened to see you do it."

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1 Right?

2 A. The answer is yes in a general way.

3 Q. And I realize, these are all generalizations that
4 Dr. Kassin was able to conclude based on that particular
5 laboratory study. Right?

6 A. Those are laboratory based results that may or may not
7 have any relationship to what goes on in the real world.

8 Q. You're not saying, are you, that it is not appropriate
9 for social psychologists to utilize those studies along with
10 other studies in order to form their conclusions or opinion?

11 A. I don't think it is entirely appropriate, and I welcome
12 that kind of research, as I think all academics and

13 researchers do.

14 Q. Did you also accept or recognize what might be referred
15 to as anecdotal studies as an appropriate method of obtaining
16 information for purposes of scientific learning?

17 A. I'm not sure if you're referring to anecdotal studies as
18 case studies, but clearly they are an accepted way of trying
19 to understand some phenomenon in the world. In this case
20 let's say false confessions, that they have no generality and
21 are our ability to draw empirical generalizations from them to
22 what may happen in the typical case is probably more limited
23 than the example you gave earlier.

24 Q. Would you consider a threat of a death penalty to be a
25 threat to a suspect?

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1 A. It could be in some circumstances. In others it may not.

2 Q. Would you consider a promise of treatment rather than
3 imprisonment to be a promise to be -- I'm sorry, to be a
4 positive thing to a suspect?

5 A. You mean could it be viewed positively?

6 Q. Yes.

7 A. Sure, there are some circumstances where that would
8 prevail.

9 Q. I would assume that you wouldn't be familiar with
10 Dr. Ofshe's most recent article in the Denver Law Review.
11 Correct?

12 A. I'm familiar only that he has accomplished that and that
13 it was submitted as an exhibit this morning.

14 Q. Okay. You're familiar with the good cop/bad cop routine?

15 A. The general routine, yes.

16 Q. Do you know whether using that particular routine --

17 THE COURT: Is this involved in our case, this
18 concept of good cop/bad cop?

19 MR. DeAM4OND: Well, it is from the standpoint that
20 there's a clear indication that Mr. Miller is a very
21 aggressive and angry interrogator, Mr. Randolph acknowledges
22 that he's kind of the warm fuzzy guy who comes in and "Gee,
23 Larry, let's talk about your family. Let's talk about your
24 hobbies."

25 THE COURT: Okay. Well, let me just interpose here

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1 and say this is the problem with experts. I suspect these two
2 gentlemen could sit down over a drink and probably agree on a
3 lot of things about this phenomenon of false confessions. But
4 here it seems to me because we're in court all I'm hearing is
5 how they disagree. And there's always some pride in
6 authorship, and it seems to me that there's a tendency to
7 enhance differences, and lawyers are being paid to exploit
8 this for the benefit of their clients.

9 It seems to me a few simple questions may be
10 all that I need from this gentleman.

11 From what I understand, Dr. Horvath, would you

12 agree that there is a body of specialized knowledge that
13 exists dealing with the subject of false confessions?

14 THE WITNESS: Yes, I would agree with that.

15 THE COURT: And would you agree that this body of
16 knowledge is not, for the most part, derived from the
17 application of scientific methods or experimental methods but
18 through some other process --

19 THE WITNESS: I'm not sure precisely how to respond
20 to that. There are clearly some experimental designs in the
21 mix that we --

22 THE COURT: But for the most part that's not how
23 this body of knowledge was derived.

24 THE WITNESS: For the most part I agree with you.

25 THE COURT: Okay. And because it is not, therefore,

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1 scientifically derived, you don't feel it's appropriate for
2 Dr. Ofshe or any other expert to suggest that there's a cause
3 and effect relationship between the use of any type of
4 interrogation technique and the fact of the false confession,
5 b'asically that's what you're saying, isn't it?

6 THE WITNESS: If I can restate, it's not a question
7 of whether it's appropriate or not, it's a question of whether
8 there is a scientific foundation --

9 THE COURT: I was being charitable.

10 THE WITNESS: -- supporting that. And in my
11 opinion there is absolutely no scientific basis whatsoever.

12 THE COURT: Okay. Do you think Dr. Of she would

13 disagree with that statement?

14 THE WITNESS: Yes, I do.

15 THE COURT: Why?

16 THE WITNESS: Because I heard him testify for a day
17 and a half.

18 THE COURT: If you were having a drink at the local
19 bar, would he disagree with that statement?

20 THE WITNESS: I would assume that he would, yes.

21 THE COURT: All right.

22 THE WITNESS: Because I think he has a vested
23 interest in presenting that side.

24 THE COURT: Then you think that his testimony before
25 this court so far is that he can predict a false confession

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1 when he learns what the interrogation techniques used were.
2 You think he will say yes, you tell me what the interrogation
3 techniques were, whether you had good cop/bad cop,
4 maximization/minimization, you tell me what all those were and
5 I'm going to tell you if this was a false confession. You
6 think he would say yes, he could do that?

7 THE WITNESS: I think he believes that he can do
8 that or he says that he can do that, yes.

9 THE COURT: What's your understanding of why he's
10 reluctant to give an opinion in this case as to whether or not
11 the defendant's confession was false if he believes what you

12 think he believes?

13 THE WITNESS: I believe that it's because he knows
14 that there is no scientific foundation for what he has done in
15 this particular case or in the statements he has made. If I
16 can elaborate a bit maybe this will give you an idea of how
17 I'm thinking of it. There are three pieces that I see here.
18 One is the first piece, and that is whether or not there is an
19 acceptance of the idea of do people falsely confess. Do
20 innocent people confess to crimes they didn't do? I think
21 everyone, as I said before, in the scientific community, the
22 legal community, the criminological community and so forth
23 agrees that that occurs. That's point No. 1.

24 Point No. 2 --

25 THE COURT: Let me interrupt you to say on point No.

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1 1, and, please, keep your train of thought, but let me just
2 ask you this. As a social scientist --

3 THE WITNESS: -- criminologist.

4 THE COURT: Would you be a social scientist?

5 THE WITNESS: Yes.

6 THE COURT: As a social scientist, what is the basis
7 for your belief that there exists such things as false
8 confessions?

9 THE WITNESS: There are two bases. One, that people
10 have given them to me personally; and, two, I've seen some of
11 the literature that documents clearly that certain people in
12 certain cases have falsely confessed; that they didn't do the

13 act they were accused of doing.

14 THE COURT: Now, that literature you're referring
15 to, would that be some of the papers or studies, whatever I
16 refer to that, that Dr. Ofshe has offered through counsel into
17 evidence with the Court?

18 THE WITNESS: The answer is yes; however, not all
19 the confessions that they label as false confessions, in my
20 opinion, can be so demonstrated.

21 THE COURT: Okay. So in your judgment social
22 scientists might disagree with one another as to whether or
23 not something is or is not a false confession?

24 THE WITNESS: Social scientists do disagree on
25 certain cases.

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1 THE COURT: And primarily that's because the data
2 which they are relying upon is not scientifically based
3 whereby it can be duplicated by each other and, therefore, the
4 falsability determined; is that correct?

5 THE WITNESS: It's more the problem I mentioned
6 before the idea of ground truth. The question is really how
7 do we prove that when someone confesses that it was a false
8 confession? We had an absolute measure of the truthfulness of
9 the circumstance then we would have what we call ground truth.
10 What's lacking in some cases is a ground truth criterion on
11 which everyone agrees that is similar to what you're
12 suggesting, not exactly the same.

13 THE COURT: It's probably at this stage impossible

14 to have -- to achieve that type of ground zero truth; is that
15 correct?

16 THE WITNESS: In most cases it's probably extremely
17 difficult, if not impossible.

18 THE COURT: Okay. But if the overall function is to
19 advance knowledge in this area of false confessions, and there
20 are sincere people like Dr. Ofshe and yourself and others who
21 are writing on the subject, you are presenting for publication
22 the best approximation you can have of this phenomena of false
23 confessions, aren't you?

24 THE WITNESS: I believe that's generally true, yes.

25 THE COURT: Okay. And the difference you have is

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1 that you don't perceive that false confessions can be as
2 easily identified or related to interrogation techniques as
3 easily as Dr. Ofshe?

4 THE WITNESS: Yes, I think that's generally true.

5 THE COURT: You're not saying that there is no
6 correlation, you're just saying there's been no studies to
7 prove it because there's so many variables that are involved,
8 and unless you're able to isolate all those other variables
9 you can't really come to any cause and effect conclusion; is
10 that fair?

11 THE WITNESS: Yes, that's true, there is no
12 scientific basis for relating particular interrogation
13 techniques in the real world to false outcomes, false
14 confessions.

15 THE COURT: Would it be fair to say that the most,
16 in your judgment, that the -- this body of knowledge about
17 false confessions can say today is to generally explain that
18 such a phenomenon exists, that there may be a correlation
19 between certain interrogation techniques and a confession, but
20 whether or not the confession is false does not necessarily
21 depend upon the interrogation techniques used?

22 THE WITNESS: That's true.

23 THE COURT: Do you think Dr. Ofshe would disagree
24 with that?

25 THE WITNESS: I believe he would, yes.

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1 THE COURT: Why do you think he would disagree?

2 THE WITNESS: I believe that he has testified that
3 some of Professor Kassin's arguments, for instance, can be
4 applied to the real world setting. That the idea of
5 minimization and maximization as researched by Kassin in the
6 experimental studies, for instance, applies directly to what
7 happens in the real world and I strongly disagree with that,
8 as I think most people in the scientific community would.

9 THE COURT: You don't think Dr. Ofshe recognizes
10 that what a college student does in a classroom as part of a
11 research project is vastly different from what a suspect who's
12 facing a serious felony charge would do at a police station,
13 that he could analogize the one to the other? Do you think he
14 believes that?

15 THE WITNESS: I can only tell you there is no other

16 research that would support the idea other than what has been
17 mentioned, that is Kassin's laboratory research, so if Dr.
18 Ofshe testified to the effect that this finding would apply in
19 the real world it has to be based scientifically, it has to be
20 based either on the college students' study or some literature
21 that doesn't exist.

22 THE COURT: Okay. One final question. You
23 acknowledge that in this area the fact that all of the -- that
24 most of the research is not scientifically based does not
25 invalidate the findings, does not necessarily invalidate the

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1 findings.

2 THE WITNESS: The research findings?

3 THE COURT: Yes.

4 THE WITNESS: I would say it doesn't invalidate them
5 but makes them far less reliable in my mind. We can't depend
6 upon them if they are not scientifically based, because they
7 are not.

8 THE COURT: You can't depend upon them as you would
9 if they had been scientifically based?

10 THE WITNESS: That's true.

11 THE COURT: Do you think Dr. Of she would disagree
12 with that?

13 THE WITNESS: I don't think so.

14 THE COURT: You don't think so?

15 THE WITNESS: I think he would agree with me that
16 scientific literature is to be preferred over nonscientific

17 literature.

18 THE COURT: I would hope so. Okay. I have no more
19 questions, Counsel.

20 MR. DeAPJAOND: Your Honor, I don't think I can top
21 that. Thank you. I have no other questions.

22 MR. BEAUMONT: We have nothing further, thank you.

23 THE COURT: All right. Thank you, sir.

24 (The witness was excused.)

25 THE COURT: You know, I really meant what I said.

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1 It seems to me that this is an area, which according to the
2 Seventh Circuit, the average layman doesn't appreciate, this
3 idea of false confessions. And it seems to me that it would
4 be helpful to put before the jury information that would help
5 them in assessing a confession based on this body of
6 knowledge. And the Court would like to get it right, but it
7 seems to me when you have experts who know, who are put at
8 loggerheads where there is some incentive to be an advocate
9 rather than an objective teacher, that's not as helpful as it
10 could be because then the Court is forced to make a choice,
11 probably between two extreme positions, one of which may not
12 be right. I know that's the nature of the beast, and perhaps
13 this is just an appropriate chastisement, but it seems to me
14 that a lot of time has been spent here these -- in this
15 hearing, and it seems to me that with all the work I know
16 awaits me in chambers I hope it's worth it.

17 I still maybe naively believe that Dr. Ofshe

18 and Dr. Horvath probably could agree on probably everything
19 except one or two differences, although I'm not so sure that's
20 true because I recall Dr. Ofshe admitted that most of the
21 research was not scientifically based. He gave explanation
22 for that which is understandable. So if it's not
23 scientifically based, you don't have the predictive ability as
24 you would if it were scientifically based, you don't have the
25 control, you don't have the ability to make cause and effect

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1 relationships. Anyway, I'm rambling.

2 Mr. Beaumont, do you have any more witnesses?

3 MR. BEAUMONT: No, sir, I do not.

4 THE COURT: Did you have anything in rebuttal?

5 MR. DEARMOND: May I have one moment?

6 THE COURT: You may.

7 RICHARD OFSHE, WITNESS, PREVIOUSLY SWORN

8 REDIRECT EXAMINATION

9 BY MR. DEARMOND:

10 Q. Doctor, you've heard Dr. Horvath discuss the areas of
11 what he thought were agreement and disagreement; is that
12 correct?

13 A. Yes.

14 Q. Could you perhaps explain to the Court what you would see
15 as your areas of agreement or disagreement with Dr. Horvath?

16 A. I'd be happy to. Could I raise these in really a series
17 of issues? I'll try to address one topic and then go on to
18 the next.

19 The first is the notion of what constitutes
20 social science, empirical data, which includes studies that
21 are not necessarily laboratory controlled experiments. I'm
22 well aware of that and Dr. Horvath is well aware of that.
23 believe he and Dr. Kassin and I all recognize that studies
24 demonstrating the existence of a phenomenon are not
25 necessarily and, in fact, normally do not come about initially

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1 out of experimental work. They come about because the
2 phenomenon is observed in the real world. So that the studies
3 by Bedau and Radelet, for example, and it's quite correct that
4 the Bedau and Radelet study is weighted towards early
5 Twentieth Century cases, that's exactly why Professor Leo and
6 I undertook to identify 250 examples of false confession
7 produced through modern interrogation after psychological
8 methods came into existence to demonstrate that the phenomenon
9 is alive and unwell, which we did. Professor Horvath
10 misunderstands something about that study.

11 The study is one in which we evaluate the
12 evidence of absolute innocence that was introduced to
13 demonstrate the innocence of the person. We use criteria to
14 identify false confessions or cases in which the person was
15 innocent. There are many cases indisputable, such as the
16 murder victim was still alive, such as the real killer
17 confessed and proved his guilt, such as a person was pardoned,
18 things of that sort. Such as DNA proved that the person was
19 not the donor of the semen in the rape/murder case.

20 We also had other examples where there was very
21 powerful evidence of absolute innocence, and we had other
22 cases that we judged to produce evidence of innocence that was
23 somewhat less powerful, but in every case that we studied the
24 entirety of the state's case was nothing but the fact that the
25 person had said "I did it." That study was about measuring

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1 the impact of making the statement "I did it" when in fact the
2 state has nothing else and in fact there are varying degrees
3 of evidence indicating innocence. And it's that study that
4 goes very properly to the proposition, because that's what we
5 found was the probability of someone being convicted under
6 those circumstances is 76 percent. That's No. 1.

7 So there's a broad body of knowledge that is
8 brought to bear to identify the existence of the phenomenon,
9 to learn something about the phenomenon, by people who want to
10 understand it for the right reasons.

11 I'm well aware, acutely aware, as Dr. Horvath
12 is, that this is an extremely difficult problem to study.
13 That's why I have devoted ten years to study diagnosing this
14 problem in a situation in which the question of the validity
15 of what I'm studying is not at issue. That is why I have
16 studied this in the real world using principally transcripts
17 of interrogations. It has taken ten years to accumulate the
18 data that is reported in the study, first "The Social
19 Psychology of False Confession" study that was introduced as
20 an exhibit earlier; and, second, in the law review article

21 which was introduced this morning. The law review article
22 demonstrates the very steps of the interrogation process using
23 transcripts from real interrogations in the real world where
24 people's lives are really up for grabs, and we demonstrate
25 that. That study is based on a total of over 300 case files,

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1 180 studied by Richard Leo. We call those the ordinary
2 interrogations. That was his doctoral dissertation research
3 studying observationally ongoing interrogations.

4 We then have an additional in excess of 125
5 case, most of which include the transcripts of the
6 interrogation in which disputed confessions arose, and what we
7 do is study the characteristics of those interrogations that
8 have produced confessions, some of which we code as false
9 confessions and some of which we code as true confessions.

10 THE COURT: Let me interrupt you. I appreciate what
11 you've said. I haven't interrupted you before, but would you
12 say that given your ability to -- can you say that you can
13 look at a transcript of an interrogation in which the suspect
14 confessed, and by just looking at the interrogation techniques
15 that was used, you can predict whether the confession
16 is -- will be false or valid?

17 THE WITNESS: If I might be allowed to reframe your
18 question a little bit in the interest of making my answer
19 clear. I believe it's possible, based on my study in this
20 area, to discriminate between interrogation methodology that
21 has the potential to produce a false confession versus

22 interrogation methodology that has almost no potential to
23 produce a false confession. Your Honor, all of this is
24 written out in two papers.

25 THE COURT: To me what you're saying is yes/no, you

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1 can't do it because all you can say is it has a potential.

2 THE WITNESS: The first part is I believe the vast
3 majority of interrogations are unlikely to produce false
4 confessions because certain tactics are absent. When I look
5 at cases in which false confessions have been produced, what I
6 observe is a very high frequency use of certain coercive
7 tactics, and it is in those cases where those tactics are
8 present that I observe a correlation between the presence of
9 those and the fact of a false confession.

10 THE COURT: I understand that working back, but my
11 question is, working outward, can you just look at those same
12 coercive techniques in any other case and then predict that it
13 will be a false confession, can you to a scientific certainty
14 say that?

15 THE WITNESS: I can say that the presence of certain
16 techniques are correlated with the production of false
17 confessions. Now, scientific statements are made as
18 probabilistic statements, they are not made as absolutes.
19 This is a probabilistic universe we live in. Modern science
20 deals with the likely effect of certain variables on other
21 variables. All statements are probabilistic. So that by
22 looking at the characteristics of an interrogation, whether or

23 not for example a death threat versus an opportunity to avoid
24 punishment. The issue, we can look at that and I can tell you
25 it is based on the experience I've had for the last ten years

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1 that in cases in which people are coerced into producing false
2 confessions, it is the presence of threats of essentially that
3 level of seriousness that produce it that I have observed over
4 and over again in the transcripts I've studied, and those
5 transcripts are illustrated and quoted in the articles in Your
6 Honor's possession. Because these are transcripts, as in the
7 Phoenix Temple murder case, for example, where five innocent
8 people were interrogated, and three of them gave false
9 confessions. And in every one of those cases they were
10 threatened with the death penalty, and that's all recorded.
11 So we can see a correlation.

12 Now correlation is a predictive statement.
13 When one says something correlates perfectly, that means every
14 time you get A, B appears. If something is correlated 50
15 percent of the time, that means half the time that you get
16 death threats you get confessions. So correlation naturally
17 translates into prediction taking into account the
18 probability, the probabilities associated with these things,
19 that's why we use correlation. Establishing causation can
20 only be done using experimental methods, but virtually every
21 science begins with establishing correlation. So if things
22 had gotten to the point at which we could say if all
23 interrogations were identical, and if we had the ability to

24 study these, whether they're in the laboratory or in the real
25 world, and we could code everything, we could statistically

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1 break it down, because every experiment is, in fact, a natural
2 experiment. A natural experiment is no different than any
3 other kind of experiment, save one factor. In a laboratory
4 experiment subjects are randomly assigned to treatment
5 conditions. Now that is not something that ever occurs in a
6 natural experiment. A natural experiment, to explain how an
7 interrogation is a natural experiment, John Doe is selected
8 for interrogation. Let us say John Doe is innocent. John Doe
9 takes the position I am innocent. John Doe is then exposed to
10 interrogation. That's the experimental variable. John Doe
11 then confesses. That's the result. If the interrogation that
12 John Doe is exposed to contains coercive threats using the
13 legal and strong psychological definition of coercion, there
14 is a probability that an innocent person will confess. That's
15 a natural experiment.

16 THE COURT: If you take the same coercive
17 interrogation techniques used on that John Doe, and apply them
18 to someone else, you would predict that that person would
19 confess falsely also.

20 THE WITNESS: There is a probability that that
21 person would confess. But in scientific analysis, for
22 example, the establishment of a significant effect using
23 statistical methods is that the data shows that there is an
24 effect of variable A statistically discriminable from zero,

25 and that introduces the idea of how much of the variance is

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1 explained. So it's possible to establish statistically
2 significant effects and still be explaining a small part of
3 the variance. These are complicated questions in research
4 methods, and I suspect that my understanding of research
5 methods is probably on a par with Professor Horvath's. So
6 these are -- this is the method of social science. It
7 involves correlation, it involves statistical significance, it
8 involves the notion of how much variance is explained, but it
9 starts with observation of the phenomenon.

10 THE COURT: I understand that. And I guess what I
11 view as perhaps the underlying differences between you and
12 Dr. Horvath is that he feels you're still at the correlation
13 stage and you think you moved beyond it to a stage where you
14 are able to predict; is that fair?

15 THE WITNESS: Correlation and prediction are
16 identical when understood in the appropriate way. That
17 cigarette smoke correlates --

18 THE COURT: I thought you said that at some point
19 correlation will move over into something else?

20 THE WITNESS: What distinguishes between a
21 correlational statement and a causal statement?

22 THE COURT: Yes.

23 THE WITNESS: If variable A and variable B both go
24 up and down together, they are correlated. The question does
25 A cause B can only be established -- only be established using

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1 experimental methods, using random assignment of treatment
2 condition or methods that approximate that. There is an
3 entire literature on natural experiments.

4 THE COURT: Have you done that yet on false
5 confessions?

6 THE WITNESS: What we are showing in the case
7 materials, using the case materials, because false confession
8 is so difficult to study, are the exemplars of this causal
9 connection. It is written about, hopefully with sufficient
10 clarity and attention to the issues, that if Your Honor could
11 take the time to look at that, I think particularly the law
12 review paper, I think it would illustrate everything that I'm
13 talking about with examples that are absolutely valid, because
14 they are taken from real interrogations. And it is a
15 difficult problem, that is why in that very paper one of the
16 things I point out is that Professor Kassin demonstrates using
17 laboratory methods, that this maximization/minimization
18 technique communicates a threat which the field studies show
19 if communicated in a real interrogation is associated with
20 producing false confession. These -- this is a way of using
21 multiple sources of information to try to arrive at a reasoned
22 sound opinion. Every social scientist uses all of these
23 methods. Kassin relies on observational studies, Horvath
24 relies on observational studies. The difficulty of studying
25 false confession is if anybody wanted to they could not do to

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1 an innocent person what is done to someone in an interrogation
2 to produce a false confession. It would be unethical in the
3 extremity. So whether he uses other methods for accumulating
4 data that any fair-minded person looking at this data would
5 have to say this is what's going on here. And that's what
6 I've tried to do by gathering real world examples of this in
7 studying over 1250 separate cases, studying entireties of
8 transcripts. Some of the examples in the paper I mentioned
9 are examples in which someone gives a confession and then on
10 the record is asked why did you just give that confession, and
11 they identify the very variables that we're talking about.
12 Those things demonstrate the existence of the phenomena. More
13 studies are always better. We gain more confidence. But that
14 the phenomenon exists, that it can be demonstrated to occur
15 regularly in response to these techniques is part of social
16 science knowledge building. And I would not be here if I did
17 not believe that those things that I am willing to testify
18 about are well established using a variety of methods. I
19 believe Professor Kassin would say the same thing.

20 THE COURT: All right. Thank you. I'm sorry I
21 interrupted you. Go ahead.

22 MR. DeABMOND: That's fine.

23 BY MR. DeARMOND:

24 Q. At the point we were at I think you were explaining some

25 of the points yourself and Dr. Horvath would agree or

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1 disagree.

2 A. For example, he misunderstands the significance of the
3 Kassin study. The Kassin study demonstrates that a well-
4 understood principle of reasoning and information processing
5 would associate the offer and the threat made in the
6 maximization/minimization technique with the expectation of
7 high/low sentencing. Now that is one step in the causal
8 chain.

9 Kassin demonstrates that causally, I've
10 demonstrated that using field data, and I could point you to
11 appellate courts' opinions where they say it is obvious that a
12 reasonable person given this statement would conclude that an
13 offer is being made. This subject of pragmatic implication is
14 not something Kassin invented. It's studied by other people.
15 He is taking a generally understood cognitive psychology
16 principle and demonstrating that that principle of how people
17 understand communications applies when you connect it to the
18 accident scenario technique.

19 What Kassin's research does is demonstrate
20 causally that issuing these threats and promises indirectly
21 successfully communicates the threat and the offer of
22 leniency. Now, that can be experimentally demonstrated, and
23 it doesn't matter whether it's done with college students.
24 Doesn't matter whether they're left-handed or right-handed,

25 blond or brunette, doesn't make any difference. Because what

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1 he's dealing with is a fundamental property of human
2 information processing. He shows that given this message a
3 reasonable person will reach this conclusion. That means that
4 the threat, that if you don't confess you will get the death
5 penalty, is communicated even if the words death penalty are
6 not used, as is illustrated time after time after time in the
7 recorded interrogations that are contained and illustrated in
8 the law review paper. And these are interrogations in which
9 interrogators, knowing that they are recorded, have issued
10 these threats.

11 Now, that an interrogator issued a particular
12 threat in an unrecorded situation is a judgment someone else
13 has to make, but I think it's quite reasonable to assume if
14 you can show these threats are issued when it's on the record
15 there's also at least an equal likelihood they're going to be
16 issued off the record, if not greater, and everything I'm
17 dealing with in that paper is either demonstrated from the
18 interrogation technique or the interviews that I did with
19 people who were proven to be innocent who explained how the
20 interrogation affected them. All of this fits together. It
21 is absolutely consistent with what Kassin finds in the library
22 -- in the laboratory, and it helps to explain the dangers of
23 some of these interrogation tactics knowing that modern
24 interrogation produces false confessions.

25 Q. Is there any intention or was there any intention by you

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1 to testify that if this particular tactic is used outside of
2 the specific facts involved in this case then this false
3 confession -- this confession is false?

4 A. No.

5 Q. In this case here?

6 A. No, no, in fact even if the tactic --

7 THE COURT: I don't understand your question.

8 MR. DeAP~MOND: I'm trying to remove it from the
9 particulars of the case in the formation of his opinions.

10 Q. In other words, as Dr. Horvath had indicated, there were
11 a lot of variables that would have to be involved, including
12 the relationship of the interrogator and the suspect and
13 things of that nature, and I guess my question is, I want to
14 make sure that it's clear that you're not taking your
15 particular opinions that you're rendering in this case out of
16 particular facts and circumstances of this case?

17 A. No, absolutely not. I mean this --

18 Q. You do that in each case?

19 A. Of course. I mean you have to analyze the particular
20 facts of the case, the model of interrogation and the model
21 leading to the decision to falsely confess was published
22 certainly before I came back from these hearings, and I
23 certainly am not changing the line of research I've done for
24 the last ten years simply because of one case. This is what I
25 believe, based on my training, experience, and 30 years' worth

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1 of research in the area of decision-making.

2 Q. As far as how far your testimony was going to go, I think
3 Counsel's questions to Dr. Horvath had to do with or at least
4 the impression was left that you're going to say that in every
5 case if these particular interrogation techniques occur there
6 will result a false or coerced confession. Is that --

7 A. That's a Newtonian model of how the universe works where
8 there are certainty and so on. No social scientist, no model
9 scientist, makes those kinds of statements. We make
10 probabilistic statements. It is likely that the effect of
11 variable A will be to produce an increase in variable B.
12 These things are probabilistic, not only in interrogation but
13 in every aspect of life, and as most people would agree in
14 every aspect of physical reality.

15 Q. In this particular case is it your intention to explain
16 that false confessions exist, what various dynamics are of
17 false confessions and what aspects of the interrogation you
18 find from your examination of the record would, in your
19 opinion, affect the truth or falsity of the confession?

20 A. Yes. And also to indicate how it is and why it is that
21 one needs to pay careful attention to the information elicited
22 in the post admission narrative in order to rationally
23 discriminate between the hypothesis that someone has actual
24 knowledge of the crime and the hypothesis that the person does
25 not have actual knowledge of the crime.

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1 MR. DeARMOND: Your Honor, then if I could just very
2 briefly, I have a couple of questions that -- from what
3 Mr. Beaumont asked at the previous hearing that we would like
4 to clear up.

5 THE COURT: Very brief, Counsel, please.

6 MR. DeARNOND: Yes.

7 Q. Doctor, could you explain with regard to your question,
8 the question from Mr. Beaumont concerning a number of times
9 you testified in federal court previously?

10 A. Yes. I made a mistakes or a mistake was made. My answer
11 that I testified once was correct because I had in my mind a
12 case, a civil case in the Southern District of New York called
13 Fotomecy (ph), in which I testified in which the judge in my
14 presence opined that this area of work would satisfy Daubert
15 and I went ahead and testified.

16 Mr. Beaumont then brought up the Art case. I
17 did not consider myself to have testified in theArt case,
18 because as we began my presentation, we began to go through
19 the Daubert issues, the judge essentially said let's dispense
20 with this and get right to the heart of it. This was on the
21 Thursday afternoon, late, he called the side bar at the
22 conclusion of the day, and he told the lawyers he didn't find
23 this helpful, and told them to tell me not to bother to come
24 back. So I never completed my testimony in that case, and I
25 have with me the transcript of that hearing. I was not in

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1 court on Monday when he made whatever statement he made. I
2 was only there on Thursday. And I have the transcript of my
3 presentation, his cutting it off, and the statements he made
4 at side bar, which I think are borne out, my characterization
5 is or is not borne out by the transcript which I brought with
6 me.

7 Q. Have you testified in other cases in the federal
8 system --

9 A. Yes, I testified --

10 Q. On Daubert?

11 A. In which a Daubert evaluation was done, yes, in naval
12 military court in Florida recently a case called Ellis.

13 Q. How many times have you testified in state court under
14 the equivalent of a Daubert type hearing?

15 A. Well, I've testified whatever number I referred to last
16 time, I believe it's in excess of 70 times. I try in every
17 case to lay the foundation, whether it's called for or not,
18 but there have been specific requests to do an evaluation at
19 least twice in Florida, one in a case called Christoff (ph),
20 another in a case called Johnstone (ph), I believe possibly
21 also a third Florida case called Lewis, but as I sit here I
22 don't have clarity on that without checking the transcript.
23 In addition, in Indiana in a case I testified in Nashville,
24 Indiana. In addition in Oregon in a case involving a woman
25 named Stangel (ph), State v. Stangel. And in Arizona, most

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1 recently in the Givens case. In all of those cases the
2 evaluation was done, and in all of those cases the judge found
3 that there was a sufficient basis for my testimony.

4 THE COURT: Let me make sure I understand this. You
5 have testified twice in federal court with reference to false
6 confessions?

7 THE WITNESS: That's correct, Your Honor.

8 THE COURT: And you have testified approximately 70
9 times in state court with reference to false confessions?

10 THE WITNESS: I can give you the exact number. It's
11 whatever I said last time. Right. I don't want to mislead.

12 THE COURT: Okay.

13 BY MR. DeARMOND:

14 Q. Lastly, Counsel made reference to the Fishman case in his
15 cross-examination of you. Did that case have anything to do
16 with the issues that are involved here?

17 A. Absolutely nothing.

18 Q. What was the focus of the testimony in the Fishman case?

19 A. The focus of the testimony in the Fishman case was
20 whether or not Judge Jenssen would permit a novel theory of
21 insanity to be introduced. My role in that was merely to talk
22 about the influence brought to bear on a particular individual
23 by the Church of Scientology in order to convince him that
24 committing acts of theft were morally acceptable if he gave
25 the money to scientology.

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1 I do not believe and never have believed that
2 thought reform produces a state equivalent to legal insanity.
3 And, in fact, published to that effect and, in fact, have
4 brought all of my publications on that subject which would
5 very clearly show that I have never believed that, and the
6 only thing I disagree with in Judge Jenssen's opinion is for
7 some reason I do not understand he decided or his clerk
8 decided to put my name in as someone who believed that
9 ignoring all the evidence, to the contrary. And unfortunately
10 that case settled so it could not be appealed and the record
11 corrected.

12 Q. Was there anything in that case that involved either
13 police interrogations, coercive techniques, or a false
14 confession?

15 A. No. And I also have to add the same issue has come up in
16 subsequent federal cases and has been resolved appropriately.

17 MR. DeARMOND: I have no other questions. Thank
18 you, Your Honor.

19 THE COURT: Mr. Beaumont?

20 MR. BEAUMONT: No, sir, I have no questions. Thank
21 you.

22 THE COURT: Thank you, Doctor.

23 (The witness was excused.)

24 THE COURT: All right. Let's take a ten-minute
25 break and then we'll come back. You can make an argument and

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1 then I think my -- I would come back tomorrow morning and
2 render my -- announce my decision on this motion, the hearsay
3 motion, and also the other two motions, one of which hopefully
4 the parties have worked something out on.

5 MR. PARSONS: Yes, sir, we have in regard to the
6 hands. It's been worked out, Your Honor. Do you want
7 me -- I'll withdraw it tomorrow or whenever.

8 THE COURT: You can do it tomorrow because maybe
9 I'll just get -- I don't want to call it argument, we'll get
10 argument in today and then that's enough for the day and come
11 back tomorrow morning. Arid you know it won't take very long
12 to announce my decision. Let's recess for ten minutes and
13 then come back.

14 (A recess was taken from 3:39 P.M. until 3:59 P.M.)

15 THE COURT: All right. I will hear argument from
16 counsel, and each side is restricted to 20 minutes, so you can
17 -- probably have to be somewhat succinct realizing, of course,
18 that I've listened very attentively to what has gone on, and
19 in large measures I've been educated by both sides, and you
20 can -- you don't have to relive the testimony in detail to me.
21 I have a pretty good idea about it. You can maybe stick to
22 the big picture, but anyway I'm going to limit you to 20
23 minutes. And tomorrow at 10 o'clock I will announce my
24 decision on this motion and all the other motions. The only
25 one I still don't -- well, I guess you did put in a response,

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1 Mr. Beaumont.

2 MR. BEAUMONT: Yes, sir, I did, and I think we
3 resolved --

4 THE COURT: I haven't had a chance to read it.

5 MR. PARSONS: We've resolved two of them, and I'll
6 do it tomorrow.

7 THE COURT: The motor and also -- good job, men.

8 MR. PARSONS: During the recess, and if we have time
9 I'll address it later if you want.

10 THE COURT: Or you could tell me tomorrow at 10:00.

11 MR. PARSONS: Sure.

12 THE COURT: Okay. So --

13 MR. BEAUMONT: Judge, could I ask one -- can we do
14 this tomorrow at 11:00 instead of 10:00, the only reason I'm
15 asking because I'm going back to Champaign tonight and --

16 THE COURT: No, 11:00 is fine with me. I have no
17 problem with it. We select the jury at 1:00, and I have no
18 problem with 11:00.

19 If that's the case, because I thought it might
20 make some difference to you to know as soon as possible what
21 you could use -- if that's the case I will probably -- I would
22 probably announce my decision on the hearsay tonight then and
23 give you the expert tomorrow at 11:00 along with the other two
24 motions that you worked out. But I'll give you my hearsay
25 decision tonight. I think you probably should know that as

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1 you prepare for trial tomorrow, so since I don't want to wait
2 till 11:00 to tell you that. So, okay, let's get arguments
3 now. Mr. DeArrnond.

4 MR. DeARMOND: Thank you. Your Honor, I don't think
5 I'm going to need anywhere near the 20 minutes, because I
6 realize the Court has heard all of this in probably painful
7 detail, but I just want to point out a couple of things. The
8 issue here I would suggest to the Court is not necessarily
9 whether the type of science that is being referred to here is
10 the same as physics, which is the hard science, but it is a
11 soft or social science that merits admission in this court
12 under the criteria of Daubert. I would suggest to the Court
13 that the indication in Daubert is that there are certain
14 criteria, which we've gone through before, that the Court
15 needs to look at, and the Court has quite effectively asked
16 questions, I think, that went to each one of those criteria,
17 and I would suggest that in each case what we find is that
18 although there may be some disagreement between the experts as
19 to whether there is a sufficient basis for some of these
20 conclusions, there is, in fact, a uniformity of opinion, I
21 would suggest, on a number of the important issues here.

22 No. 1, that false confessions do exist. No. 2,
23 that there are, in fact, methods of coercion, and that those
24 methods of coercion may on occasion lead to false confessions.
25 Now, whether it's agreed or disagreed that they will in all

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1 occasions or not, I don't think is relevant. I think what's
2 relevant is do the experts believe that there are, in fact,
3 coercive forms of interrogation? Yes, they do. Have those
4 been proven by empirical studies? Yes, they have. Can we say
5 that they in each instance will result in a false confession?
6 No, we can't. Is that what we're seeking to do in this case?
7 No, we're not. What we're trying to show the Court and to the
8 jury simply as the Court has repeatedly pointed out is that
9 these phenomenon and false confessions do exist, and that
10 these are some of the things which they may look at in making
11 an assessment of whether there may be some degree of coercion
12 being forced upon the suspect in this particular case. And I
13 think it was important that we kept trying to make it clear
14 that each of the cases as looked at in a case by case basis,
15 because even as Dr. Horvath indicated to the Court, there are
16 a number of variables in each case which are going to be
17 different. So, no, it is not possible to just coldly
18 determine that in every instance that I see these things I can
19 always say that a false confession occurred. I think that
20 that was kind of the point of what the Court's question of Dr.
21 Ofshe in this last interchange was. And as I understood his
22 answer, no, you can't make that one-to-one correlation. Can
23 you say that it would appear with the current body of
24 knowledge that there does appear to be some correlation
25 between certain forms of coercive interrogation techniques and

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1 the possibility of false confession? Yes. Can you say there
2 is a one-to-one correlation? No. But that I don't think is
3 where we're at anyway.

4 We're not trying to ask this Court to allow us
5 to tell this jury that, ladies and gentlemen, if we establish
6 to you that A, B, C, and D occurred, therefore, you must
7 conclude this was a false confession. We're far from that.
8 We have tried to take the language of the Seventh Circuit in
9 their opinion as to what they would suggest or at least what I
10 interpreted them to say they are suggesting are the areas we
11 could discuss, and those are simply the ones that kept being
12 pointed out here that they exist, how you recognize them -- by
13 how you recognize them I don't think that there is any
14 particular disagreement that these techniques occur and that
15 these techniques might, in fact, result in false confessions,
16 and then the issue is how you decide whether they fit the
17 facts of this particular case, and it's interesting that they
18 use that same language that's used by the experts in pointing
19 out the reference to the fit of the post conviction or the
20 post admission narrative.

21 And what we're trying to ask, what we're asking
22 the Court to consider, is that this body of knowledge is to
23 the point where there are aspects of a point -- of a post
24 admission narrative which would be taken into consideration by
25 someone analyzing these facts to determine whether there

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1 appears to be a greater or lesser likelihood of this
2 confession being false.

3 As the evidence has indicated, according to the
4 doctor and according to the methodology that's used in
5 analyzing the post admission narrative, there are a number of
6 factors that one might expect to see. And he then listed
7 additional information or the failure to obtain information,
8 that's a factor because that goes to whether the interrogators
9 are, in fact, seeking to establish corroboration for the
10 statement "I did it." I think that where perhaps the two
11 tended to disagree, if I understood their testimonies, Dr.
12 Horvath and Dr. Qfshe, was that Dr. Horvath places no
13 significance whatsoever in the post admission narrative.
14 Under, I would suggest, the same theory that he maintains or
15 at least his perspective, I wouldn't say a theory, his
16 perspective, and I'm not a scientist, so if I misuse these
17 terms I apologize, but he seems to say that if we do things as
18 an interrogator which creates impressions in the mind of a
19 suspect, that's the suspect's problem. That's not really our
20 problem. I think as a social scientist, a social
21 psychologist, Dr. Ofshe is saying, well, if you do those
22 things and you do them with the intent to get that result
23 created in the suspect's mind, that's as real as if you had
24 done them purely. The point being if you're going to do those
25 things and try to get this "I did it" statement, do you then

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1 have facts from any subsequent investigation conversation that
2 tend to corroborate that statement? And that I think is
3 something which without an expert a jury isn't likely to truly
4 appreciate, I don't think, and I think the Court's absolutely
5 on point. I don't think juries are going to understand or
6 recognize false confessions. I don't think juries are going
7 to appreciate the mechanics by which false confessions can
8 occur and the various investigative techniques and the
9 relevance or irrelevance of those techniques. Nor do I think
10 they can appreciate the lack of fit that may or may not exist
11 with regard to any post admission narrative. That that's why
12 it's important to then tie that into the assessment of whether
13 that post admission narrative seems to buttress or seems to
14 fly in the face of what purports to be an "I did it"
15 statement.

16 I would suggest that the scientific knowledge
17 that we're talking about under Daubert, as the Seventh Circuit
18 pointed out, includes various social sciences and includes
19 topics such as the syndrome evidence that I've referred to
20 previously. If we want to talk about a body of knowledge that
21 has absolutely no empirical basis, it would be psychological
22 testimony with regard to child sexual abuse syndrome and
23 things of that nature, clearly an understood and recognized
24 phenomenon, one that's accepted and recognized in courts
25 throughout the country, but not based on any form of empirical

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1 knowledge whatsoever.

2 As the Seventh Circuit also pointed out, there
3 are a number of other cases where they would expect to find
4 social science being used in an expert manner, none of which
5 involve the type of specificity that one might find in the
6 case we've got here with the types of actual research that has
7 been testified to. The Court indicated that they find social
8 science to be an integral part of employment discrimination,
9 family law, and criminal cases. Well, those are clearly soft
10 science type cases, and I would suggest that if they find that
11 type of scientific evidence to be sufficient scientific
12 knowledge, then that would also -- that should also be the
13 finding here. We ask the Court to admit the testimony of Dr.
14 Ofshe. Thank you.

15 THE COURT: Thank you, Mr. DeArmond. Mr. Beaumont.

16 MR. BEAUMONT: Thank you, Your Honor. I would
17 suggest that what they're attempting to do here today under
18 the guise of science is to get Dr. Ofshe on the stand and
19 repeat what's in this government or Defendant's Exhibit No.
20 38, which was an interview between the defendant and
21 Mr. DeArmond, which is replete with allegations of being
22 exposed to piranhas and clearly coercive tactics, all kinds of
23 facts that are nowhere in the record and have nowhere been in
24 the record until today until we see this document. They were
25 not entered into in the suppression hearing. They were not

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1 testified to when the defendant testified at trial. And

2 suddenly Dr. Ofshe's going to get on the stand and say, well,
3 Larry Hall, when you say to somebody we're going to expose you
4 to piranhas, and we're going to give you the death penalty,
5 and we're going to do all those things to you, that's
6 coercive.

7 And let's look at his confession. What do we
8 see? Well, we see his witnesses, they say he was somewhere
9 else. They say he did this. They say he did that. It's
10 interesting to note he doesn't know anything about the
11 government witnesses, the other side's witnesses, that we
12 believe totally discredited any alibi evidence.

13 And I would suggest that under the guise of
14 science that's, in essence, what they want to do is say, well,
15 look at this witness that the defendant had and they said he
16 was somewhere else on the day of September 19 or September 20.
17 Look at this witness. This witness said this. Look. And
18 that makes sense, ladies and gentlemen, when you think about
19 the fact that they told him they're going to feed him to the
20 piranhas and they're going to give him the death penalty and
21 they're going to do all these things, and that is what the
22 Seventh Circuit said quite plainly is merely fancy phrases or
23 scientific phrases for common sense knowledge, and that's all
24 attempting to do. Under the guise of calling this science,
25 they're saying this is the way we analyze interrogations by

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1 looking at what all the witnesses said. By looking at what

2 Larry Hall said. And, ladies and gentlemen, this is what he
3 said and, therefore, you can believe this is a false
4 confession or appears to be a false confession or you've got
5 to consider this because it could be a false confession,
6 whatever it is they want to say, and I would suggest that's
7 what they're attempting to do, and I would suggest that's what
8 specifically Daubert would not permit, and I would suggest
9 that the Seventh Circuit has specifically cautioned that that
10 type of evidence is not admissible.

11 I'm sorry, Judge, there's two other things I
12 would like to say. I do need to move to admit Government
13 Exhibit 4 and 5 for the record. I didn't do that earlier, I
14 was told.

15 THE COURT: They will be admitted.

16 (Government Exhibits 4 and 5 admitted into evidence.)

17 MR. BEAUMONT: And I would ask the Court on a second
18 basis, based on this new statement of the defendant, this
19 interview of the defendant, I would ask that the Court
20 consider under Rule 403 as a separate issue as to whether or
21 not, because this clearly forms a basis of the witness's
22 opinion and a significant basis, I would suggest, and I would
23 suggest under Rule 403 that the Court consider disallowing
24 this evidence. Thank you.

25 THE COURT: Mr. Beaumont has raised something that I

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1 hadn't thought about, and that is that I don't think it's
2 appropriate for the defendant's statement as to what went on

3 during the interrogation to be put before the jury without
4 counsel having the opportunity to cross-examine him and the
5 jury to judge his credibility. And it didn't occur to me that
6 there would be some effort to get that statement into
7 evidence. I won't have that.

8 MR. PARSONS: Your Honor, it's only suggested
9 by -- just to clear the record, that was only suggested by the
10 prosecution. It's never been an effort by us to introduce
11 that before the jury, and I just wanted to make that clear,
12 Your Honor. There's been an accusation, and I must answer it.
13 There is no intention.

14 THE COURT: Okay. Because I don't think that will
15 be -- it was relied upon by the Dr. Ofshe, but -- and he
16 certainly can use it for that purpose, but then in explaining
17 it we have to give some thought how to handle that because
18 that's not -- and I'm going to invite counsel's advice about
19 that, because I agree with the government. I don't think that
20 should be substantive evidence in this case. And it really
21 shouldn't get before the jury, because defendant could say
22 anything to his lawyer, and he said it in the privacy of his
23 lawyer's office. The jury's had no ability to assess him, he
24 hasn't been subject to cross-examination, that's a problem.

25 At this point I don't really know how to deal

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1 with it, but I recognize it is a problem that we're going to
2 have to deal with, and the defendant's position certainly is a
3 good starting point that perhaps we can be able to come up

4 with something that is suitable.

5 The Court will take the motion about expert
6 under advisement and will announce its decision tomorrow at
7 10:00.

B With reference to the government's motion in
9 limine attempting to bar as hearsay the testimony of certain
10 witnesses who would testify, nope, that isn't government,
11 that's the defendant who filed a motion seeking approval for
12 the introduction of the testimony of certain witnesses who
13 will testify that persons other than Mr. Hall confessed to the
14 murder of Jessica Roach. The Supreme Court in *Chambers v.*
15 *Mississippi* have emphasized that the hearsay rule should not
16 be mechanically applied in a situation where constitutional
17 rights directly affecting the ascertainment of guilt or
18 innocence are implicated. The Court was concerned that the
19 mechanical nature of Mississippi's hearsay rule in the
20 Chamber's case would inhibit defendant's due process rights by
21 preventing them from using even strong and reliable evidence
22 of innocence. The critical question becomes how reliable or
23 trustworthy must hearsay be to fit the Chamber's
24 constitutional standard.

25 Our Seventh Circuit has developed the following

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1 test. If a confession is sturdy enough for the state to use
2 it in it's own case, if it is a sort of evidence that
3 prosecutors regularly use against defendants, then defendants
4 are entitled to use it for their own purposes.

5 Federal Rule 804(b) (3), Federal Rule of
6 Evidence, articulates the teaching of Chambers and recognizes
7 an exception to the hearsay rule for an unavailable declarant
8 who makes a statement tending to expose the declarant to
9 criminal liability and offered to exculpate the accused so
10 long as corroborating circumstances clearly indicate the
11 trustworthiness of the statement.

12 Likewise, evidence Rule 803(24) establishes a
13 catchall exception for available declarants if the statement
14 has equivalent circumstantial guarantees of trustworthiness as
15 the other hearsay exceptions.

16 I believe these rules are in line with the
17 constitutional norm established in Chambers and the Seventh
18 Circuit's test articulated in Lee v. McCaughtry.

19 As I see it, the Court need only apply these
20 rules here to determine admissibility of the hearsay
21 statements sought to be introduced by defendant. The Court
22 initially notes that the only confessions worth discussing are
23 those of Lester OtToole. The other alleged confessions sought
24 to introduce lack even the barest indicia of reliability.
25 Keith Goble appears to be psychotic, and there is no real

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1 evidence to connect Tom Smith to this crime.

2 While O'Toole's confession presents a closer
3 case, the corroborating evidence simply does not clearly
4 indicate the trustworthiness of the statements as required

5 under Rule 803 (b) (3) . The utmost probative piece of evidence
6 is O'Toole's admission to Eduardo Vela that he had disposed of
7 Jessica Roach's body and that she will be found at harvest
8 time in a cornfield in Indiana.

9 If this statement were made before the
10 discovery of Roach's body, it would show that O'Toole
11 possessed independent knowledge about the crime. However,
12 Vela's recorded statement is internally inconsistent. He
13 stated that his first conversation with O'Toole occurred in
14 December of 1993, "around the time of her disappearance" yet
15 Roach disappeared in September of 1993 and her body had
16 already been found by November 8, 1993, before any
17 conversation he might have had with O'Toole in December of
18 '93. The comment about the body being found in a cornfield in
19 Indiana did not occur until a subsequent conversation. While
20 Vela states that this later conversation happened "about eight
21 days after Roach's disappearance," this is inconsistent with
22 his previous answer that the original conversation took place
23 in December of 1993.

24 Because of these discrepancies, the Court finds
25 Vela's testimony on this point to be unclear. O'Toole may

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1 very well have been aware that Jessica's body had been
2 discovered when he made his statement. Without that
3 statement, there is simply not enough evidence to corroborate
4 O'Toole's alleged confession so that the trustworthiness is
5 clearly apparent.

6 It's true that O'Toole owned a two-tone brown
7 van, but there is no testimony that he was the driver of the
8 van that picked up Jessica. He also, as I gathered from
9 something that defense counsel said, he may have a prior
10 conviction for having raped his 14-year-old sister, but there
11 is no indication how old this conviction was, and his mere
12 propensity to commit such a crime is not enough to implicate
13 him in this particular incident. Indeed Q'Toole's confession
14 may have been a vivid memory of the previous incident with his
15 sister. Who knows. Jamie Wheeler testified that O'Toole told
16 her mother he had "to get out of town before the shit hits the
17 fan." However, he could have made the statement for any
18 number of reasons not involving the Jessica Roach abduction.
19 Moreover, Wheeler can only approximate that he made the
20 statement a couple of days after Roach was abducted.

21 The similarity of the police sketch to O'Toole
22 does little to prove his involvement in the crime. The sketch
23 is admittedly inaccurate. Monty Cox was never satisfied with
24 the final portrait, moreover any number of persons could pose
25 a resemblance to such a sketch and is not a dead ringer for

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1 O'Toole.

2 O'Toole's three-day disappearance during the
3 month of September 1993 is not probative because it is unclear
4 which three days of the month he was gone. Nor does the
5 disappearance of O'Toole's dog have any relevance to this case
6 beyond a mere speculation that he lost the dog when Roach was

7 abducted.

8 O'Toole's casual relationship with Roach's ex-
9 boyfriend is also too slim a reason to determine clear
10 reliability.

11 Finally, the consistency of the various
12 confessions made by O'Toole fails to show their clear
13 truthworthiness. None of these confessions contain specific
14 details of the crime, moreover, the dates of these confessions
15 are largely unknown in relation to the discovery of Roach's
16 body. Most persons can make up a story line and stick with
17 it. While not dispositive, O'Toole has now recanted his
18 confessions and has passed a lie detector test in which he
19 proclaims his innocence. This cuts against the truthfulness
20 of his prior confessions.

21 For all these reasons the Court finds that the
22 corroborating evidence does not clearly indicate the
23 trustworthiness of O'Toole's statements as required by Rule
24 804 (b) (2) . Thus under the Federal Rules of Evidence and
25 pertinent constitutional principles, these statements must be

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1 excluded as hearsay. The Court further notes that the
2 government would not use such unreliable evidence to prosecute
3 O'Toole, and indeed it chose not to do so here. So,
4 therefore, the defendant's motion to -- for admission of the
5 various hearsay statements is denied for those reasons.

6 And I will see you tomorrow at 10 o'clock to
7 announce the decision about the experts and to finalize the

8 other two pending motions that you have worked out. I'm
9 sorry, 11 o'clock, that's right.

10 MR. BEAUMONT: Thank you.

11 (The hearing adjourned at 4:27 P.M.)

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CERTIFICATE

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19 I certify that the foregoing is a correct transcript from
20 the record of proceedings in the above-entitled matter.

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Ro e LaBerdia, RDR
Illinois CSR No. 084-001506

Date

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1 forgo the inducement to push it beyond what's -- okay.

2 MR. DeAP~NOND: Your Honor, I appreciate the Court's
3 ruling, and I'm not going to do anything to try to get beyond
4 that.

5 (Open Court)

6 THE COURT: You may call your next witness,
7 Mr. DeArrnond.

8 MR. DeARNOND: Thank you. We call Dr. Richard
9 Ofshe.

10 RICHARD J. OFSHE, WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MR. DeARMOND:

13 Q. Would you state your name and spell your last name for
14 the court reporter, please?

15 A. Richard J. Of she, O-F-S-H-E.

16 Q. And what is your current profession or occupation,
17 please?

18 A. I'm a professor at the University of California at
19 Berkley.

20 Q. Could you describe, for the ladies and gentlemen of the
21 jury, what your particular area of expertise is?

22 A. My area of work is on the study of influence, and
23 particularly extreme techniques of influence.

24 Q. How long have you been in your current position at
25 Berkley?

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1 A. 30 years.

2 Q. And what's the nature of your work at Berkley?

3 A. I'm a professor in the department of sociology. I'm a
4 social psychologist. I teach and do research on topics of
5 influence.

6 Q. How long have you been working in the area of influence
7 and decision making?

8 A. Over the course of my whole career, probably 33 or 34
9 years.

10 Q. Could you describe briefly, for the ladies and gentlemen,
11 what your educational background has been since graduating
12 from college?

13 A. I have a bachelor's degree from Queens College of the
14 City University of New York, a master's degree from the same
15 institution, and then a Ph.D. degree from Stanford University.

16 Q. What was your doctoral work in?

17 A. It was in the area of influence and decision making.

18 Q. What, if any, competitive awards or honors have you
19 received?

20 A. I was awarded a John Simon Guggenheim Memorial Foundation
21 Fellowship which, in my field, is an honor. I shared -- in a
22 sense, I was a member of the three-person research and
23 reporting group that won a Pulitzer prize in the name of the
24 Point Reyes Light newspaper for an expose' of a violent cult
25 group that we did. And I also, in 1994, received an award for

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1 the best clinical paper on the subject of hypnosis awarded by

2 the International Society for the Study of Clinical and
3 Experimental Hypnosis.

4 Q. Do you have any training in research methods?

5 A. Yes.

6 Q. Have you taught research methods at post-graduate level?

7 A. Yes.

8 Q. Do you regularly teach about the concepts of social
9 science, in general?

10 A. Yes.

11 Q. Have you and do you currently serve on any educational
12 boards or committees for any professional journals?

13 A. I review for professional journals. I'm not currently on
14 any editorial boards of any professional journals, although I
15 have been. But I get manuscripts to review as part of the
16 peer review process. I'm currently on the professional and --
17 scientific and professional advisory board of an organization
18 called the False Memory Syndrome Foundation. Those are the
19 appointments I currently have.

20 Q. Do you and have you served as a consultant in areas of
21 social psychology --

22 A. Yes.

23 Q. -- influence and interrogation?

24 A. Yes.

25 Q. Has this included members of law enforcement?

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1 A. Yes.

2 Q. What types of law enforcement agencies, both local,

3 state, and federal have you been involved in consulting for?
4 A. Over the years I've been a consultant to the Mann
5 County, California, Sheriff's Department, the office of the
6 Attorney General of the State of California, the United States
7 Attorney's Office in Los Angeles on two different occasions,
8 the office of the Attorney General of the State of Arizona,
9 the United States Department of Justice, both the tax division
10 and the criminal division, the prosecuting attorney's office
11 of Jefferson County, West Virginia, the Los Angeles District
12 Attorney's office in 1984, the office of the Commissioner of
13 Social and Rehabilitation Services of the State of Vermont,
14 the Internal Revenue Service, U.S. Attorney's office in West
15 Virginia, Thurston County, Washington, prosecutor's office,
16 states attorney's office in Fort Lauderdale, Florida, the
17 office of the governor of the State of Missouri in connection
18 with a decision as to pardoning an individual who had given a
19 false confession to a murder, and the office of the District
20 Attorney in Los Angeles in connection with the second Menendez
21 brothers' trial.

22 Q. Have you had occasion to be involved in consultation with
23 any trials of particular notoriety?

24 MR. BEAUMONT: I object. That's not relevant.

25 Well, I withdraw the question. I'm sorry. I withdraw the

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1 question.

2 THE COURT: Well, it's been answered already.

3 Q. Besides the Menendez case?

4 A. I've been involved in other cases of great notoriety,
5 including court proceedings in connection with those cases.

6 Q. Do you have occasion to confer for both prosecution and
7 defense?

8 A. Yes.

9 Q. And do you have any idea of the percentage or number of
10 times you may be conferring for prosecution or defense?

11 A. It depends on the subject matter. When it comes to
12 issues of group influence leading individuals to commit
13 crimes, it would most likely be for prosecution. When it
14 comes to the subject of police interrogation leading to
15 coerced or false statements, it would most likely be for the
16 defense.

17 Q. Have you had occasion to be asked to provide lectures for
18 both law enforcement and judiciary on the topics of coercion
19 and influence?

20 A. Yes.

21 Q. Does that involve both false confessions and police
22 interrogation?

23 A. Yes, it has to do -- in one case I was asked to give a
24 mini-course for judges in Florida, and that had to do with
25 interrogation, how it works and so on. And another case I

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1 recently lectured to the Texas Police Association on the issue
2 of interrogation and how to avoid taking false confessions, in
3 particular.

4 Q. What's the particular focus of your field of expertise?

5 A. Particularly on manipulation and influence. And in this
6 context, the way in which police interrogation works, the way
7 in which people can be led to make the decision to give a
8 confession, whether that confession is true or false.

9 Q. Have you had occasion to publish any books, articles, or
10 other writings in the areas of false confession, influence,
11 and decision making and police interrogation?

12 A. Yes.

13 Q. And what's your most recent article in this area?

14 A. The most recent article is currently in press. It's an
15 article for a law review. It's called The Decision to Confess
16 Falsely.

17 MR. DeARNOND: May I approach the witness?

18 THE COURT: You may.

19 Q. I tender to you what we're marking as Defendant's Exhibit
20 No. 13. Tell us if you recognize this, please, and if so,
21 what do you recognize it to be?

22 A. It's a copy of my curriculum vitae.

23 Q. Doctor, you list about five pages of different
24 publications. Of those publications, what percentage of them
25 involve police interrogations, coercion, and false confession?

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1 A. Well, they're almost uniformly on influence and decision
2 making, which is foundational, and particularly on
3 interrogation per Se. The overall percentage, I don't know.

4 It's been my principal preoccupation for the last number of
5 years, and it is the principal thing about which I'm writing
6 currently and have been writing for the last couple of years.

7 Q. About how long has your focus of professional study been
8 in the areas of influence, coercion, and persuasion in their
9 application to interrogation procedures?

10 A. At least ten years.

11 Q. Could you describe or explain to the jury where we are in
12 the field of study of confessions and interrogations?

13 A. Well, we're at a point at which we understand how it is
14 that police interrogation works. Police interrogation itself
15 is a totally artificial event. It's not something that occurs
16 in nature. It's not like storms in the weather. It's not the
17 product of natural events. It's something that's constructed.
18 It's something that's built in order to influence people. It
19 changes over the years. Probably for the last 40 years police
20 interrogations have become principally psychological in the
21 way in which it works, changing the way in which police
22 interrogation occurs. At this point, I think we know a great
23 deal about police interrogation, partly because we can study
24 the tests and the procedures that are used to teach police how
25 to interrogate, and we can also study actual police

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1 interrogations because today many of them are tape-recorded so
2 that it's possible to know exactly what happened. And it's
3 from that, together with interviewing people who have been
4 involved in either doing them or on the receiving end of them,

5 that we generate knowledge as to how police interrogation
6 works and the effects that it has.

7 Q. How do police interrogations fit into the field of social
8 psychology?

9 A. Well, it's generally agreed, both by the people who teach
10 police how to interrogate and invent the methods as well as by
11 the people who study these methods and try to figure out how
12 they actually work, that the subject of social psychology, and
13 particularly the issue of influence and decision making, is
14 the fundamental social science discipline or subject matter
15 from which methods of police interrogation have evolved. In
16 other words, the understanding, the knowledge of how people
17 are influenced is what is used to construct methods and
18 techniques of police interrogation.

19 Q. Have you ever been qualified to testify in court on the
20 topic of false confessions and police interrogation
21 techniques?

22 A. Yes.

23 Q. Do you have an approximation of the number of times?

24 A. Approximately 72 times.

25 Q. Would that involve state and federal court?

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1 A. Yes.

2 MR. DeARMOND: Your Honor, at this time we would
3 tender Dr. Ofshe as an expert witness.

4 MR. BEAUMONT: We have no objection.

5 THE COURT: You may continue.

6 MR. DeARNOND: Thank you.

7 Q. Doctor, is there any dispute, in the scientific
8 literature in your field and among your peers, that false
9 confessions exist?

10 A. No, absolutely not.

11 Q. Could you describe, for the ladies and gentlemen of the
12 jury, what is a false confession?

13 A. Well, a false confession would be a confession to a crime
14 where a confession means a description of what happened, an
15 account of the crime, of the story of the crime, how it
16 happened, what was done, the details of it, that's given by
17 someone who did not commit the crime.

18 Q. Do you recognize the influence of various interrogation
19 techniques on the decision making that's involved in leading
20 to false confessions?

21 A. Oh, yes. If one starts with someone saying no, I didn't
22 do it, and some number of hours later they say yes, I did do
23 it, something has affected their decision making, and that
24 something is interrogation.

25 Q. Would you describe the difference between interrogation

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1 and interview?

2 A. Interview is something that's done to gather information.
3 When someone is interviewing, questions are asked to learn
4 answers. Interrogation is all about getting someone to say I
5 did it, and then describing the crime, and how it happened.

6 Q. In the study of false confessions, have you developed an

7 -- or is there developed within the field a definition or
8 explanation of different types of false confessions?

9 A. Yes.

10 Q. Could you explain those, please.

11 A. Well, it's generally recognized that there are several
12 kinds of false confessions that can occur. False confessions
13 can occur without interrogation, and those are called
14 voluntary false confessions. They happen, typically, when
15 there's a crime that's received some notoriety. People who
16 are unstable, want attention, will very often contact the
17 police and claim to have knowledge about the crime or to have
18 committed the crime, and make a confession to some
19 participation in the crime, without having to be interrogated,
20 without necessarily ever saying I didn't do it, just,
21 essentially, present themselves, either personally or on the
22 phone, in order to say I did do it when, in fact, they didn't,
23 and they just simply want attention.

24 Q. How does the interrogation process fit with the concept
25 of false confession?

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1 A. Well, except for voluntary false confessions,
2 interrogation is what it is that changes a person who,
3 initially, upon becoming a suspect and being accused, says, "I
4 didn't do it," changes that person to then say, "I did do it."
5 What interrogation is about is how one manipulates an
6 individual's decision making to get someone who is ideally --
7 and the way it should work, someone who is guilty, who knows

8 they're guilty, to admit to having committed the crime, and
9 then to provide a detailed account of what happened. The
10 problem is that sometimes those very same techniques can lead
11 someone who, in fact, is innocent to also say "I did it" and
12 then try to give a description of what happened.

13 Q. How do you go about determining, or at least trying to
14 make a determination, as to whether a confession is a false
15 confession or a true confession?

16 A. Well, there are two things that one would look at.
17 First, one would have to look at what evidence there is
18 independent of the interrogation, independent of the
19 confession, that links the person to the crime. Putting that
20 aside for the moment, then one would then look at, what I
21 would call, the post-admission narrative of the crime. That
22 is -- any interrogation can be broken into two parts. The
23 first part has to do with how do you get the person to say, "I
24 did it." And that's all about the motivation to get them to
25 make the admission. After the person says "I did it," now, a

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1 well-trained interrogator, well-trained police officer will
2 now seek to get details and information about the crime.
3 Because collecting that information, what I call the
4 post-admission narrative, is what allows one to know whether
5 or not the person who is answering the questions has actual
6 knowledge of the crime, or is guessing, or making it up. So
7 that someone who has actual knowledge, someone who is the
8 perpetrator, who is making a voluntary admission is in a

9 position to tell the police a great deal about the crime that
10 is only known to the perpetrator. And I'm assuming here I'm
11 thinking about things have not been published, have not been
12 told to the individual in the course of the interrogation,
13 things that only the perpetrator would know, someone who has
14 actual knowledge can supply that information. Someone who has
15 been moved to say "I did it" when, in fact, they're innocent
16 is going to lack that actual knowledge. So someone who, in
17 fact, committed the crime can't prove they committed the crime
18 by answering the questions and supplying these details.
19 Someone who didn't commit the crime is unlikely to guess the
20 right answer, is likely to give statements that are full of
21 holes and full of errors, and is going to act as if -- or
22 they are going to appear to be someone who doesn't really know
23 what happened. And that's the way to discriminate, to make
24 it -- to allocate people who did it into one category and
25 people who are false confessors in another. You test their

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1 knowledge of the crime. And if they fail that test, that
2 leaves open very much the possibility that they could be
3 giving a false confession.

4 Q. When you make reference to the police interrogation
5 process and reference to things like coercion, are you
6 necessarily meaning by coercion something that's illegal or
7 improper?

8 A. When I use the term, yes.

9 Q. What kind of coercion are there?

10 A. Well, there's what, in a general sense, might be called
11 coercive, and it's not the way I'm using the term. Pressure,
12 intense pressure brought to bear on someone, getting in their
13 face, so to speak, intimidating them by moving in on them.
14 All that would be pressuring. Now, I prefer to call that
15 putting pressure on an individual to try to get compliance, to
16 try to get them to do what you want them to do. When I use
17 the term coercion, I'm talking about doing something, such as
18 threatening someone, if you don't tell me about this, I'm
19 going to make sure that you get the worst possible punishment,
20 or perhaps offering them a benefit, such as, well, if you do
21 tell me, if you do admit you did this, then I'll help you in
22 some way. I'll make sure you get a lesser charge, or I'll get
23 you some benefit. That is coercive, coercion in the way in
24 which I'm using the term. Threats of bad treatment and offers
25 of leniency, offers of a deal, offers of a benefit, would be

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1 coercive.
2 Q. Do the threats necessarily have to be explicit?
3 A. No. The research on police interrogation shows that
4 people understand what's going on. They reason by -- and this
5 is a general aspect of the way in which people communicate and
6 understand one another. They reason through, what's called,
7 pragmatic implication. They figure -- we all figure out
8 what's really meant by something, what the consequences will
9 be. So you don't have to be completely explicit in saying, if
10 you don't do this, I'll make sure you get a death penalty, for

11 example. If it's the kind of crime that might carry that sort
12 of punishment, then the interrogator, if he chooses to break
13 the rules and wants to accomplish this, can communicate the
14 fact that you're going to get the harshest possible punishment
15 without having to use the words death penalty. At the same
16 time, the interrogator can talk about help and, you know, we
17 will see if this can work out, or that can work out, or maybe
18 if you cooperate and show remorse the prosecutor will choose a
19 lower level of crime to charge you with. All of that can be
20 subjectively done or it can be done very boldly. But it has
21 the same effect. It gets the message across.

22 Q. Are there certain commonly recognized factors found to
23 exist in police interrogations which may lead to false
24 confessions?

25 A. Yes.

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1 Q. Such as?
2 A. Well, on the one hand, if the kinds of coercion
3 techniques that I've been describing are used, those are
4 generally regarded as dangerous, and the kind of thing that's
5 capable of producing a false confession. If someone is
6 handicapped in some way, and they're less able to deal with
7 the interrogation, this can also lead to compliance, just
8 giving in, and producing a false confession. People who are,
9 for example, intellectually handicapped, they're less than
10 normal in intelligence, are recognized as being vulnerable to

11 pressure, and also vulnerable to the demands and the
12 manipulations of interrogators because they're less able to
13 deal with lots of situations. So things about a person's
14 capabilities, their personalities, their intellectual
15 abilities, all of this can lead to false confession, as well
16 as things that the interrogator does particularly, such as
17 introducing a threat and offering a promise of benefit if one
18 complies.

19 Q. During your study in the area, how many interrogations
20 have you been asked to review?

21 A. I've been asked to review more than 116 interrogations.
22 That's the number that I have records on. There were more
23 than that, but my home was destroyed in a fire, and I lost a
24 lot of my records, but I know about 116.

25 Q. And can you explain or describe to the ladies and

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1 gentlemen of the jury, examples of false confessions, how
2 these things have come about?

3 A. Sure. Perhaps the best example I can think about is in
4 connection with a case called the Phoenix Temple murder.

5 MR. BEAUMONT: I object to that, Judge. There's no
6 relevance to other examples of cases in false confessions,
7 unless there's some foundation that the facts are the same as
8 in this case.

9 THE COURT: The Court will sustain the objection.
10 think the doctor has testified generally to the dynamics of
11 false confessions. We don't need examples.

12 Q. Doctor, what factors do you look for in assessing the
13 potential validity of a confession?

14 A. I look at the fit between the post-admission narrative
15 and the facts of the crime. If the account of the crime given
16 by the person contains information that can only be known by
17 someone who committed the crime, and there's no other possible
18 way the person could have learned that, then that's extremely
19 important.

20 If, on the other hand, there are things that
21 the perpetrator should know that the person is unable to
22 answer, then that raises a red flag as to whether or not the
23 statement is a trustworthy statement. The -- so errors,
24 things that the person says, well, it happened this way, and,
25 in fact, we know it happened a different way. The method of

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1 killing, for example, would be an -- would be one example of
2 that. Or if the person was saying, in the extreme, doesn't
3 know the gender of the victim. Presumably someone who does a
4 killing should know whether they murdered someone who is male
5 or female. But if they make big mistakes, things that you
6 would expect someone who had done something complicated
7 involving another person to know about that other person.
8 Sort of generally what they looked like, perhaps their race,
9 perhaps the clothing that they were wearing, things like that
10 that you'd expect people to know. If they get those things

11 wrong, that raises very serious questions because they may
12 just be guessing. So you have to look -- one has to look at
13 the subject and assess whether or not it's a subject that
14 someone could guess the right answer to easily. Was the body
15 face up or face down? It was a 50/50 chance that anyone would
16 guess that right. On the other hand, where's the murder
17 weapon? And there could be ten million places the murder
18 weapon could be hidden; the person can't tell you that. Then
19 that's quite serious. If they tell you that, on the other
20 hand, that tells you that they have actual knowledge of this
21 crime.

22 Q. In your study of the interrogation process and false
23 confessions, what about somebody who gives that confession but
24 then they just don't want to tell you where the weapon is?

25 A. Then you have to look at the interrogation itself. If,

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1 for example, it's an interrogation in which someone is said to
2 be cooperative, is giving a voluntary statement. In other
3 words, someone who has decided to admit guilt for all the
4 right reasons. If that person then is unable to answer these
5 questions, it makes a difference. That is to say it doesn't
6 make any sense. If, on the other hand, the person has
7 been -- there's -- has been threatened or there's a lot of
8 acrimony between the interrogator and the person, then someone
9 just might choose not to say anything just because they don't
10 want to interact with the interrogator, even though they admit

11 that they did it. Also, it makes a difference what issues the
12 person is unwilling to talk about. So that there are some
13 kinds of things that someone -- that's fairly easy to
14 understand why someone like Richard Allen Davis, for example,
15 who kidnapped and killed --

16 MR. BEAUMONT: Your Honor, I object. Specific
17 example in another case, unless there's a foundation that it
18 fits this case.

19 THE COURT: Sustained. Dr. Of she, you understand my
20 ruling? You're not to give examples.

21 THE WITNESS: I'm sorry, Your Honor.

22 A. An example, in general, would be someone who committed a
23 crime that has a particularly heinous element to it, something
24 that is decidedly extremely awful. A person might not be
25 willing to admit to that part of it, but might be willing to

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1 give an accurate description of all the other facts about the
2 crime. And, in fact, the accuracy of the information in terms
3 of assessing whether someone has actual knowledge or not, it
4 doesn't matter how dramatic the fact is or not. Very
5 untraumatic things can tell you that someone knows, for
6 example, what this courtroom looks like. Probably everyone
7 who's been in this courtroom for a day can generally describe
8 the configuration of this courtroom. It's not very dramatic,
9 but it's different than a lot of other courtrooms. So having

10 been in the courtroom, you can give a fairly accurate
11 description of it.

12 THE COURT: Doctor, let me interrupt you. I thought
13 the question put to you was, what about somebody who gives
14 that confession, but then they just don't want to tell you
15 where the weapon is. I think that was the question.

16 THE WITNESS: I must have lost the question. I'm
17 sorry, Your Honor.

18 THE COURT: I thought Mr. DeArmond's question to you
19 was, what about somebody who gives a confession, but then they
20 just don't want to tell you where the weapon is. It's not
21 that they don't know where it is, they apparently choose not
22 to tell you. He's asking you about that person; is that
23 correct?

24 MR. DeARMOND: Yes, sir. And I think we got
25 into -- then have you to look at the interrogation.

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1 THE COURT: Well, he got into that, but I thought
2 you asked him, what about that person who just don't want to
3 tell you where the weapon is. I thought that was your
4 question.

5 MR. DeARMOND: Yes, sir.

6 THE COURT: I'm looking at it.

7 MR. DeAPHOND: Yes, sir.

8 THE COURT: Did you answer that question?

9 THE WITNESS: If I didn't, the answer is that can

10 happen sometimes.

11 Q. What do you then have to analyze or look at in
12 determining whether, in fact, you can make any assessment as
13 to the person's conscious choice not to give the information
14 or an inability to do so?

15 A. Well, you want to look at everything that they say. So
16 that while on one element the person may refuse to tell you
17 the answer, what one is looking for is in the entirety of
18 everything that they say whether or not they are demonstrating
19 knowledge of the crime or ignorance. And, obviously, if they
20 don't give you an answer, you can't make any inference from
21 that. All you know is that they haven't answered the
22 question. So you look at the questions that they do answer.
23 Then you say, given the questions that are answered, do these
24 answers add up to knowledge, or do they add up to what seems
25 to be guesses.

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1 Q. Is the manner and method of questioning important in
2 assessing the validity of the information that you get?

3 A. Oh, yes.

4 Q. Why is that?

5 A. Well, the record of the interrogation is paramount. It's
6 the most important thing. So the manner -- the manner of the
7 questioning, excluding the issue of whether or not it's
8 recorded. Human memory does not allow one to remember complex

9 conversations.

10 MR. BEAUNONT: I object. There is no foundation for
11 that. I object. It's not relevant.

12 THE COURT: Overruled.

13 A. If an interrogation is recorded, we know exactly what was
14 said. We know exactly what questions were asked, we know
15 whether answers were suggested or whether or not answers were
16 volunteered. We know everything that happened. Given that,
17 we can go through the post-admission portion of the
18 interrogation and look and see what the person definitely
19 knows, or appears to know. That's the major element that goes
20 into the method of the interrogation. Beyond that, there
21 would be whether questions are asked. Sometimes an
22 interrogator may not ask for details, at which point it
23 becomes more difficult to know what to make of the admission
24 "I did it" if no details are asked.

25 MR. BEAUMONT: Your Honor, I object. H&s called

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1 for speculation.

2 THE COURT: Well, I think you're ranging far away
3 from the question that was asked of you, Doctor. Could you
4 ask another question of the doctor?

5 MR. DeARMOND: Yes, sir.

6 Q. Doctor, I'd like you to assume for a moment that
7 Detective Miller indicated that he met Mr. Hall on November 2,
8 1994, with four other detectives, and that he had not met
9 Mr. Hall before. Assume that the meeting is taking place in a

10 large conference room with Detective Miller seated to
11 Mr. Hall's immediate left, Detective Tim Arnon, the person
12 with whom Mr. Hall has developed a certain level of rapport,
13 seated to his immediate right. Mr. Hall is seated at the end
14 of the table. That there are three other detectives down both
15 sides of the table with Mr. Hall seated, essentially, in the
16 center. In your study of police interrogation techniques, is
17 the positioning of the people, the placement of the
18 individuals, relevant at all?

19 A. Well, I'm not sure about the positioning and the
20 placement. The mere number is extremely relevant.

21 Q. Why is that?

22 A. Because when you have one person and five people in
23 authority all gathered together to examine the person who's on
24 the hot seat, that's an exceptional number of people to be
25 involved in an interrogation of anyone.

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1 Q. Assume then for a moment, that Detective Miller has been
2 introduced by Detective Arnon.

3 THE COURT: Excuse me one minute. Doctor, does your
4 answer assume that all five people ask questions of the
5 defendant? Or suppose it was only one person who asked
6 questions of the defendant, would that make a difference?

7 THE WITNESS: If all five joined in, then it would
8 be five active interrogators. The presence of five police
9 officers, in and of itself, even if only one does the
10 questioning, communicates something about the significance of

11 what's going on.

12 THE COURT: Okay. So you're saying the mere
13 presence of five, regardless of whether or not they all five
14 ask questions?

15 THE WITNESS: Yes, Your Honor, in a typical
16 interrogation.

17 THE COURT: You answered my question.

18 THE WITNESS: I apologize.

19 Q. Let's assume Detective Miller has been introduced by
20 Detective Amones as somebody who's made a great deal of effort
21 to come to talk to Mr. Hall. Assume that he's advised
22 Mr. Hall that it was imperative that he speak -- that he show
23 up at the police station, and that he speak with Detective
24 Miller. Assume that Detective Miller began the interrogation
25 with a rights waiver form, and then specifically told him that

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1 he was investigating an incident in Georgetown, Illinois, on
2 October 22, in which young girls had reported a person
3 matching his description had attempted to pick them up. And
4 assume that Investigator Miller tells Mr. Hall that they have
5 eyewitnesses who have described him, his license plate number,
6 and his description of the van. Is that a particular
7 technique which you are familiar with as a police
8 interrogation technique?

9 A. Yes.

10 Q. Can you describe what that is?

11 MR. BEAUMONT: I object to that.

12 THE COURT: What's your objection?

13 MR. BEAUMONT: I don't know. I think it's -- it's
14 also interview technique. I mean, I don't see --

15 THE COURT: Well, it seems to me that's -- I don't
16 think that calls for expert opinion. Is there something wrong
17 with that technique, seems to me, if you're an expert, that's
18 what was done, so that's what was done. But I guess to assist
19 the jury, do you have -- do you think there's anything
20 significant about that?

21 THE WITNESS: Yes, Your Honor.

22 THE COURT: Even though the police officer may have
23 that information and may truly be investigating that
24 complaint?

25 THE WITNESS: There is nothing wrong with

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1 investigating a complaint, Your Honor. It's a particular way
2 of doing it, that's what makes it significant.

3 THE COURT: So you're saying something
4 wrong -- there's something, in your judgment, wrong about
5 confronting a person who you suspect meets all of those
6 descriptions?

7 THE WITNESS: No, I hope I didn't say that.

8 THE COURT: What are you saying then? What's the
9 significance of it?

10 THE WITNESS: The significance of it is that's
11 opening the interrogation using an accusatory style as opposed
12 to an information-gathering style. You could take the same
13 circumstance and ask someone questions. Here, what the
14 interrogator is doing is communicating to the person right out
15 of the box. Look, this is what we've got against you, A, B,
16 C, D. The object is to produce a particular effect.

17 THE COURT: What would you rather have -- what would
18 you rather have the investigator do in a circumstance where he
19 has all the information which counsel put to you --

20 THE WITNESS: I think the most --

21 THE COURT: -- that would not be objectionable in
22 your mind?

23 THE WITNESS: Well, what I'm describing is not
24 objectionable in my mind. It's simply a way of doing it.

25 THE COURT: Well, I thought you said it's

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1 significant. What's significant about it?

2 THE WITNESS: It's significant because it is
3 describing a particular tactic of interrogation. Significant
4 doesn't mean objectionable. It's just a way of doing it.

5 THE COURT: So I take it you're saying you have no
6 problem with that as an expert?

7 THE WITNESS: No. It's a commonly done technique
8 which can, together with other techniques, ultimately produce

9 a true or a false confession.

10 THE COURT: I'm not talking about other techniques.
11 I'm just asking, do you have anything -- what's your expert
12 opinion about that set of circumstances that counsel put to
13 you in his question?

14 THE WITNESS: That's a technique for moving the
15 person to the point at which they may say "I did it." It is a
16 technique that's used frequently.

17 THE COURT: Do you find anything objectionable about
18 the use of that technique --

19 THE WITNESS: No.

20 THE COURT: -- as an expert?

21 THE WITNESS: No.

22 THE COURT: So there's nothing significant about it
23 other than it was used?

24 THE WITNESS: It's significant in that many things
25 might have been done. It is a technique that is taught. It

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1 is one way of approaching the interrogation. It is shifting,
2 for example. It is that would be called doing an
3 accusatory interrogation.

4 THE COURT: So I'm asking you what, in your expert
5 opinion, should have been a more appropriate way to start that
6 interview with that information?

7 THE WITNESS: I don't know that there is a more
8 appropriate way. There are different ways of doing it.

9 THE COURT: Okay.

10 MR. DeAPMOND: Your Honor, could we approach?

11 THE COURT: No. Let's -- you can -- at the next
12 break you can approach me.

13 MR. DeARMOND: All right.

14 BY MR. DeAPJAOND:

15 Q. Doctor, what we're talking about here with regard to
16 recognized forms of police interrogation techniques, are
17 you -- what are you saying as to whether they are necessarily
18 in and of themselves improper?

19 A. What I'm saying is that there are many proper
20 interrogation techniques. Sometimes those proper
21 interrogation techniques, without doing anything improper, can
22 lead to an unreliable false confession. The -- how you
23 produce a true confession and how a false confession is
24 produced are very similar. And while it may be that, and it
25 is, that a false confession is more likely if certain improper

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1 techniques are introduced. Interrogation is this whole system
2 of manipulating people, can sometimes result in an unreliable
3 false statement and other times result in a reliable true
4 statement out of the use of very similar techniques.

5 Q. Now, what's the purpose of confronting the individual
6 right out of the box with this body of information that
7 specifically identifies the place, the nature of the offense,

8 and the information that they have that identifies this person
9 as the suspect?

10 MR. BEAUMONT: I object. Calls for speculation on
11 what that purpose may be.

12 THE COURT: Overruled. He's an expert. He may give
13 an opinion if he has one.

14 A. The object in doing that is to try to convince the person
15 that there is overwhelming evidence proving that they
16 committed the crime from the very beginning. The key to the
17 first major step in the interrogation is getting someone to
18 believe that they're caught, and laying out for them all the
19 evidence that the police actually have, or all the evidence
20 that the police have, plus anything else they care to
21 introduce is all designed to convince someone, we've got
22 enough to arrest you, convict you, and so on, whether you say
23 anything or not.

24 Q. Assume, then, that after receiving some form of denial by
25 Mr. Hall, either that he's never been there or that he didn't

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1 know where Georgetown was, that Investigator Miller then again
2 confronts him with the fact that he's been identified, they
3 have his plate number, they have a van description. What
4 interrogative purpose is there to doing that in that sequence?

5 A. It's re-enforcing the fact that we, the police, are
6 claiming that we have so much evidence putting you in this
7 place on this day that nothing you say is going to convince us
8 that you weren't there.

9 Q. Within the study of police interrogation techniques,
10 what's the intended result of that?

11 A. The intended result is to convince the person that their
12 situation is hopeless. That there is more than enough
13 evidence to convict them, whether they say anything or not.
14 To make them realize that no matter how much they object, that
15 the future holds arrest, trial, and conviction.

16 Q. Assume now that Investigator Miller then offers an
17 innocent explanation for Mr. Hall's van having appeared at the
18 location that he's described.

19 THE COURT: Did you misstate that, sir?

20 MR. DeAP.NOND: I'm sorry.

21 THE COURT: Did you mean to say Mr. Miller?

22 Q. Investigator Miller offers an innocent explanation,
23 alternative. And, again, I want to make sure we're clear.
24 This is November 2 we're talking about. Assume then that
25 Investigator Miller then offers to the defendant an innocent

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1 explanation alternative for why his van might have appeared in
2 Georgetown and been identified, such as, is it possible that
3 someone could have borrowed your van? Is that particular
4 method something that you find in this continuum of
5 interrogation process that you've been describing?

6 A. Yes.

7 Q. What's significant about that?

8 A. The significance is, after massing all the evidence
9 saying that you were there, offering a way out is an attempt

10 to trap the person into grabbing at that way out so that they
11 can subsequently be confronted with the fact that they tried
12 to grab at this door that has just been opened.

13 MR. BEAUMONT: I object to that. There's no
14 foundation for that. It's speculation. It's speculation.

15 THE COURT: Overruled. The jury has heard the
16 evidence with reference to what took place at this interview
17 session on November 2. And the jury will form its own
18 judgments and conclusions about the interview. They are not
19 required to accept this witness' opinion. But, as an expert,
20 he may offer it for what it's worth to the jury. Overruled.
21 He may continue.

22 Q. Is this offering of the innocent alternative within this
23 sequence a fairly commonly recognized police interrogation
24 technique?

25 A. Yes.

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1 Q. And as you were explaining, what's the purpose in giving
2 that offer at that point in time?

3 A. To allow the person to make a mistake so that they can
4 then be confronted with that in the very near future, and say,
5 and here's another reason why we know you did it, because you
6 tried to lie about this as well.

7 Q. So when the innocent explanation is offered, what's the
8 -- within the confines of the police interrogations, what's
9 the intended purpose of the interrogator when the explanation
10 is offered?

11 A. To elicit more information that can be used to convince
12 the person that they're caught, to trap them.

13 Q. How does that happen?

14 A. If the person grabs for it, because they know they were
15 there, and they're trying to find a way out, and then they
16 make this mistake, then it gives the interrogator an
17 opportunity to turn around and say, who was it? Tell me his
18 name. They can even say, I'll send officer so-and-so to call
19 and contact that person and find out if it's true. The minute
20 the person grabs at that, they can now be tested on that. And
21 if it turns out that they made up a name, then that becomes
22 powerful damning evidence that you're lying to us, you must
23 know you did this.

24 THE COURT: Doctor, up to this point, in your expert
25 opinion, is there something wrong with what's been done?

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1 THE WITNESS: No.

2 THE COURT: Okay.

3 Q. Let's assume now that Mr. Hall then indicates that, no,
4 he hadn't loaned his van to anyone, and assume that
5 Investigator Miller then asks him a series of questions
6 whether he had traveled a lot, whether he might have traveled
7 a lot driving his van, and if so, where did he travel. What's
8 the purpose in asking this series of questions at this point
9 in the interrogation?

10 A. That would be to get the person to acknowledge that they

11 had some awareness, some knowledge, of the place at issue, in
12 this case Georgetown. To be able to get the person to make
13 the admission, yes, I've been to Georgetown, even if they're
14 not willing to admit that they were there on that particular
15 day.

16 Q. Within the interrogative process, what's important about
17 trying to get the person to, at least, admit some portion of
18 the accusation that's been made?

19 A. Well, again, it's placing themselves there, rather than
20 saying no, I've never been there. So anything that moves the
21 person closer to the crime is a step desirable from the
22 interrogator's point of view.

23 Q. Assume then Investigator Miller shows Mr. Hall a map of
24 the area and points out the location he's referring to, and
25 assume --

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1 THE COURT: Location who's referring to?
2 Q. I'm sorry, Investigator Miller was referring to. Points
3 out an area that he describes as being the area of Georgetown.
4 Assume then that Investigator Miller asks Mr. Hall whether he
5 might have been in that area in the early evening hours of
6 October 22, 1994, and Mr. Hall's response, that he wasn't
7 sure, but that he has traveled in that area for other events,
8 such as going to a Turkey Run Park and going to some sort of
9 covered bridge festival. If there's an acknowledgment at that

10 point that he might be familiar with that area, what is its
11 significance in relation to an admission of having been there?
12 A. Well, he's acknowledging that -- the person saying that
13 would be acknowledging that they have some familiarity with
14 the area, and it's possible. But what the statement would
15 mean is, I presumably had no specific recollection of having
16 been there. Put now we're talking about possibilities. And
17 once things go to possibilities, now, it's easy to agree to
18 possibilities, if you don't remember, because anything is
19 possible. I mean, I could have been there on that day, as far
20 as I know. I don't know where I was on that day.

21 MR. BEAUMONT: I object.

22 THE COURT: Sustained. Jury disregard that last
23 statement by the witness.

24 Q. What's the purpose in the interrogative process of
25 getting the suspect to begin buying into the idea of

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1 possibilities?

2 A. It's, at least, keeping the door open. It's not a
3 rejection; no, I've never been in that place. But I could
4 have been, you know, as opposed to saying, I could have been
5 there. The door is a little bit more open than simply being
6 told, no, I've never been there. And it's the interrogator's
7 job to move the person to admit that they were at the scene on
8 that particular day, and that's ultimately what they are
9 trying to accomplish.

10 Q. Assume Investigator Miller then asks specifically about
11 being -- asks Mr. Hall specifically about whether he might
12 have been in a small town in Illinois and stopped to talk to
13 some girls. Assume that Mr. Hall indicates then that he might
14 have been, or that he could have been in a small town which
15 could have been in Illinois, and he remembers stopping and
16 talking to girls.

17 What, if any, significance is there to the fact
18 that all of this information, which Mr. Hall has then related
19 back to Mr. Miller, came initially from Mr. Miller's
20 questions?

21 A. Well, he's agreeing with the initial assertions made by
22 Miller about the evidence that puts him in that place, so he's
23 doing it by giving grounds, step by step by step. He's
24 complying.

25 Q. I'm sorry?

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1 A. He's complying.

2 THE COURT: He also may be telling the truth; is
3 that correct?

4 THE WITNESS: He may very well be telling the truth.
5 He may be complying because he knows it's true, or he may be
6 complying because of the structure of the interrogation.

7 THE COURT: Okay.

8 Q. At that point, is there any way to assess the truth or

9 falsity of what he said if the information originally came
10 from the investigator?

11 A. No, not that I know of, unless there's independent
12 evidence showing that he, in fact, was there.

13 THE COURT: Doctor, when he first put the
14 hypothetical to you, I thought he said he started out with
15 information he got whereby witnesses said they identified the
16 defendant, had the license number of his car. Would that be
17 the type of independent evidence you're talking about?

18 THE WITNESS: Yes.

19 THE COURT: So there is something there?

20 THE WITNESS: If those things are true, then that
21 places the van and --

22 THE COURT: Aren't you assuming the truth of them?

23 THE WITNESS: I was only assuming that those
24 statements were made. If the statements are true, then that's
25 independent evidence. If the statements are not true, they're

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1 still made, and I've only been dealing with who said what in
2 the course of this exchange so far. I think that's all I was
3 asked about.

4 MR. DeARMOND: Yes.

5 Q. You're familiar with the use of untrue information,
6 right --

7 A. Certainly.

8 Q. -- as part of the interrogation process?

9 A. Certainly.

10 THE COURT: What was that question, sir?

11 BY MR. DeARMOND:

12 Q. That he's familiar with the use of untrue information in
13 the interrogative process, confronting suspects with
14 information?

15 THE COURT: Yes. But I thought you said to him, at
16 the start of this, that Mr. Miller confronted him with
17 information that he had that the defendant had been
18 identified, his license number. Didnt you say that?

19 MR. DeARMOND: And so that the record is clear, we
20 are not saying that those things weren't true. That was all
21 true information at the time he asked it. But in my question,
22 I'm simply asking him the relevance of that as an
23 interrogative technique, confronting someone with that kind of
24 information. Whether it's true or not --

25 THE COURT: Apparently, the doctor was under the

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1 impression it wasn't true, or he didn't know.

2 THE WITNESS: No, Your Honor. I was just trying to
3 answer the question as I was asked, independent of whether
4 it's true or not. If I'm asked, if these things are true,
5 what does it mean, I would try to explain that. And if I were
6 asked, if these were made up, what does it mean, I would try
7 to explain that.

8 Q. In analyzing the interrogation, what sorts of things do
9 you look for with regard to the content of questions and the
10 content of answers?

11 A. Well, the less information given by the interrogator, the
12 better, although the interrogator is going to have to give a
13 certain amount of information in order to drive the
14 realization to the person that there's overwhelming evidence.
15 So the interrogator's going to contribute information that's
16 going to convince the person, you're caught. Now that,
17 ideally, is less desirable than simply asking the person, were
18 you there? Put that has to happen. The key thing at this
19 point is, we have not yet gotten to the part at which the
20 crime is being described. We're only talking about motivating
21 the person to say, okay, I was there.

22 Q. And is that an atypical interrogation technique?

23 A. No, this is -- the principal interrogation technique is
24 do anything to convince the person that the police already
25 have more than enough evidence to arrest them.

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1 Q. Assuming Investigator Miller then asks Mr. Hall about
2 whether he can describe the area, and Mr. Hall testifies about
3 facts which clearly indicate he has knowledge of Georgetown,
4 such as a stoplight, a restaurant in the immediate vicinity,
5 and assume as part of the interrogation he has already
6 indicated to Mr. Miller, he meaning Mr. Hall, has already
7 indicated to Mr. Miller that he may have been familiar with
8 the area as a result of having been there for other reasons.
9 Can you then attach any significance to the fact that he can
10 describe some aspect of the area?

11 A. No, not on that alone.

12 Q. Why not?

13 A. Because he said he's been there at other times, so we're
14 still talking about whether he was there on that particular
15 night. Ultimately, that goes back to the quality of the
16 initial information that makes him a suspect for having been
17 there on that particular night. If that information is good
18 quality, that is to say it's true and stand-up information,
19 then the interrogator knows that he was there. And so any
20 holding back on that is going to make the interrogator more
21 sure that the person is someone who's worthy of suspicion.

22 Q. Mr. Hall is then unable to recall any other landmarks,
23 he's not asked to describe the girls, their clothes, their
24 ages, their hair, the number of girls, he's unable to give any
25 locations of where these things may have occurred, or any

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1 particular about what happened in the interaction, or what he
2 was doing when he stopped in the vicinity of the girls and
3 talked with them. What, if any, significance is there in
4 that, in terms of the interrogation itself at this point?

5 MR. BEAUMONT: Your Honor, I object on the
6 interrogation that he's unable to give these things. There' s
7 no evidence of the fact he's unable to give these things.

8 THE COURT: Sustained.

9 MR. DeARMOND: I'm sorry. I will withdraw the
10 question and rephrase it.

11 Q. If he either responds that he cannot or fails to give

12 that information, or is not asked by the interrogator, what is
13 the significance of that?

14 A. The significance is that less has been learned about what
15 he actually knows as to his place and what happened on that
16 particular day. You can draw no inferences from the fact that
17 there's no information.

18 Q. What sorts of information would you expect to be sought
19 by the interrogator under the circumstances that we' ye
20 described previously, assuming that the suspect appears to be
21 cooperative, in order to assess the reliability or
22 unreliability of his answers?

23 A. Detailed information that it would be reasonable to
24 believe the perpetrator would possess. The more details, the
25 more the person gives that accurately describe the

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1 circumstance, or that contribute information currently unknown
2 to the police that can be verified, the more the person is
3 demonstrating actual knowledge of the crime.

4 The less able they are to do that, the less
5 valuable the "I did it" statement is. In other words, absent
6 corroboration, absent giving information that shows that you
7 have actual knowledge, it remains a question as to whether the
8 "I did it" statement is a true statement or is just a
9 compliance response.

10 MR. DeARMOND: Your Honor, I don't know what time

11 you wanted to take the afternoon break.

12 THE COURT: This is a good time.

13 (The jury leaves the courtroom.)

14 THE COURT: Mr. DeArmond, you said you wanted to
15 talk to the Court, and I deferred that until we took a break.

16 MR. DeARMOND: Thank you, Your Honor. I was getting
17 the perception from the Court's questions of Dr. Ofshe that
18 maybe I've not explained clearly what we are suggesting. It
19 is not the suggestion of the defense that any and all
20 interrogation techniques that may be used on a suspect must be
21 illegal or improper in order to lead to a false confession,
22 and that coercion comes in many forms and many degrees. The
23 questions I had begun asking Dr. Ofshe were not intended to
24 create the appearance that those techniques that were being
25 used were necessarily improper, but that they are, in fact,

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1 simply recognized and accepted police interrogation
2 techniques. It's only when all of these procedures are
3 brought together, combined with what sorts of things one
4 should look at in the post-admission narrative, and not
5 necessarily in this case in particular, but in general, that
6 you can then assess the effect of those interrogation
7 techniques on the individual being interrogated.

8 We' re not contending necessarily, nor I think
9 is it necessary for Dr. Ofshe' s opinion to be that the only
10 forms of police interrogation techniques that could lead to
11 false confessions have to be illegal or improper. And I got

12 the impression from the Court's questions, what's improper

13 about that? We weren' t assuming that there was any
14 impropriety at this point.

15 THE COURT: But, frankly, Counsel, I feel
16 blind-sided because I thought that Dr. Ofshe was saying that
17 there is a phenomenon known as false confessions. These
18 confessions are most likely to occur when we have the police
19 using certain interrogation techniques. And in my judgment,
20 certain interrogation techniques were used with Mr. Hall that,
21 more than likely, could lead to a false confession. And I
22 expected, based on prior testimony at the Daubert hearing, and
23 that this is what -- and also in light of what the Seventh
24 Circuit said in this mandate, I thought this is what he was
25 going to testify to. I feel blind-sided because we've gotten

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1 not into his testifying to certain techniques which, in his
2 judgment, are most likely to produce false confessions, but we
3 have him, through your direct examination, critiquing the
4 interview session without making any distinction for the jury
5 as to which of these techniques are consistent with the
6 phenomenon known as false confessions, which he's an expert
7 on. And it seems to me that this is not what the Seventh
8 Circuit had in mind. And, somehow, I feel that I have been
9 deficient in letting in something which was never intended by
10 the Seventh Circuit, nor by this Court.

11 So that explains -- so I guess your re right.
12 am on a different wavelength than you. That prompted me to

13 ask, what's wrong with that technique, because I thought he
14 was testifying about techniques which are associated with
15 false confessions. And that's not what he said in response to
16 my questions. And I think the jury is getting confused by all
17 this.

18 MR. DeARNOND: The only way to explain the phenomena
19 is to go through the entire interrogative process and then
20 explain what aspects of that interrogative process are found
21 most frequently to lead to false confessions. In this case,
22 it involves the combination of the November 2 and then the
23 November 15.

24 THE COURT: Well, I don't have any problem with
25 that, Counsel, if you put a hypothetical to him which included

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1 all of the information that you are putting to him, and then
2 you ask him to give a judgment on -- upon whether or not that
3 interrogation, which included both the November 2 and November
4 15 incidents, were in any way coercive and suggestive of false
5 confession. I don't think I would have any problem, but
6 that's not what you're doing. You're asking him discreet
7 critique of everything that took place. And it seems to me
8 that that creates a different impression to the jury than if
9 you put to him a hypothetical that included all of that
10 information, and then asked him, all right, assume this
11 hypothetical tells you what the interrogation was like, what
12 is it about that interrogation that you consider to be
13 conducive of a false confession. To me, that's helpful to the

14 jury, and that doesn't confuse them because they've heard all
15 of the facts. They hear him saying, given all of these
16 because of this, that, and this, it seems to me this is
17 consistent with a false confession, but that's not what's
18 happening here. So --

19 MR. DeARPIOND: I'll be glad to --

20 THE COURT: I take the blame for that. But it seems
21 to me we've gotten off on something that was never intended by
22 the Seventh Circuit, nor by this Court, and perhaps that's
23 just credit to your skills as a trial lawyer, but that
24 reflects my dismay.

25 MR. DeARMOND: Well, Your Honor, I apologize. That

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1 was not the intention at all. I thought that what we were
2 supposed to be doing was taking him through the interrogation
3 process and having him explain the significance of various
4 aspects of the process.

5 THE COURT: That's never been said. That's never
6 been mentioned before, take him through. I mean, I've always
7 thought that his point was that there is this phenomenon known
8 as false confessions. That it's associated with certain
9 coercive interrogation techniques. Some of those techniques
10 was used in Mr. Hall's case. Therefore, in my opinion,
11 there's a possibility of false confession. And, you know,
12 perhaps the jury doesn't see this as I see it, but on behalf
13 of the jury, it seems to me that it's a little confusing

14 because I don't hear any mention of coercive interrogation
15 techniques. I simply hear some critique of everything that's
16 been done that he's being asked. Well, what's the
17 significance of that? Well, what does that mean? Are you
18 asking him to tell you whether or not that's appropriate or
19 inappropriate? Well, he wasn't asked that question except by
20 me. But it seems to me before I asked that question, there
21 was no way for this jury to know whether or not this expert
22 was not saying that this is inappropriate. So, you know, I
23 don't know what to do about it. But I was just responding to
24 your perception that I was not on the same page with you, and
25 that explains why.

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1 MR. DeARMOND: Perhaps it comes from our -- perhaps
2 we have different definitions of coercive. My understanding
3 of coercive, excluding not only illegal things or necessarily
4 inappropriate, from the standpoint of the law inappropriate,
5 but excluding things which are inherently persuasive or
6 coercive of an individual from a socio -- from a social
7 psychological standpoint, from a psychological standpoint. I
8 think what we've got from our basic definition of
9 interrogations was interrogations inherently coercive. That's
10 the whole purpose of the interrogation process is to get a
11 person from point A to point B with some questioning. I think
12 perhaps the reason why I've not, apparently, been very good at
13 getting the information across to the Court is from the
14 standpoint of coercive interrogation techniques and false

15 confessions, they're not limited to those things which are
16 necessarily illegal or inappropriate from a legal standpoint.
17 That's one of the whole points is people -- police officers
18 can be perfectly well-intentioned, have no evil motive
19 whatsoever, and still obtain a false confession. It's not,
20 then, trying to do things of an evil nature to get a person to
21 say something false. It's the fact that they don't
22 appreciate, sometimes with certain individuals, the effect
23 that their inherently coercive interrogation process has and
24 how it is capable to result in that false confession without
25 ever intending to do anything wrong or improper. And

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1 that's --

2 THE COURT: Well, I understand that, Counsel, and I
3 can't give a better example than I gave of a situation where
4 had you put a hypothetical to the expert that included all the
5 information that you want to include as to what took place in
6 the November 2 and November 15 interrogations and then you
7 asked him, "Is there anything about that either continuous or
8 separate interrogations that you believe coerced the defendant
9 into falsely confessing," or I shouldn't say that, "that was
10 consistent with a false confession," I don't think I would
11 have the problem I have now.

12 MR. DeARMOND: All right.

13 THE COURT: But the problem I have now is that this

14 critiquing of each of this sort of seriatim type question and
15 answer without any explanation seems to me isn't helpful to
16 the jury and may be confusing to them, and it's confusing to
17 me, so that's why I'm verbalizing it.

18 MR. DeARNOND: I appreciate that. I think we're
19 going to the same destination. We were just going about it in
20 a different route. I thought that a hypothetical with all
21 that information would be so unwieldy that no one would
22 remember all of that information by the time I got to the end
23 of the hypothetical when I started at the beginning. So
24 that's why I've tried to break it up, and then have him
25 explain that this is a portion of an actual interrogation

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1 technique, this is a portion of an interrogation technique.
2 My end result, then, was to then ask him, "Okay. Now in light
3 of all of that information, what about that process do you see
4 to be of a coercive interrogation nature," and then get to
5 your ultimate question.

6 THE COURT: Well, that's a little better except
7 you're having him individually critique those various segments
8 now, so why do you need anything at the end? While I see it
9 the end result would be more explanatory and clear to the jury
10 than to do as you're doing now.

11 MR. DeARMOND: All right.

12 THE COURT: So that explains my perplexity. As I
13 say, I don't know what to do about it because I've sort of let

14 this go on. I don't know what to do about it now. But that's
15 what you detected that prompted me to ask the question I
16 asked.

17 MR. DeARMOND: If, perhaps, we could have a couple
18 of extra minutes, I will try to just do exactly what the Court
19 has asked and formulate the rest of my question into one or
20 two larger hypotheticals.

21 THE COURT: Well, you know, I would appreciate if
22 you would Consider it, and, of course, the decision you make
23 is up to you. But I would appreciate it because it seems to
24 me that may be more helpful to the jury.

25 MR. DeARMOND: Yes, sir.

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1 THE COURT: All right. We'll take about ten
2 minutes.

3 MR. DeAP~iMOND: Thank you.

4 (A recess was taken from 3:18 P.M. until 3:33 P.M.)

5 (OPEN COURT; JURY PRESENT)

6 THE COURT: Mr. DeArmond.

7 MR. DeARNOND: Your Honor, before I forget it, I
8 move to admit Defendant's Exhibit No. 13, Dr. Ofshe's CV.

9 THE COURT: Be admitted

10 (Defendant's Exhibit 13 admitted into evidence.)

11 BY MR. DeARMOND:

12 Q. Doctor, now taking into consideration all of the
13 assumptions that we have engaged in up to this point, I'd like

14 you to assume that during the November 2 interrogation,
15 Investigator Miller raises his voice when he is questioning
16 Mr. Hall, he becomes visibly upset with answers that are
17 given, he is described as having acted sharply, bluntly,
18 to-the-point, that he engaged in several instances of getting
19 close to Mr. Hall, invading his space in what was perceived by
20 another interrogator to be a typical interrogation process.
21 That he confronted Mr. Hall repeatedly with various
22 inconsistencies in what he was saying, became visibly angry.
23 Assume, then, also that on November 2 after he,
24 he being Investigator Miller, questions Mr. Hall about being
25 in Georgetown, he asks him if he can remember anything more

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1 about the incident, and Investigator Miller relates that
2 Mr. Hall could not be anymore specific.
3 Assume, also, that Mr. Miller then shows
4 Mr. Hall a photograph and records in his report that Mr. Hall
5 engaged in some sort of movement that he considered to be
6 significant, but that he was not questioned about the
7 photograph, nor did he seek to place any other photographs in
8 front of Mr. Hall to see what sort of reaction he may receive.
9 Assume that you have seen now the entire
10 process that occurred on November 2, 1994. Based upon that
11 information coupled with your experience, education, and
12 training, do you have an opinion with regard to the existence
13 of any coercive police interrogation techniques in that
14 process as itts been related to you in this hypothetical?

15 A. Well, in the hypothetical you are describing techniques
16 of pressure and techniques designed to convince someone that
17 they're caught. And those -- those are techniques of pressure
18 designed to get the person to accept the idea that they're
19 caught.

20 Q. Now, let's assume that the individual, Mr. Hall, does not
21 make any other admissions at that point in time with regard to
22 the Georgetown incident, nor does he provide any other factual
23 information with regard to Jessica Roach after having been
24 confronted with her picture. All right.

25 Now, I want you to assume that we move to

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1 November 15. And assume that Mr. Hall is advised prior to the
2 15th of November that the mental health treatment that he's
3 been receiving is being terminated. That he appears upset and
4 disturbed about that fact. That he has an appointment with
5 the psychiatrist set for November 16, when he is then asked to
6 come and speak to Investigator Miller. He's advised that
7 Mr. Miller is back to talk to him on the 15th in the company
8 of an FBI agent. I'd like you to assume also that in the
9 initial interview process it becomes obvious to Mr. Hall that
10 he is being interrogated about the kidnapping and murder of
11 Jessica Roach.

12 Assume that the questioning this time takes
13 place in a much smaller room, and that after an initial Advice
14 of Rights and an initial meeting with Investigator Miller

15 again, and this time a FBI Agent Randolph, who is
16 approximately Mr. Hall's height and rather small. Assume,
17 then, that Mr. Randolph engages in two hours of what he
18 describes as trying to get to know Larry Hall. And that he
19 acknowledges trying to pretend to be Larry Hall's friend,
20 trying to get Mr. Hall to think that he is his friend by
21 asking him a series of questions starting with very innocuous,
22 non-threatening, non-accusatory questions with regard to his
23 family, his habits, his hobbies, and then moving on to
24 questions concerning his emotional, his personal problems,
25 emotional problems, mental problems, to a point where

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1 Investigator Randolph reports that Mr. Hall and he have gone
2 from some distance apart in separate chairs to leaning toward
3 each other, stooping, still being some distance apart but now
4 speaking very openly, good eye contact, as opposed to
5 initially not having any significant eye contact. And assume
6 that Mr. Randolph makes a conscious decision that he -- which
7 he describes as having Mr. Hall exactly where he wanted him at
8 this point of believing that Randolph was his friend and was,
9 in fact, interested in him, to produce a photograph of Jessica
10 Roach and tell Mr. Hall, "Larry, I'm here to talk to you about
11 the murder of Jessica Roach."

12 Assume, then, that Mr. Hall is then reported to
13 have put his head down and reported to have appeared to at
14 least shed a tear. Assume then that Agent Randolph says that
15 he spent the next 20 to 30 minutes talking to Mr. Hall about

16 the Jessica Roach case. Assume that Agent Randolph represents
17 that he has very little specific knowledge of the Jessica
18 Roach case. Assume that at the end of that 20 to 30 minutes
19 Agent Randolph exits the room to indicate that Mr. Hall has
20 made admissions concerning the Jessica Roach case and is
21 willing to give a signed statement. Assume then -- may I
22 approach, Your Honor?

23 THE COURT: You may.

24 Q. Assume then that Mr. Hall produces a signed statement, a
25 copy of which Government Exhibit 45. I'll tender you a typed

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1 copy. Assume that the -- that that statement is taken in the
2 following manner. Agent Randolph exits the room where he has
3 been in privately with Mr. Hall now for two to two and a half
4 hours, tells Agent Miller -- tells Investigator Miller that
5 Mr. Hall has indicated he would be willing to give a signed
6 statement, and that he would like Investigator Miller present
7 to witness the statement. Assume, then, that the format for
6 the statement is that Agent Randolph proceeds to write out in
9 his hand the statement formulating a sentence and asking
10 Mr. Hall to acknowledge whether the sentence is correct or not
11 as something that had been said previously during their
12 private conference. Assume that the questioning at that
13 point -- I'm sorry, assume that the completion of that
14 statement is entirely by Agent Randolph. That Investigator

15 Miller makes no additions to or provides no information with
16 the statement. Assume that at the completion of the statement
17 Agent Randolph then asks Investigator Miller to read the
16 statement to Mr. Hall and then exits the room. Assume that
19 Mr. Miller then reads the statement to Mr. Hall, and upon
20 completion of reading the statement Agent Randolph re-enters
21 the room. Assume that this process, being a process of
22 completing the statement and reading it, takes approximately
23 40 minutes to another hour.

24 Assume then at the completion of that process
25 Agent Miller and Agent -- Investigator Randolph -- Agent

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1 Randolph and Investigator Miller indicate that Mr. Hall signs
2 the statement in their presence, and they also sign the
3 statement. Assume that at the completion of that signing
4 agent -- Investigator Miller then asks Mr.. Hall if he would be
5 willing to answer some additional questions.

6 Assume Investigator Miller represents to
7 Mr. Hall -- strike that. Assume that Investigator Miller
3 Indicates his reason for wanting to ask additional questions
9 is to get more specific information. Assume that for the next
10 hour, approximately, he then asks Mr. Hall some questions,
11 although he represents that Mr. -- that he asks very few
12 questions and that he just wanted what information Mr. Hall
13 was willing to give him.

14 I need to back up a moment. Assume during the

15 interrogation by Agent Randolph that Mr. Hall privately,
16 between Randolph and Hall, that Mr. Hall had made several
17 references to needing and wanting psychiatric help. And
18 assume that while in that process of befriending Mr. Hall,
19 Mr. Randolph, the FBI agent, tells him that he will help him
20 get the best treatment possible. Assume also that he is well
21 aware at that point that he is being interrogated by an FBI
22 agent regarding the kidnapping/murder of Jessica Roach.

23 Assume that during the completion of the
24 subsequent statement with Investigator Miller, Mr. Hall either
25 refuses to -- can't be sure, can't be specific, is unable to

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1 give details, or fails to give details to questions that asks
2 for where he may have spent the night the night before the
3 abduction, to questions concerning what he may have done the
4 day of the kidnapping with any specificity. That he could not
5 remember what he may have done after grabbing the girl from
6 the bike. That he could not tell how he -- he could not or
7 would not tell how he supposedly subdued the girl, could not
8 tell how he got her into the van, could not tell --

9 MR. BEAUMONT: Judge, I object. It is did not tell.
10 I don't know of this characterization of could not tell.

11 THE COURT: All right. The Court would state that
12 the jury will decide what the facts are. They have heard the
13 evidence from the witnesses with reference to these witnesses'

14 testimony as to the interrogation on the November 2 and
15 November 15. And, obviously, anything that counsel states
16 which is not consistent with the evidence, as the jury finds
17 it, should be disregarded. At this point Counsel is putting
18 the hypothetical to the jury. He may continue. The jury will
19 decide whether or not his recitation of the facts are
20 consistent with the evidence. And when you get up for
21 cross-examination, you can put your statement of the facts to
22 the witness, as you understand them to be. But, ultimately,
23 the jury hears the facts, and they will determine.

24 BY MR. DeARMOND:

25 Q. Assume that Mr. Hall either was unable to tell, couldn't

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1 tell, or wasn't asked to describe how he got the girl into the
2 van, what direction he went, how long he may have driven, what
3 kind of sex he might have engaged in with the girl, was not
4 asked to describe her clothing, her height, her weight, her
5 eye color. Couldn't say what he may have tied her up with.
6 Assume that he either did not, would not, or was never asked
7 to give an accurate physical description of Jessica Roach.
8 Assume that Agent Randolph acknowledged that at the end of the
9 interrogation, Mr. Hall told him that if he could be more
10 specific, he meaning Agent Randolph, could be more specific,
11 he might be able to provide more details.

12 THE COURT: Excuse me. I thought we were talking

13 about Investigator Miller's session with the defendant now.
14 Are you skipping back now?
15 Q. We were in -- Agent Randolph, however, indicates at the
16 very end of the whole process that Mr. Hall told him that if
17 he could give him more specific facts, he might be able to
18 provide him with more details. That was represented by Agent
19 Randolph, not Investigator Miller, who was present during that
20 entire subsequent questioning process.

21 Assume also that Agent Randolph indicates that
22 during the writing of the statement he had to refresh Larry
23 Hall's recollection several times about things that he had
24 said moments earlier in the private conference?

25 THE COURT: You are mixing up the two, correct? I

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1 thought you were talking about Investigator Miller's session
2 with the defendant after the statement had been read and
3 signed.

4 MR. DeAPJAOND: I was. I'm asking, however -- I'm
5 also plugging into the equation that during Agent Randolph's
6 private conference -- I'm sorry, during the writing of the
7 statement, Agent Randolph mentions having to refresh
8 Mr. Hall's recollection.

9 THE COURT: But that was before.

10 MR. DeAPflOND: And that's before the subsequent
11 conference.

12 THE COURT: I just want to make sure. Okay.

13 MR. DeARNOND: This occurs prior to this subsequent
14 conference between Investigator Miller and Mr. Hall.

15 THE COURT: All right.

16 Q. Assume, also, that although it is recorded by Agent
17 Randolph that in that subsequent conversation Mr. Hall
18 reportedly revisited the site, he was not able to take the
19 investigators to the location or would not take the
20 investigators to the location. Assume that he refers to the
21 abduction site as having been at least a mile from any house
22 when Agent -- when Investigator Miller acknowledges that there
23 are at least two houses within a quarter mile, one residence
24 within two hundred yards.

25 Assume that he describes the victim's hands as

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1 having been tied, but he is unable to say what they're tied
2 with. And assume further that there is no evidence that the
3 hands were ever tied.

4 Assume that he either would not, could not
5 answer, or was never asked to describe the bike, the road, the
6 location, his van.

7 MR. BEAUMONT: I object. That's clearly not -- it's
8 clearly not the facts in this case. He did describe the bike.

9 THE COURT: Here again, JAr. Beaumont, you may be
10 correct. Mr. DeArmond may be misstating the facts. But I
11 will leave it to the jury to decide whether or not he is

12 because they have heard the evidence. They know what was
13 testified to. And to the extent the hypothetical is based
14 upon unsound information, obviously, the jury will take that
15 into consideration in deciding what weight to give to the
16 expert's opinion.

17 MR. DeARMOND: And I'm talking about November 15.
18 think further on -- the hypothetical will show on November 17
19 is when he supposedly gives a description of the bicycle as
20 being a ten-speed bike with straight handlebars, or I'm sorry,
21 curved handlebars.

22 Assume that he either refuses to, cannot, or is
23 unable to describe how he grabbed the girl, how he approached
24 and left the scene, where in the field he dumped the body,
25 when it was that he had supposedly killed her, where

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1 specifically he had done it, where or how he kept this starter
2 fluid in his van, how he used it on the victim. Assume then
3 after the completion of that statement, that conversation with
4 Investigator Miller and Agent Randolph, other than the written
5 statement, neither the two hours with Investigator Randolph or
6 the subsequent hour, hour and a half with Investigator Miller
7 are written, recorded, or otherwise documented, other than the
8 notes of the agents.

9 Assume, then, that on November 17 Mr. Hall
10 again speaks with Agent Miller at Agent Ran -- at Mr. Hall's

11 request seeking to provide him additional information which
12 information is not accurate to information known. The girls
13 wearing a blue coat, that the girl was wearing glasses, that
14 the bicycle was a ten-speed bike with curved handlebars.

15 Now, Doctor, I want you to take all of that
16 information as a hypothetical, and can you explain or describe
17 the relationship between what happened November 2 and what
18 happened November 15 in terms of coercive police interrogation
19 techniques, first, in general?

20 A. Yes.

21 Q. Would you do that, please?

22 A. Part of the hypothetical describes what I'll call a
23 run-of-the-mill interrogation. And establishing a
24 run-of-the-mill interrogation is necessary in order to then
25 explain how an interrogation can become coercive. So in a

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1 run-of-the-mill interrogation which may then turn coercive,
2 the object is to convince the person that the police have the
3 evidence to arrest and convict. Letting someone know that a
4 crime of great significance is being investigated tells them
5 that the potential punishment is great. Letting a person know
6 that we believe you did this, and we have reason to believe
7 you did this, lets them know that their situation may be one
8 that will culminate in their arrest and prosecution, no matter
9 what they do. If it turns out that a person confronted with

10 the expectation that they are going to be arrested, tried, and
11 convicted and sentenced harshly is also offered a more
12 desirable alternative, the situation can now become coercive
13 in a way in which I use the term. It can become a situation
14 in which a person, who is innocent, might decide the only way
15 to minimize the punishment I'm about to get is to cooperate
16 and comply. If the person has been convinced that their
17 situation is hopeless, that if they say nothing, they will get
18 the worst punishment; but if they cooperate, their situation
19 will be better. Those are the circumstances under which an
20 innocent person might give a false confession.

21 I think I've answered the first part of that at
22 least up to the point at which an innocent person might make a
23 false "I did itt' statement.

24 Q. Can you explain what the relationship between the
25 November 2 interrogation process that involves separate

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1 incident -- the subsequent Georgetown incident of October, and
2 then the method of interrogation November 15 that starts with
3 Investigator Miller being present and then switches to
4 Investigator -- Agent Randolph who uses a completely different
5 technique, what there is about that process itself that can
6 lead to false confession?

7 A. Well, the two events are linked because the person who's
8 the subject of the interrogation knows that they are suspected

9 of the crimes that are talked about, one time or both times.
10 And certainly a kidnap and murder is a very serious crime. A
11 new person is introduced, Agent Randolph, and Agent Randolph
12 now develops a non-threatening strategy, develops rapport,
13 befriends the person, so to speak. Tries to put himself in
14 the position where the person is more likely to rely on this
15 individual's advice. If someone is hostile and accuses you,
16 they're being unfriendly. If someone shows an interest in you
17 and seems to indicate a concern about your situation, you're
18 more likely to take advice from them. And these are two
19 different ways of coming onto, so to speak, in the
20 interrogation. Agent Randolph is being the good guy. Agent
21 Randolph, as described, would be the person insinuating
22 himself in the suspect's life in a way to make himself out to
23 be a person to be trusted who may have the interest of the
24 suspect at heart. This may be entirely a role taken on by the
25 interrogator. It's a style of interrogation.

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1 If that occurred, then, on the one hand, there
2 is the threatening, punitive, carrying the message of harsh
3 punishment person; and the other person who is being
4 sympathetic. If these two role players now deliver a message,
5 I'm going to get you, you're going to get convicted if you
6 remain silent; while the other one emphasizes that there's a
7 better alternative open to you, in the context of it being
8 certain that we know you did this. Then what we're seeing
9 here is the development of these two -- or the communication

10 of the two prongs of this message: Silence, worst
11 treatment/cooperation, better treatment. And if someone
12 thinks they're hopeless, they may become desperate and may
13 grab at that.

14 Q. If you have these particular techniques present in a
15 situation, such as has been laid out in the hypothetical, then
16 what is it that you need to do to assess the truth or falsity
17 of the statements that are reflected in Government Exhibit No.
18 45?

19 A. I would call the Government Exhibit 45 the post-admission
20 narrative, at least as it's been recorded. It's the statement
21 of what happened. That statement can do one of two
22 things one of three things. It can include corroboration.
23 It can demonstrate that the person has knowledge, actual
24 knowledge of the crime that only the killer would have. It
25 can be replete with errors, which would be consistent with

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1 someone who doesn't know about the crime, guessing, and, in
2 all likelihood, coming up wrong, if there are a large number
3 of alternatives, and we can assume that the information has
4 not been given to the person in the course of the
5 interrogation.

6 The third thing it can do is add nothing so
7 that it doesn't corroborate, it doesn't prove guilt, and it
8 doesn't prove innocence, or even -- excuse me, it doesn't fit
9 the indicators of someone who has no knowledge of the crime.

10 So if that's the case, then we're left in a

11 situation in which all we know is that the person said "I did
12 it" and had no way to know whether that "I did it" statement
13 should be taken seriously. It may be worthless. It may, if
14 the post-admission narrative demonstrates corroboration, be an
15 "I did it" statement that one wants to take very seriously.
16 Or it may be an "I did it" statement which, if nothing else
17 fits, might actually indicate more likely innocence than
18 guilt.

19 So those are the three alternatives, and one
20 has to evaluate the post-admission narrative to try to decide
21 into which category to put the "I did it" statement.

22 Q. Would the period of questioning by Investigator Miller
23 after the taking of the written statement also qualify as
24 post-admission narrative?

25 A. Oh, certainly.

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1 Q. What sorts of things would you then expect to be done in
2 a post-admission narrative in order to try to validate or
3 invalidate the information you obtained in the statement?

4 MR. BEAUMONT: I object.

5 THE COURT: Asked and answered.

6 MR. DeAP~NOND: Could we approach a moment, Your
7 Honor?

8 THE COURT: You want to approach me or the witness?

9 MR. DeARNOND: You at a side bar, please.

10 THE COURT: All right.

11 (Side bar)

12 MR. DeARMOND: I'm trying to be real careful with
13 the Court's ruling. I wanted to make sure I didn't go too
14 far. If I -- at this point I think I have covered the
15 existence of false confessions, the potential for
16 interrogation techniques existent in this case which could
17 lead to a false confessions. And I take it, in light of the
18 Court's ruling and the objection, that I have covered
19 post-admission narrative and those sorts of things which would
20 be looked at in a post-admission narrative.

21 THE COURT: You asked him how to determine whether
22 the confession is a good one or bad one, and he explained it.
23 That's already in the record.

24 MR. DeARNOND: Okay.

25 THE COURT: So I said that your last question was,

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1 in essence, asks him something he's already testified to.
2 He's given the jury a way of deciding whether or not this is a
3 false confession.

4 MR. DeARMOND: And if I've understood the Court

5 THE COURT: In fact, it's giving it three
6 alternatives.

7 MR. DeARMOND: If I understand the Court's ruling,
8 then this is the extent to which I can go with this witness.

9 Am I correct?

10 THE COURT: Yes.

11 MR. DeARMOND: I don't want to then say -- I don't
12 want to ask him opinions about either the techniques in this
13 case or an opinion based on the post-admission narrative, and
14 that's what I understand the Court's ruling to be.

15 THE COURT: Well, I thought you've already asked him
16 what it was about this interrogation which were coercive. To
17 me, he's already answered that question.

18 MR. DeARMOND: Right.

19 THE COURT: That was the limit, yes.

20 MR. DeARMOND: Okay, that's fine.

21 THE COURT: Because that's consistent with my order,
22 which I said -- after my break, I came back and said I was
23 wrong. And that you could go into what it is about the
24 defendant's interrogation which were coercive, and it seems to
25 me that he has covered that.

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1 MR. DeARMOND: All right. I just want to make sure
2 I didn't go too far.

3 THE COURT: So to me, you've been consistent --

4 MR. DeARMOND: All right.

5 THE COURT: -- what I have asked you about.

6 MR. DeARMOND: If I can have just one moment to
7 speak to counsel, I may be done.

8

(Open Court)

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MR. DeAPJMIOND: Your Honor, counsel has raised a question I think we need to address at side bar.

11

THE COURT: Which counsel?

12

MR. DeARMOND. Cocounsel.

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(Side Bar)

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THE COURT: What's up, Mr. DeArmond?

15

MR. DeAPIAOND: Did I understand the Court's ruling that we could then now ask him whether these types of coercive interrogation techniques he's described could lead to false confessions in general?

19

THE COURT: I thought you already asked that.

20

MR. BEAUMONT: You asked that.

21

THE COURT: My statement was, you've already asked him that. You asked him -- I thought you asked him what is it about the interrogation, as I put to you in this hypothetical, which would lead to a false confession.

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MR. DeARMOND: Okay.

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THE COURT: He's already testified to that.

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MR. PARSONS: Then I misunderstood, but now I understand.

4

THE COURT: At least that is my impression.

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MR. PARSONS: It's just a different way of saying it.

6

7 THE COURT: You don't recall asking him that?

8 MR. DeARMOND: I guess maybe I didn't give it the
9 oomph, but it's already been asked.

10 MR. PARSONS: You can argue it.

11 MR. DeARMOND: Sure.

12 (Open Court)

13 MR. DeARMOND: I have no other questions, Your
14 Honor. Thank you.

15 THE COURT: All right.

16 MR. BEAUMONT: May I, Your Honor?

17 THE COURT: Yes, you may.

18 CROSS-EXAMINATION

19 BY MR. BEAUMONT:

20 Q. Doctor, you're not saying that your version of what
21 coercion is will necessarily lead to a false confession, are
22 you?

23 A. Not necessarily, no.

24 Q. And, in fact, that same -- your version of coercion could
25 also lead to a true confession; isn't that true?

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1 A. That's correct.

2 Q. And if I understand what you're saying --

3 THE COURT: Mr. Beaumont, hold it a minute, please.
4 Let me just check something.

5 THE COURT: Okay. May have I another side bar,

6 please?

7 (Side Bar)

8 THE COURT: Looking at the real time, let me modify
9 what I said before. It appears that you asked him to tie in
10 the November 2 with the November 15 interview process. During
11 that process, you asked him what is there about those two
12 that's coercive, and he got into the good guy/bad guy type
13 thing. I don't think you specifically asked him what is it
14 about the interrogation overall that is coercive.

15 MR. PARSONS: Right.

16 THE COURT: I wasn't able to find that on realtime,
17 and I didn't look at the whole darn thing. But I am inclined
18 to believe you did not ask him that specific question. But it
19 came in tangentially to a certain extent when he was
20 explaining the relationship between the November 2 and the
21 November 15 hearing.

22 MR. DeARMOND: I would ask leave to reopen.

23 THE COURT: So in all fairness, I think I misled
24 you.

25 MR. DeARMOND: All right.

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1 THE COURT: I'm not so sure you have asked him that
2 specific question.

3 MR. DeARMOND: All right. Thank you. I appreciate
4 that, Your Honor.

5 MR. PARSONS: Yes.

6 THE COURT: So you~re going to have to delay your
7 cross-examination. I think you should have a right to ask it.

8 MR. DeARMOND: Thank you, Your Honor.

9 MR. PARSONS: Thank you, Your Honor.

10 (Open Court)

11 THE COURT: Mr. DeArmond, I think I might have
12 misled you. You may complete your examination.

13 MR. DeARNOND: Thank you, Your Honor.

14 FURTHER DIRECT EXAMINATION

15 BY MR. DeARMOND:

16 Q. Doctor, taking into account all of the factors that we
17 referred to now with regard to the November 2 and the November
18 15 interrogations, what aspects about that entire
19 interrogative process did you find to be of the type of
20 coercive interrogation techniques which can lead to false
21 confessions?

22 A. There are two things. One of them is -- one of them is
23 an issue that has to do with what the suspect brings to the
24 interrogation. Some people are extraordinarily susceptible to
25 pressure and easy to intimidate, pathologically so. So if

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1 someone has that disability, then the intensity of the
2 interrogation itself can, for some people, cause them to
3 comply. And that's unusual. But it requires there to be this
4 pathological condition in the person.

5 In addition to that, when we look at what

6 happened in the interrogation, if the interrogation culminated
7 in leading the person to presume that they were going to be
8 arrested, tried and convicted, and that the only choice before
9 them was whether to get a maximum punishment or to minimize
10 the punishment, by at that moment choosing to cooperate,
11 choosing to do what they understood the interrogator to want,
12 that could produce a false confession, that would be coercive.

13 Q. Is that content of maximization-minimization one which
14 you see in false confession scenarios in your experience?

15 A. Yes.

16 Q. And thatts -- and I think you've already explained it in
17 detail. With regard to the interrogation techniques that you
18 observed in this case, are there any other aspects of those
19 which, in your opinion, can lead to false confessions?

20 A. That would be the one that, in my experience, would be
21 the most likely. Interrogation is a very stressful and
22 intense expense. We do not expect an ordinary person to give
23 a false confession in even an intense interrogation unless
24 they were put in a position of the kind of coercion I'm
25 talking about. But if the person is not ordinary, then the

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1 possibility that someone could give a false confession in
2 response to just an intense interrogation has to be
3 considered.

4 MR. DeARMOND: Your Honor, I think I have no further

5 questions. Thank you.

6 THE COURT: Now, Mr. Beaumont.

7 MR. BEAUMONT: Thank you.

8 FURTHER CROSS-EXAMINATION

9 BY MR. BEAUMONT:

10 Q. Let's start again, Doctor. In your view of what coercion
11 is, does not necessarily lead to a false confession, does it?

12 A. That's correct.

13 Q. And, in fact, it could lead to a true confession?

14 A. Absolutely.

15 Q. And by the way, Doctor, you are not a clinical
16 psychologist, are you?

17 A. No.

18 Q. And you have no specific expertise or training in
19 pathology, psychological pathology?

20 A. That's correct.

21 Q. And if I understand what you're saying, you're saying
22 that if the suspect, or defendant, provides details of the
23 crime that he was not told by the police and that were not
24 made public, then that is likely a true confession?

25 A. That would be demonstrating possession of that knowledge,

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1 would be information that you would -- one would have to say
2 shows that the person has actual knowledge of the crime, that
3 and if the only way they could get it is by being the single
4 perpetrator, all of that weighs toward the direction of

5 treating "I did it" statements as very valuable and important,
6 yes.

7 Q. That was yes?

8 A. That was yes.

9 Q. Okay. Thank you, Doctor. Now, I'd like to talk a little
10 bit about your past experience in testifying. You said you
11 testified how many times?

12 A. Testified about the subject of influence in police
13 interrogations 72 times.

14 Q. And of those 72 times, Doctor, how many of those times
15 were for the prosecution?

16 A. None of them.

17 Q. Did it take -- I notice you had to look in your notes to
18 see that. Was there one that maybe you're not sure about?

19 A. Yes.

20 Q. Now, Doctor, what is your standard fee for giving such
21 testimony?

22 A. My standard fee for consultation or for time spent in
23 court?

24 Q. Time spent in court, let's start with that.

25 A. My standard fee for time spent in court is \$2,000 per

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1 half day.

2 Q. Would that equal \$4,000 per day?

3 A. That's correct.

4 Q. And what is your standard fee for consultation?

5 A. \$250 an hour.

6 Q. And it would be -- would it be fair to say, Doctor, now
7 you've been a professor at Berkley for how long now?

8 A. 30 years.

9 Q. Would it be fair to say that up to one-half of your
10 income comes from testifying in these cases?

11 A. Well, if these cases -- you mean only cases involving
12 police interrogation, leaving out the work that I do in civil
13 context, I don't know what the breakdown would be specifying
14 for work done in interrogation. And also the standard fee is
15 my standard fee. That doesn't necessarily mean, by any means,
16 that I get paid that in most interrogation cases.

17 Q. Is it fair to say, Doctor, that your -- one-half of your
18 income last year was derived from either testifying or
19 consulting?

20 A. In both civil and criminal cases, that's probably
21 correct.

22 Q. Thank you. Now, I note by your resume you've presented
23 lectures at various groups; is that true?

24 A. Correct.

25 Q. And I note you testified earlier that you, in fact,

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1 presented lectures at law enforcement groups. Is that what
2 you testified to?

3 A. I think I mentioned one, yes.

4 Q. And isn't it true, Doctor, that the only one was just

5 this past June of 1997?

6 A. That's correct. That's the first time I was asked.

7 Q. Okay. But the truth of the matter is in 1997 you gave a
8 lecture before the New Hampshire State Public Defender
9 Organization, correct?

10 A. Correct.

11 Q. 1996, Chicago Seminar for the Office of Public Defender?

12 A. Correct.

13 Q. 1996, New York State Defender's Association?

14 A. That's correct.

15 Q. 1996, Oregon Criminal Defense Lawyers Association?

16 A. That's correct.

17 Q. 1996, Capital Case Defense Seminar, California Attorneys
18 for Criminal Justice and California Public Defenders
19 Association?

20 A. That's correct.

21 Q. In 1993, Doctor, did you testify of something called the
22 Top Gun Criminal Defense Association or seminars?

23 A. I lectured there. I didn't testify.

24 Q. I mean lecture. I'm sorry, Doctor.

25 A. Yes.

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1 Q. So it's fair to say that you do a lot of lecturing to
2 entities that are involved with public defenders or defense
3 attorneys?

4 A. That's true.

5 Q. Okay. And is it fair to say that one reason for doing
6 that lecturing is to somewhat market your services?

7 A. No.

8 Q. That has no bearing at all?

9 A. Absolutely not.

10 Q. Now, you testified on direct that you -- you gave a
11 lecture before the Judges Association in Florida, I think you
12 said. Is that what you said?

13 A. It was a mini-course at the request of the Florida State
14 Supreme Court, I guess, the program on continuing education.

15 Q. And how many people -- how many judges attended that?

16 A. Small number.

17 Q. Would small number be eight?

18 A. Could be.

19 Q. How many chairs were in the audience, Doctor?

20 A. It was a small room.

21 Q. How many chairs were in the audience, Doctor?

22 A. I don't know. I didn't attend any of the sessions at
23 which everyone in attendance was there. I was asked to give
24 this several hour long mini-course which I did to whoever
25 showed up in a small conference room.

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1 MR. BEAUMONT: Thank you, Doctor.

2 REDIRECT EXAMINATION

3 DY NP~. DeAPMOND:

4 Q. Doctor, in this case are you being paid your standard
5 fee?

6 A. No.

7 Q. Have you been paid anything in this case?

8 A. No.

9 Q. And you understand that --

10 A. Not yet. Hopefully.

11 Q. And you understand that any payment that you are to
12 receive in this case, as a result of through court appointment
13 and the criminal justice authority, has to be approved by the
14 Court?

15 A. Yes.

16 THE COURT: Excuse me, Doctor, but do you have a
17 different fee when the Court has to approve it than your
18 standard fee?

19 THE WITNESS: I have a policy on that which results
20 in it being a different fee, Your Honor.

21 THE COURT: Okay.

22 Q. Is that less than your standard fee?

23 A. The policy is simply, I don't make decisions about
24 participation in criminal cases based on whether or not I'm
25 being paid at all, and I prefer to be paid my full rate.

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1 However, the policy is I do it for whatever is appropriate in

2 the jurisdiction. And that means in some cases I get paid
3 almost nothing, and in other cases I get an amount that comes
4 closer to at least my standard hourly fee.

5 Q. Of the numbers of cases that you're asked to review, how
6 many do you actually wind up accepting and offering your
7 opinions in?

8 A. I've been asked to review, it's 116 cases, but a total of
9 127 separate interrogations and confessions, so looking at it
10 on an interrogation basis rather than a case basis. In more
11 than half of the cases that I'm sent to evaluate, I don't
12 become any further involved in the case. And it's usually
13 because I report back to the attorney, either I think it's a
14 voluntary statement or it's impossible for me to make a
15 judgment.

16 Q. Now, Counsel asked you about your lecturing on the topics
17 of police interrogation techniques and false confessions. You
18 listed, I believe, a number of consultations you've had about
19 a number of law enforcement agencies on topics other than
20 false confessions and police interrogation; is that correct?

21 A. That's correct.

22 Q. And in those capacities you've worked as a consultant
23 with U.S. Attorney's offices?

24 MR. BEAUMONT: I object. It's not relevant, and
25 it's been asked and answered on direct.

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1 MR. DeARMOND: I think it is.

2 THE COURT: I think the cross-examination scope was
3 referenced to interrogation techniques, wasn't it?

4 MR. DeARMOND: I'm sorry.

5 THE COURT: Wasn't it limited to interrogation
6 techniques?

7 MR. BEAUMONT: I honestly don't recall.

8 MR. DeARMOND: That was the scope.

9 THE COURT: You don't recall?

10 MR. BEAUMONT: No, sir, I don't.

11 THE COURT: I don't recall either.

12 MR. BEAUMONT: I think I did limit it to testifying,
13 consulting about confession techniques. I believe I did,
14 but --

15 THE COURT: I thought you did, too. What's your
16 recollection, Mr. DeArmond?

17 MR. DeARMOND: I just got the impression he was
18 asking about his consultations in general as well as just
19 police interrogation techniques. If that's not the case
20 then --

21 THE COURT: Well, I don't recall. So since I can't
22 recall, I can't decide the objection. You may go ahead.

23 Q. Doctor, you consult in areas other than police
24 interrogation and false confessions with law enforcement
25 agencies, and that consultation has included the United States

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1 Attorney's office, has it not?

2 A. Yes, it has.

3 MR. DeARMOND: I don't have any other questions.

4 RE-CROSS-EXAMINATION

5 BY MR. BEAUMONT:

6 Q. And that consultation with the United States Attorney's
7 Office had nothing to do with confessions, did it?

8 A. That's correct.

9 MR. BEAUMONT: Thank you.

10 THE COURT: All right. Thank you, Doctor.

11 (The witness was excused.)

12 THE COURT: Counsel, want to approach?

13 MR. PARSONS: We better, Your Honor, yes.

14 (Conference at bench among the Court and Counsel.)

15 MR. PARSONS: Your Honor, I have to be careful.

16 don't want the jury to hear what I'm about to say. Mr.
17 Steele, our only other witness other than Larry, didn't show
18 up even though he is subpoenaed, so we're out of witnesses
19 except for Larry Hall. And, Your Honor, and here's the
20 sensitive part of it.

21 MR. BEAUMONT: Your Honor, I would suggest we do
22 this at side bar because I can clearly hear and --

23 MR. PARSONS: I prefer that.

24 (Open Court)

25 THE COURT: Why don't we take a break while I decide

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