

1 County called the point Reyes Light. We did an  
2 Expose on Synanon that shared -- won the 1979  
3 Pulitzer Prize. I continued working on this area  
4 of-control group generated violence and did so in the  
5 context of a variety of different criminal  
6 investigations throughout the nation, often working  
7 with prosecutors on this issue and sometimes working  
8 with defense attorneys on this issue. And then in  
9 the mid 1980's or slightly past the middle of the  
10 1980's I began doing work on police interrogation  
11 leading to confession and false confession. Since  
12 then done work continuously on that subject. I've  
13 been publishing on that subject, I think it's fair to  
14 say I'm internationally recognized as someone whose  
15 opinions about that are at least taken seriously in  
16 the academic world.

17 Q. And as far as in terms of the legal system  
18 have you, in fact, qualified as an expert in courts  
19 in the State of California previously in this  
20 particular avenue?

21 A. Yes, I have.

22 MR. FAZIO: I would just like a more  
23 definitive as to what particular area --

24 Q. (By Mr. Rappaport:) Have you qualified as  
25 an expert in the area of improper or undue influence  
26 in a police interrogation?

27 A. I've qualified on the subject of influence  
28 and police interrogation 22 times around the country,

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1 and give me a moment I can tell you how many times in  
2 California. Eight times in California.

3 Q. Have you published articles in this  
4 particular area?

5 A. Yes, I have.

6 Q. Approximately how many?

7 A. Since this derives from decision making in  
8 general I consider all of my work on influence to be  
9 related. On police interrogation in particular I  
10 think I've published perhaps three articles and I'm  
11 currently working on a book on that particular  
12 subject reporting the work I've been doing for the  
13 last eight years.

14 MR. RAPPAPORT: At this point, your Honor, I  
15 would offer Dr. Ofshe as an expert in the area of  
16 undue influence, in particular police interrogation.

17 MR. FAZIO: He never said he was an expert on  
18 the area of undue influence.

19 MR. RAPPAPORT: Improper influence --

20 MR. FAZIO: He didn't say improper --

21 MR. RAPPAPORT: -- influence during  
22 interrogation.

23 THE COURT: Mr. Rappaport, you may state your  
24 next question.

25 MR. FAZIO: Can I voir dire him on this  
26 subject area before you make a ruling as to whether  
27 he's an expert or not?

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1 depends on the question that's asked of him. The  
2 defendant has established certain qualifications, I  
3 believe it is not required for the Court to designate  
4 him or find him to be an expert in any particular  
5 area, depends on what the question is asked.

6 And you may voir dire him, Mr. Fazio, with  
7 regard to his qualifications to answer a particular  
8 question, indicate to me that you believe the  
9 qualifications are inadequate after I hear the  
10 question.

11 MR. FAZIO: Fine.

12 Q. (By Mr. Rappaport:) Have you conducted  
13 research and or testified in the area of influence  
14 during interrogation?

15 A. Yes.

16 Q. Have you worked on, studied or testified in  
17 the area of influence during police interrogation?

18 A. Yes.

19 Q. Has that been the primary focus of your work  
20 over the last eight years and in general over the  
21 entire length of your career?

22 A. I would say the primary focus of my work is  
23 split between two subjects over the period that  
24 you're talking about, but that was certainly one of  
25 them, and it was a major part of my work during that

26 time. It was the major part, more than half would  
27 have been devoted to that subject.

28 Q. In discussing influence during police

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1 interrogation, are there certain types of confessions  
2 that may be elicited during that type of  
3 interrogation?

4 A. Yes.

5 Q. And what types would those be?

6 A. Well, clearly there are true and reliable  
7 confessions which can be elicited in response to  
8 police interrogation. When it comes to the subject  
9 of false confession there are generally recognized  
10 three categories of false confession, the first  
11 kind is referred to as a coerced compliant false  
12 confession. The second is referred to as a coerced  
13 internalized confession. And the third is generally  
14 designated as a voluntarily false confession.

15 voluntary false confession is the easiest to  
16 say something about, it simply doesn't involve  
17 interrogation. In particular it relates to the  
18 circumstance under which an individual voluntarily  
19 and without necessarily being coerced or even  
20 persuaded confesses to a crime that they did not  
21 commit. So it's a false confession.

22 The other two kinds of interrogation are the  
23 product of police interrogation. Generally a coerced

24 compliant confession is one and false confession is  
25 one in which the individual gives a false statement  
26 knowing that the statement is false. Generally it's  
27 accepted that the reasons for that are that one, they  
28 may not be able to stand the intensity and stress of

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1 the interrogation and simply will conform so they  
2 rationalize in order to escape the pressure.

3           The second kind or the second way in which  
4 it's recognized that these come about has to do with  
5 people panicking and finding themselves having to  
6 choose at the moment between more or less serious  
7 punishment and they give a false confession, usually  
8 seeking to minimize the punishment, often seeking to  
9 preserve their lives, believing that what they do in  
10 this very short period of time is determinative of  
11 what will happen in the future.

12           The other kind is called a coerced  
13 internalized false confession. And there the word  
14 internalized is perhaps a bit too strong but I didn't  
15 define that. Internalized would generally mean  
16 coming to believe something in a more or less  
17 permanent way and that's really not what  
18 happened. So I prefer to think of that category as a  
19 circumstance whereby the person becomes convinced  
20 that it is more probable than not that they did  
21 indeed commit a crime about which they have no memory

22 and of which they are, in fact, innocent.

23 That describes the belief state and the  
24 confusion that usually attends to a coerced  
25 internalized false confession.

26 And the key element there that differentiates  
27 it usually is that one will find in the interrogation  
28 a concerted directed attack on the confidence, the

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1 person's confidence in their own memory of the events  
2 that are in dispute.

3 Q. Without looking at whether a confession is  
4 true or false, have you also studied and is it an  
5 integral part of improper interrogation or is  
6 coercion a part of this process~'

7 A. Well, coercion -- there are influence  
8 elements that can be considered to be coercive and  
9 the judgment of where the line is drawn between  
10 something that is coercive and not, in the law, is  
11 really not a social psychological question.

12 Q. Have you looked at the social psychological  
13 questions of undue influence?

14 A. Yes.

15 Q. And have you looked at those influences as  
16 applied to Mr. Anderson's case?

17 A. Yes.

18 Q. And did you review a copy of the transcript

19 of the tape of Mr. Anderson's statement to Inspector  
20 Fagan and Johnson?

21 A. Yes, I did.

22 Q. And when you looked at that tape what did you  
23 initially examine it for?

24 A. I examined it initially to get an overview of  
25 what happened and then I began to break it down in  
26 terms of the elements that I determined were  
27 important to track throughout the  
28 interrogation.

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1 Largely I was looking for influence elements,  
2 impact of these influence elements on Mr. Anderson's  
3 statements, insofar as this was reported during the  
4 interrogation, the flow of the interrogation from  
5 start to finish, the appearance of a variety of  
6 different interrogation tactics that I recognized,  
7 having seen them many, many times and sought to  
8 analyze the influence structure and what was  
9 influencing Mr. Anderson's decision making as  
10 reported in the interrogation.

11 Q. Okay. Before we talk about the particulars  
12 of what is contained within the tape, did you examine  
13 the circumstances -- did you examine the tape to  
14 determine if there were statements made that were not  
15 on that tape?

16 A. Yes.

17 Q. And could you please discuss that with the  
18 Court?

19 A. Well, there are several places, references to  
20 information that is not contained on the tape that  
21 would indicate that there was prior discussion of  
22 certain points before the tape was turned on.

23 Q. Now, if I may stop you for a second, there  
24 was discussion of certain points you indicated. What  
25 would the first of those points have been?

26 A. I would have to go back to Berkeley and get  
27 the particular sheet of paper that I now remember I  
28 left on my desk that has that track on it.

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1 Q. Okay. Let's talk about the areas in  
2 general. Can you recall those specifically?

3 A. Yes.

4 Q. Without your notes? What areas would those  
5 be?

6 A. The areas would be essentially that the  
7 evidence -- the evidence against Mr. Anderson was  
8 overwhelming, that there was certainty that he would  
9 be convicted, and that is a major theme in police  
10 interrogation, it is one of the two organizing  
11 principles of modern police interrogation, it can be  
12 thought of and it happens in anyone of a number of  
13 different ways as attempts to increase the suspect's  
14 subjective certainty, confidence, belief or  
15 expectation that they will be convicted of the

16 crime. And the object is to drive that to a level of  
17 complete certainty.

18 Q. Now, are you stating, not in particular  
19 because you don't have your notes, but in general,  
20 that there was a discussion of this outside of the  
21 tape or --

22 A. Excuse me. The only thing I don't have my  
23 notes on is the point of what was discussed off the  
24 tape and on the tape. Everything else I have the  
25 notes, there is just one set of paper that I  
26 neglected to bring.

27 Q. Okay. Let me ask you this question, if you  
28 recall, not in particular, was it apparent to you

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1 that there were discussions of the charges off the  
2 tape?

3 MR. FAZIO: I'm going to object to that  
4 question. That is pure speculation. This witness,  
5 with due respect, his expertise, he has no expertise  
6 which allows him to reflect -- to offer that he knows  
7 that discussions were made outside that doesn't  
8 appear on that tape.

9 THE COURT: Mr. Rappaport, I'm going to  
10 sustain the objection. You have not laid, to my  
11 satisfaction, the foundation to establish that this  
12 witness has expertise on the recording techniques.

13 MR. RAPPAPORT: Okay.

14 Q. Dr. Ofshe, do you have training, experience,  
15 education or knowledge in the area of language?

16 A. Yes.

17 Q. And have you previously received training,  
18 experience, education in the area of reviewing tapes  
19 or police interrogations that have been taped to make  
20 a determination if something is not on that tape  
21 based on what you've seen during the tape?

22 A. I've done that in the past and testified on  
23 that subject.

24 Q. Okay. How would you do that? How can you  
25 assist this Court in doing that?

26 A. There is a complete record of what was said  
27 on the tape. And there are at various points  
28 references to things that do not appear on the tape

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1 and therefore must have been discussed prior and the  
2 references are specific and I have a number of them  
3 that I identified. I'm looking at my notes to see if  
4 I also marked them on the notes themselves.

5 But my recollection is there were, I believe,  
6 two or three specific things that I identified that  
7 indicated that this was picking up a prior -- prior  
8 discussion.

9 THE COURT: Mr. Rappaport, before the witness

10 gets into answering your question or discussing what  
11 he believes is evidence of the occurrence of the  
12 prior conversations that are not recorded, I believe  
13 you have not yet laid a foundation to allow him to  
14 testify as an expert witness on this subject.

15 MR. RAPPAPORT: Okay.

16 Q. Dr. Ofshe, how, given your training and  
17 experience, would you determine that things were  
18 stated of f tape that would be reflected in the tape  
19 that we have?

20 A. Well, sometimes it's perfectly obvious when  
21 someone says, "as we said before about such and such  
22 a subject," and one looks at the record and such and  
23 such a subject is simply not discussed on the record,  
24 the only possibility that it occurred at a point  
25 earlier in time. There is a reference made to a  
26 conversation that preceded the turning on of the  
27 tape.

28 Q. For example, would that be on page 3 of the

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1 prosecution transcript of Mr. Anderson's statement?  
2 I'm referring to the inspector's comment beginning  
3 "wait, wait, wait, let me just tell you this, it is  
4 you, all right? And the situation is we know  
5 everything that happened. It's all right here. We  
6 know everything that happened. We just don't know  
7 why it happened. And we don't know why you did  
8 it. And only you know that and only you can answer

9 that, not us, huh? Mr. Anderson: It wasn't  
10 me. Inspector: Well, earlier you mentioned some  
11 things. Dot, dot, dot."

12 MR. FAZIO: Judge, I don't have an  
13 objection. Let me just state something  
14 here. Something like that, my objection was making  
15 the witness an expert. That does appear to be  
16 something that a person without any expertise might  
17 very well conclude when the inspector allegedly says,  
18 well, earlier you mentioned some things so if he  
19 wants to take it one on one that's fine, but --

20 THE COURT: Mr. Fazio, I have not yet been  
21 convinced that that area of inquiry is beyond the  
22 fact finder's lay skill to analyze. This is a fairly  
23 obvious, and a task that I can perform as well as  
24 this expert in reviewing the transcript to determine  
25 references or determine from the text that there were  
26 references to off-tape conversation.

27 MR. RAPPAPORT: Okay. I'm just suggesting  
28 that this is the first part of the analysis. That

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1 there were conversations that occurred before that  
2 pertain to charges, that that begins the process that  
3 we're going to discuss.

4 THE COURT: If this is simply a basis for his  
5 opinion on some other subject, that's fine, you can  
6 have him recite that.

7 MR. RAPPAPORT: Yes, we're getting this, I  
8 wanted to cite, for the example to the Court, but  
9 apparently we're not going to be able to do that  
10 today.

11 Q. Now, so you look at the tape, Doctor, to  
12 determine if there were, in fact, conversations  
13 off-tape or were there some discussion of the subject  
14 matter prior to the tape being turned on, is that  
15 correct?

16 A. Well, if that issue is disputed, if it's  
17 agreed that the moment the person walked into the  
18 room the tape recorder was turned on, as it is in  
19 some jurisdictions, and no one is disputing that,  
20 then one would necessarily look at it. Here  
21 apparently there is a disputing as to whether or not  
22 that occurred.

23 Q. Is that borne out by the transcript, in your  
24 opinion?

25 Mi. FAZIO: Judge, that -- again, that  
26 question -- I don't think this witness should answer  
27 that question, that's --

28 THE COURT: The question is ambiguous.

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1 Sir, don't make any assumptions as to what is  
2 in dispute, simply focus on the question that has  
3 been asked of you and answer those questions.

4           You may continue with your examination.

5           MR. RAPPAPORT:   Thank you.

6           Q.   After -- once you begin to look at the  
7 transcription or the tape itself of the interrogation  
8 to determine if the undue influence is exercised,  
9 what do you look for?

10          A.   I look for the three places that I now found  
11 in my notes that I marked the word "prior," which I  
12 have tabbed because they made reference to statements  
13 that are not the substance of which is not preceded  
14 in the transcribed material.   The first one occurs on  
15 page 2, there is a reference to the statement,   I'm  
16 sorry, it's on page 2 -- it would be on page 2 of the  
17 district attorney's office transcript and it's a  
18 statement that reads in the version I'm working from,  
19 which is the version prepared by the public  
20 defender's office.   And get it straightened  
21 out.   That had to do -- the detective says on the  
22 preceding statement "And the reason I turned the tape  
23 recorder on is you said you wanted to talk about the  
24 case and get it straightened out."

25                Second, on page 3, it would be towards the  
26 top of page 3, Mr. Anderson says, "Well, I asked if  
27 it's just the fingerprints?"   And I was unable to  
28 find any reference to fingerprints being discussed

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1   prior to that point in the interrogation.

2           MR. FAZIO:   Excuse me.  Can the witness --  
3   can I ask that he repeat that question because that  
4   statement is frankly different than my transcription.

5           MR. RAPPAPORT:  It's "Can I ask if it's just  
6   the fingerprints."

7           THE COURT:  I'm not sure if that's what Dr.  
8   Of she said.  Could you repeat --

9           THE WITNESS:  Understand because I only got  
10   the district attorney's office transcript this  
11   morning and had already made my notes coordinated to  
12   the Public Defender's Office transcript, what I've  
13   done is just marked mine.  There may be some  
14   inconsistencies in the actual words.

15          THE COURT:  Sir, have a look at People's 2,  
16   that is the original.

17          THE WITNESS:  All right.  It's different  
18   here, it says "can I ask if it's just fingerprints?"

19          Q.  (By Mr. Rappaport:)  But, in essence, it's  
20   the same comment, is that correct?

21          A.  Well, it doesn't indicate that there as  
22   clearly as in the other version, that there is a  
23   reference to an earlier --

24          Q.  For your information the Court was going to  
25   go through the tape as to its accuracy and look --

26          THE COURT:  I'm not going to do that unless  
27   I'm satisfied I can do that without it being improper  
28   procedure.

1           LIR. FAZIO: Can I have for the record what  
2 the doctor said the first time now he's confirmed  
3 it's different than the documentation that the Court  
4 has as to that same issue, that same question?

5           Your transcription, Doctor.

6           THE WITNESS: It says "Well, I asked if it's  
7 just the fingerprints?"

8           MR. FAZIO: Okay, thank you.

9           Q. (By Mr. Rappaport:) This indicates "Can I  
10 ask if it's just the fingerprints?"

11           THE COURT: Correct. There still remains a  
12 reference to fingerprints but the substance is  
13 different.

14           MR. RAPPAPORT: Okay.

15           A. And then the next one that I had marked is  
16 the same passage that you read a minute ago or a few  
17 minutes ago.

18           Q. Indicating that Mr. Anderson -- the inspector  
19 said, "Well, earlier you mentioned some things --"  
20 and the conversation just before that was talking  
21 about who committed the offense, is that correct?

22           A. Yes.

23           Q. Okay. So you looked to the transcript, you  
24 looked to the tape of the transcript to determine if  
25 there are facts that may have been discussed outside  
26 the tape recording?

27           Once you look at the tape recording what do  
28 you look for?

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1 WEDNESDAY, FEBRUARY 1, 1995, (Excerpt)

2

3 THE COURT: Back on the record. Counsel are  
4 present. Mr. Anderson is present.

5 Mr. Rappaport, you may call your first  
6 witness.

7 MR. RAPPAPORT: Thank you at this point the  
8 defense would call Dr. Richard Ofshe.

9 THE COURT: Dr. Of she would you raise your  
10 right hand to be sworn.

11 RICHARD J. OFSHE, Ph.D.,  
12 called as a witness by and on behalf of the  
13 Defendant, having been first duly sworn, was examined  
14 and testified as follows:

15 DIRECT EXAMINATION

16 By Douglas Rappaport, Deputy Public Defender:

17 MR. RAPPAPORT: Good afternoon, Doctor.

18 THE WITNESS: Good afternoon.

19 Q. Could you please tell this Court how you are  
20 currently employed?

21 A. I'm a professor in the Department of  
22 Sociology at the University of California at  
23 Berkeley.

24 Q. What is your area of study in general?

25 A. I'm a social psychologist and I specialize in  
26 the study of extreme forms of influence.

27 Q. And when you say extreme forms of influence  
28 what in particular are you talking about?

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1       A.    Particularly systems and techniques of  
2 coercion, extreme social control, techniques that can  
3 be used to create artificial and false memories or  
4 beliefs in events that simply never happened such as  
5 space alien kidnapping or past life memories, things  
6 of that sort.

7       Q.    Does that also include improper coercion by  
8 police departments while interrogating suspects?

9       A.    Yes, I've been studying techniques of  
10 influence in police interrogation for perhaps the  
11 last, directly focused on that, the last seven or  
12 eight years.

13       Q.    Do you have any training and experience,  
14 education in this field?

15       A.    Yes.

16       Q.    And did you bring with you a curriculum vitae?

17       A.    Yes, I did.

18       Q.    I believe that's been provided to the Court  
19 yesterday as well as to the prosecution.

20            THE COURT:   And, Roger, may I ask you to give  
21 me a copy of Defendant's A.   Thank you.   Defendant's  
22 A has been given to the witness, if you wish to refer  
23 to it.

24       Q.    Thank you.   Have you -- again, I ask you  
25 specifically what training and experience, education  
26 you've received in this particular area?

27           A.    I have a bachelor's degree in psychology from  
28   Queens College in the City University of New York.    A

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1    master's degree from the same institution in  
2    sociology.  A Ph.D. degree from Stanford in the  
3    sociology department, that specializing in the area  
4    of social psychology.

5            Since 1967 when I joined the faculty at  
6    Berkeley I've been a professor at Berkeley doing  
7    research and teaching on the subject of initially  
8    group influence and decision making and then by the  
9    early 1970's began specializing in more complex and  
10   more extreme forms of influence.    Conducted research  
11   on that subject in various forms since -- decision  
12   making in general throughout my entire career and on  
~3   extreme forms of influence,   since the early 1970's.  
~4   I've done both applied work and laboratory base  
15   research.  I've done field work,   studying these sorts  
16   of things as they actually occur.    For a number of  
17   years I studied complex social structures, things  
18   that -- organizations that many people would call  
19   cults and particularly I was interested in the  
20   techniques whereby such organizations could induct  
21   people, manipulate them and ultimately persuade them  
22   and coerce them into being willing to take part in  
23   acts of violence.

24            I conducted a lengthy and major study of

25 Synanon for a period about four or five years. It  
26 culminated in a number of academic papers together  
27 with an applied experience doing journalism along  
28 with the people who owned the newspaper in Mann

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19

1 A. Look for the presence of interrogation  
2 tactics designed to produce the result that I  
3 mentioned before, that is convincing the suspect that  
4 they are caught.

5 And that's done in any one of a number of  
6 different ways. Then I tracked statements indicating  
7 that there was, what I refer to as an offer, that's  
8 my classification, but it's indication that there is  
9 a benefit to giving a statement and that can be done  
10 again in any one of a number of different ways, some  
11 more subtle, others more obvious. It can run from  
12 suggestions that you'll feel better, to suggestions  
13 that you will be less severely punished or more  
14 severely punished. The less or more severely  
15 punished obviously is at the coercive end of the  
16 continuum.

17 Q. Okay.

18 A. Then I would also look for suggestions  
19 formatting a scenario that in the context of the  
20 other things going on the defendant is being  
21 encouraged or the person being interrogated is being  
22 encouraged to adopt, because one scenario versus

23 another scenario works to their advantage.

24           So these separate things all have to do with  
25 making a decision. Then I would look for statements  
26 that would indicate that the person was indeed  
27 convinced that they would be convicted and insofar as  
28 that explains why they might have given the

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1 this is admissible. But -- you may --

2 Q. (By Mr. Rappaport:) What are those  
3 interrogation tactics designed to do?

4 A. Interrogation in general is designed to  
5 convince someone to make admissions and to make a  
6 confession statement and to give a post admission  
7 narrative of the crime. There are -- the two major  
8 points of interrogation are eliciting the admission  
9 or confession, I did it, and then the second part,  
10 which is extremely important, is eliciting a  
11 narrative of the crime once the person has made an  
12 admission that they were involved in the crime in  
13 someway.

14 Q. Okay. I'd like to talk to you specifically  
15 now about promises and enticements to confess. I  
16 guess that would be part two of the offer. That  
17 they're deriving a benefit from confessing.

18           When you looked at Mr. Anderson's case did  
19 you look at it to determine if offers were conveyed

20 to Mr. Anderson?

21 A. Yes.

22 Q. And did you determine whether those -- can  
23 you please explain how those offers were conveyed?  
24 Its antecedents to begin with.

25 A. By emphasizing first we have to assume that  
26 as the interrogation goes on, there is cumulative  
27 effort directed at convincing the person that they  
28 are caught and that they will be convicted and this

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22

1 theme is returned to throughout the interrogation.

2 Q. Okay, I'm sorry, please continue.

3 A. With that happening what occurs is, and  
4 often it occurs almost joined with emphasis on the  
5 fact that you're caught, is the idea that there are  
6 range of punishments and this is your opportunity to  
7 minimize the punishment. The only question that is  
8 left before us is what you're going to be charged  
9 with. That you can, in a sense, control what you're  
10 going to be charged with by taking the opportunity  
11 now being offered to you to give a  
12 statement. Depending on the particular interrogation  
13 that can be done more or less explicitly here at  
14 various points in this interrogation the  
15 interrogators refer to themselves as the conduit, or  
16 one of the detectives refer to himself as the conduit  
17 to the prosecutor.

18 I have a complete breakdown of all their  
19 statements about not having to spend the rest of your  
20 life in jail in direct response to Mr. Anderson's  
21 raising this question about "I don't want to spend  
22 the rest of my life in jail" and he's told he doesn't  
23 have to. The emphasis is on the reason. And the  
24 only way that you can introduce the reason which we  
25 will take to the prosecutor is by telling us. And  
26 it's very clear and it's repeated over and over again  
27 that that will affect the charge that is brought  
28 against you.

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23

1 Q. And in this case was an offer conveyed to Mr.  
2 Anderson of leniency based on your review of the  
3 transcript, your training and experience in the area  
4 of interrogation?

5 MR. FAZIO: I don't think that we need expert  
6 testimony to make that conclusion.

7 THE COURT: Overruled.

8 MR. FAZIO: The transcript speaks for itself.

9 THE COURT: Overruled.

10 THE WITNESS: A. I believe it was.

11 Q. (By Mr. Rappaport:) Can you please explain  
12 why?

13 A. Because first the idea that this was possible  
14 was suggested.

15 Q. When?

16 A. Repeatedly throughout the interrogation. I  
17 can walk through, I can go through the interrogation  
18 page by page, statement by statement and show the  
19 development of this.

20 Q. Could you please do that in abbreviated  
21 fashion as to the statements and how the process  
22 began and had built up.

23 A. If I can be permitted to read my summary of  
24 this with reference to where it can be found in the  
25 transcript I can do it in abbreviated fashion.

26 MR. FAZIO: I have no objection.

27 MR. RAPPAPORT: No objection.

28 A. On -- I'll cite the pages that are in the

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24

1 district attorney's office transcript -- on either  
2 page 2 or page 3 because my transcript runs over so  
3 I'll bracket it. There is emphasis on evidence and  
4 the statement "you and only you can answer what  
5 happened."

6 Also on page two or three, "the big reason  
7 the only thing that we don't know." And this again  
8 refers to why it happened. On page 3 of the district  
9 attorney's version there is again emphasis on  
10 evidence and then the statement "we just don't know  
11 why it happened." "Here's the situation. I'm just  
12 here to be your conduit, to let you tell me why it  
13 happened." "Well, we're going to be the ones who  
14 talk to the prosecutor, alright? And, and, and

15 really just it's just a matter was it manslaughter,  
16 voluntary, involuntary, second degree, first degree."

17 On page 9 or 10 again there is emphasis on,  
18 follows -- emphasis on the evidence which occurs on  
19 the preceding page, followed by emphasis on need for  
20 the reason, and again, the evidence showing that he  
21 committed the crime is again stressed.

22 And I should point out in stressing that  
23 evidence, some of the statements made may be true,  
24 some of the statements made may be false or may be  
25 not supported by the facts of the case.

26 The use of overstatement of evidence is a  
27 commonly used interrogation tactic, it's used all  
28 over the United States. And it illustrates what an

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1 interrogator will do to try to convince someone that  
2 they are caught. So inventing eyewitnesses who are  
3 not there, inventing physical evidence, inventing  
4 fingerprints may be extremely important in convincing  
5 someone that they are indeed caught and that can  
6 convince someone who is guilty and it can convince  
7 someone who is innocent that they will be prosecuted  
8 and found guilty.

9 On page 11 or 12 again Mr. Anderson says, in  
10 my version, "You know, I don't want to spend the rest

11 of my life in prison." And one of the detectives  
12 replies, "Well, you don't have to spend the rest of  
13 your life in prison. And that's what I've tried to  
14 explain to you is, don't go off the deep end on this.  
15 This '-appened a long time ago, you were a young kid,  
16 and like I said, there's a reason for it. But we  
17 weren't there, Mike and I weren't there. You were  
18 though, and you know why it happened and how it  
19 happened, and you know why it happened and that's  
20 what we want to know."

21 On page 12 or 13 statement is made about  
22 "this is your opportunity, nothing in the book  
23 changes." And the book here is a reference to the  
24 file. Again a tactic that one often sees in  
25 interrogaLion of bringing in either the case file or  
26 a file that is stuffed with more material than is, in  
27 fact, in the case file, emphasizing simply the  
28 weight, physical weight, if you will, of the evidence

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1 showing that the person is guilty.

2 So the statement is "nothing in the book  
3 changes, but what we -- but what it does do," and  
4 here on page -- my page or district attorney's page  
5 probably beginning on about page 15, "the question --  
6 it's not a question we're asking, Robert. I mean we  
7 know what, we know that you did it. The question is  
8 like why? I said earlier that's the only thing we're

9 really interested in and that will make the  
10 difference whether --" Mr. Anderson then says, "what  
11 gets me is --" the detective continues in my version,  
12 "will make the difference whether it is first degree  
13 murder or manslaughter or something."

14 Then on page 17 or 18, it's on page 18 of the  
15 district attorney's office transcript, the statement  
16 is made "A alright. Let me ask you this. Just answer  
17 me, and you can tell me anything you want. You just  
18 tell me the truth."

19 That illustrates a tactic of trying to elicit  
20 from a suspect a self-serving statement. In the  
21 context of discussion of a variety of levels of  
22 punishment the statement, "you can tell me anything  
23 you want." And then with the addition, "just tell me  
24 the truth," has to be, in my judgment, interpreted as  
25 an offer to accept a version of the story that may be  
26 less serious than what actually happened. This  
27 tactic again appears, this tactic of lowering the  
28 threshold appears in interrogation all the time and

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1 often what will happen is that a suspect will accept  
2 that offer, will give a self-serving story and then  
3 an interrogator will break that down and move towards  
4 getting an accurate narrative of the crime.

5 Q. Has that, in fact, also happened on page 27  
6 of the People's transcript, an inducement to tell any

7 story?

8 MR. FAZIO: I suggest that Mr. Rappaport  
9 read it, because the doctor doesn't have our copy,  
10 your Honor, he has the Public Defender's copy, so it  
11 doesn't appear on his page.

12 THE COURT: Mr. Rappaport, why don't you  
13 refer to that portion on page 27 that you intend to  
14 have the witness focus on by reading it.

15 MR. RAPPAPORT: The comment by Inspector Mike  
16 Johnson that begins, "Hey Robert? We know you killed  
17 the guy. The only reason is why, if you don't want  
18 to tell us, that, that's fine. But I mean, that's to  
19 your advantage. I mean, right now, we're  
20 thinking, you went to the guy's house and you planned  
21 on killing him and that's how you did it. You  
22 planned it from the beginning, and that's first  
23 degree murder. The only question is why did you kill  
24 him. Was there some reason? Was there a fight,  
25 what happened? Is there some kind of circumstance  
26 that led up to it that will help explain it and  
27 modify it? That's the only issue, that's the only  
28 question."

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1 A. And that is -- that statement, if you read  
2 the next statement you'll find that there is more on  
3 that subject.

4 Q. Okay. Quote, by -- comment by Inspector  
5 Fagan: "The only question is, in this situation is

6 why? Did he threaten you? You've told me, no -- he  
7 didn't threaten you. That no homosexual ever  
8 threatened you. Did he make you angry? Did he throw  
9 you out? Uh, did -- you know? What was the reason,  
10 and that, that's all we need to hear. Uh, you  
11 know -- the rest of the stuff," et cetera, I guess it  
12 goes on. "You're just fixating on things that aren't  
13 important. And the question really is, is why. It's  
14 not a matter of whether you --

15 Is that also part of that process?

16 A. Yes. And that illustrates teaching the  
17 suspect what he or she needs to say in order to  
18 qualify for lesser charge, reemphasizing that the  
19 issue of deny guilt is a hopeless operation and that  
20 the suggestion is that if you tell us the right story  
21 we'll fulfill our part of the tacit bargain which is  
22 developing over the course of this interrogation that  
23 you will get a lesser charge.

24 Q. Where do you see that passive bargain in  
25 terms of ..nterrogation in this case?

26 A. It's throughout. It's all of these  
27 references are part of that process. And then I have  
28 pages of references in which that theme is gone back

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1 to and also it's sometimes stated very explicitly and

2 also the defendant indicates that that is what I say,  
3 motivating him, and that's also in the record --

4 Q. Where do you find that?

5 A. Generally in the area beginning on pages 45  
6 and 46 of the district attorney's office  
7 transcript. Prior to the point I have marked, there  
8 is discussion of whether or not to repeat what was  
9 said off the record with the tape recorder off  
10 again. And I would identify the area in that context  
11 where Mr. Anderson says, and if you could read from  
12 this point forward that might be helpful. "This will  
13 hurt me if I don't put it on --" then there is an  
14 incomprehensible word, "right?"

15 Q. Following with the inspector?

16 A. Yes.

17 Q. Quote on page 45. "No. No, you -- while  
18 we're on -- wait, wait, wait, wait. Let me ask you  
19 this, did we threaten you while we're off tape? Did  
20 we make you any promises while we're off tape? Did  
21 you ask to talk to your attorney while you're off  
22 tape? Did you tell us about the murder while you  
23 were off tape?

24 ANSWER: Yes."

25 Tu which question parenthetically we don't  
26 know, it's a compound question.

27 "INSPECTOR: Did you explain to us what  
28 happened while we were off tape? Did you confess to

\*1

1 the murder while you were off tape? Airright. What  
2 I'm going to say to you now is, is, you were afraid  
3 of the tape recorder, and we turned it off, and you  
4 explained to us in great detail, what happened in San  
5 Francisco, and about the murder.

6 MR. ANDERSON: And the only reason why is  
7 because I'm going to be found guilty anyway."

8 Is that the portion you're referring to?

9 A. Continue on.

10 Q. Certainly. "INSPECTOR: Well, wait. Wait.  
11 Let me ask you this: Do you want to at this time,  
12 continue talking to us? And do you want to tell us  
13 what you told us off tape? Do you want to tell us  
14 what you --" There is a pause. Mr. Anderson's  
15 response is inaudible. "INSPECTOR: Wait. Do you  
16 want to to tell us what you told us while we were off  
17 tape? MR. ANDERSON: I still get the same amount of  
18 time, right?"

19 A. That's the portion that I marked. If one  
20 looks at, overall at that portion, Mr. Anderson is  
21 expressing, he's been convinced that he is going to  
22 be found guilty and his concern is minimizing the  
23 time and his concern is about repeating the statement  
24 on the tape and that if he repeats it on the tape he  
25 still getb the same amount of time.

26 Q. To you does that indicate that Mr. Anderson  
27 told the police what happened because of the promise  
28 of leniency or reduced charge?

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1 MR. FAZIO: I object to that question.

2 THE COURT: The objection is sustained. It's  
3 leading.

4 MR. RAPPAPORT: I believe the Evidence Code  
5 provides for leading an expert but --

6 THE COURT: I understand, but it's  
7 discretionary and this is an ultimate question.

8 MR. RAPPAPORT: Okay.

9 Q. Dr. Of she, looking at the transcript of the  
10 tape recorded statement, can you determine whether  
11 Mr. Anderson provided a statement to the inspectors  
12 based on the inspector's, one, convincing Mr.  
13 Anderson that he had, in fact, committed the crime;  
14 two, offering a benefit to Mr. Anderson by way of  
15 reduced charge or the fact that he wouldn't have to  
16 spend his life in prison; and three, suggestions that  
17 he formulate a scenario that included a homicide less  
18 than first degree murder?

19 MR. FAZIO: I object to that question as  
20 calling for speculation.

21 THE COURT: Overruled.

22 THE WITNESS: A. Yes, but it requires  
23 additional -- let me point to an additional part of  
24 the transcript that follows shortly after the part  
25 you just read.

26 Q. Please.

27 A. It begins on page 47 -- I have the district  
28 attorney's office transcript, the inspector is

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1 discussing the appointed lawyer or the lawyer who  
2 will be appointed and says, "And the guy will handle  
3 your case. Airight, as you told us when you were off  
4 tape, you did it. You just want to sort of come  
5 clean with the whole thing, and make amends, and I  
6 believe you."

7 Mr. Anderson then says: "You don't think  
8 that without that on tape, I could get it dropped?"  
9 Then the D.A.'s version says "inaudible," and the  
10 Public Defender's Office is "to lesser."

11 MR. RAPPAPORT: That will be a matter of  
12 determination here in this courtroom at a subsequent  
13 time. But please proceed assuming, given what you  
14 have.

15 A. Clearly what Mr. Anderson is expressing is  
16 the willingness to repeat the statement based on the  
17 idea that he's been found guilty or will be found  
18 guilty, it is absolutely certain. He doesn't have to  
19 spend the rest of his life in jail which was a  
20 suggestion made earlier. The range of charges have  
21 been discussed, he's concerned about getting a lesser

22 and now he's expressing concern about repeating what  
23 he just said because if he does not repeat his --  
24 he's concerned if he doesn't repeat it on tape the  
25 charge won't be "dropped to," and then depending on  
26 whose version, we don't know, or the "dropped to a  
27 lesser." It's clearly expressing that which is of  
28 concern to him and it is the product of very common

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1 interrogation tactics which have gotten into the area  
2 of negotiating charge.

3 Q. Was there any pressure, you've determined  
4 from the transcript, placed on Mr. Anderson to  
5 proceed with giving a statement in a rushed fashion  
6 or by analogy, the train is leaving the station, and  
7 you get and you better get on now or you're not  
8 getting on --

9 MR. FAZIO: Same objection, calls for  
10 speculation.

11 THE COURT: Overruled.

12 MR. FAZIO: Beyond his expertise.

13 THE COURT: Overruled.

14 THE WITNESS: A. There are examples where  
15 the detectives threaten to stop it if he doesn't  
16 cooperate. Get off being fixated on the evidence,  
17 proving that he did or did not do it, disputing that  
18 ~vider~c~. So they were sug~e.stinc~ that. they were the  
19 conduit, they are withdrawing that if he continues to

20 protest, they are manipulating him in order to elicit  
21 this statement, this is his chance, they repeat that  
22 several times prior to his giving the statement. As  
23 soon as he's given the statement and he ask  
24 specifically about the time element, that is to say  
25 the level of punishment, they begin talking a  
26 different talk.

27 Q. Which is what kind of talk? Can you refer to  
28 the transcript?

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1 A. On page 46 of the district attorney's office  
2 version, they now say as -- I'll just read from my  
3 version. "Well, just so -- I think we have --" Mr.  
4 Anderson says "Well, I'll still get the same amount  
5 of time, right?" One of the detectives said, "Well,  
6 just so -- I think we explained this to you --" \*the  
7 other detective says, "That's really not up to us,  
8 Robert." And then the first detective comes back and  
9 says "It, it's not up to us -- we're not, we're just  
10 the investigators. We're the ones who came out here  
11 to pick you up. We're the ones who talk to you. But  
12 the district attorney will file, you'll go to a  
13 judge, and your attorney and the District Attorney  
14 will decide uh, about this. And we explained to you

15 --" Mr. Anderson says, "I'll be found guilty, for  
16 sure."

17 Q. Can you please explain the difference between  
18 that statement and the statement found on page 4  
19 where the inspector indicates that "I'm just here to  
20 be your conduit." And Mr. Anderson replies, "Well,  
21 you ain't going to be the prosecutor." The  
22 inspector's statement then is, "Well, we're going to  
23 be the ones that talk to the prosecutor alright? And  
24 really it's just a matter was it manslaughter,  
25 voluntary, involuntary, second degree, first  
26 degree."

27 What is the difference between that statement  
28 that is found at the beginning of the interrogation

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a. and the statement that you just read found after Mr.  
2 Anderson made a statement to the police?

3 MR. FAZIO: I object to that, beyond his  
4 scope of interpreting what was in the individual's  
5 minds on prior occasions. Statement speaks for  
6 themselves, you don't need an expert to tell us what  
7 the difference, if any, is.

8 THE COURT: The question may be ambiguous.  
9 will ask you to restate it, Mr. Rappaport, to focus  
10 on this witness's areas of expertise, and rather than  
11 having him recite what he thinks somebody was meaning

12 by their language.

13 Q. (By Mr. Rappaport:) Looking at promises or  
14 implied promises of leniency is within the scope and  
15 course of your training and experience, is that  
16 correct?

17 A. That's correct.

18 C. Do you find a pattern of implied promises of  
19 leniency in terms of charging this case prior to the  
20 time the tape recorder is turned on, somewhere  
21 around page 35 of the transcript?

22 A. Yes, there is a strategy of suggesting that  
23 there would be a benefit, this is an opportunity to  
24 tell your story, this is repeated over and over and  
25 over again in a number of different ways and Mr.  
26 Anderson evidences that he has understood that the  
27 issue here is how much time he's going to spend in  
28 jail. It's explicitly discussed, not necessarily the

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1 rest of your life and so on. That has been  
2 communicated. It's suggested. The evidence that is  
3 suggested is abundant and it's also demonstrated that  
4 Mr. Anderson has understood that in his statements,  
5 so this is a strategy of communicating an idea and  
6 Mr. Anderson demonstrating that he has gotten that  
7 idea.

8 MR. RAPPAPORT: Thank you very much. I have

9 nothing further.

10 THE COURT: We are due for a break.

11 MR. FAZIO: I think more than that, your  
12 Honor, may I just ask one foundational preliminary  
13 question then we may recess for the day depending  
14 what your ruling is?

15 THE COURT: Do you have cross-examination of  
16 this witness?

17 MR. FAZIO: Yes, and that question is geared  
18 toward extent of that cross-examination.

19 THE COURT: All right.

20 CROSS-EXAMINATION

21 By: William Fazio, Assistant District Attorney:

22 Q. Doctor, do you have a report with you you're  
23 reading from?

24 A. No.

25 Q. Well, you read through several pages, what is  
26 that --

27 A. They're notes.

28 Q. That you took?

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1 A. Yes.

2 Q. In preparation for your testimony?

3 A. Correct.

4 MR. FAZIO: I'd like to see a copy of that  
5 before I cross-examine the doctor.

6 MR. RAPPAPORT: I believe those are work  
7 product, number one --

8 MR. FAZIO: I think, Judge, this whole  
9 concept of discovery has really taken on apparently  
10 the real import that was due it years ago when it was  
11 passed by the People of the State of California, this  
12 is an expert witness, the discovery in criminal cases  
13 really, I submit, is no different except for the  
14 right of the defendant's Fifth Amendment protection  
15 than that of civil cases. For years prosecutors  
16 operate under the sporting system of justice, now we  
17 have an expert who is reading from a report and I  
if don~ have the right to lo~ at that awld examine it?  
19 That's eminently unfair.

20 THE COURT: The problem I have, Mr. Fazio, is  
21 that this is a pre-proposition 115 days, is it not?

22 MR. FAZIO: That doesn't matter, your Honor,  
23 since this is a procedural -- in fact, counsel -- if  
24 counsel felt that way he would not have provided to  
25 me a list of his -- a list of his witnesses and he  
26 has never taken that position. And I've addressed a  
27 letter to him dated January 9 asking for him to  
28 comply under Section 1054.3 and he's indicated he

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1 intended to do so. For him now to say that those are  
2 work product, that's simply not the case. He's  
3 referred to it so it's no longer privileged, even if  
4 it was at one time work product.

5 So I would like a copy of those reports and  
6 also counsel indicated to me earlier that there was  
7 some taped statement apparently that the doctor  
8 relied on which I don't have a copy of either.

9 MR. RAPPAPORT: He has not relied upon it for  
10 formulating his opinion, he's not been asked about it  
11 in anyway.

12 MR. FAZIO: Well, I'm going to ask him about  
13 it, counsel brought it to my attention earlier, I  
14 think I have a right to have that also.

15 So I'm not prepared to engage in any  
16 cross-examination of the doctor at this stage,  
17 particularly in light of the fact that he's an expert  
18 in the area, which in 20 years of practice I've  
19 had the opportunity of engaging and cross-examining  
20 one, so I'm just --

21 MR. RAPPAPORT: I've never had the  
22 opportunity to a direct examination on one either.

23 MR. FAZIO: You've had the opportunity of  
24 talking to him, Counsel, I haven't.

25 THE COURT: With regard to the materials upon  
26 which this witness has considered and relied and  
27 based his opinion, if it includes some tape it is  
28 subject to production and review by the

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1 prosecution. If there is material here which clearly  
2 appears to have refreshed his recollection after he  
3 noted that he left some of his materials in his  
4 office, I believe that too is appropriately subject  
5 to review and --

6 MR. RAPPAPORT: I think I should probably  
7 review the notes prior to Mr. Fazio examining them  
8 should the Court order that. They certainly may  
9 contain attorney-client statements. Dr. Ofshe as a  
10 defense expert would fall within the purview of the  
11 attorney-client privilege as well as work product, so  
12 I would like to discuss that with him.

13 But more importantly I think the Court needs  
14 to determine the threshold issue as to whether with  
15 regard to discovery does apply in this case.

16 THE COURT: I don't know that I need to  
17 refer -- that is what I'm suggesting, Mr. Rappaport,  
18 because "where the witness is using a writing to  
19 refresh his memory it must be produced at the hearing  
20 at the request of the adverse party, unless writing  
21 is so produced the testimony of the witness  
22 concerning such matter shall be stricken."

23 MR. RAPPAPORT: Does the law envision notes  
24 for refreshing recollection, such a writing? I don't  
25 believe it does. I believe it's talking about  
26 learned treatises, reports of examination, et

27 cetera. I don't think it's simply someone's personal  
28 notes.

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1 MR. FAZIO I don't think there is any  
2 limitation on it. It says writing and writing is  
3 writing in general.

4 MR. RAPPAPORT: I should for purpose of, and  
5 also for the purpose of examining the situation and  
6 what constitutes a writing, there is a provision in  
7 the Evidence Code, for example, that says if an  
8 expert relies upon statements of a party that party,  
9 party of a case that party may not be cross-examined,  
10 however, if the expert relies upon any other  
11 statements that person or party who provided the  
12 statement to the expert is subject to  
13 cross-examination. So here those notes, if they do  
14 contain statements based on conversations with  
15 counsel or contain work product should -- would be  
16 analogous to statements taken from the party and  
17 should not be subject to cross-examination.

18 YR. FAZIO: I've never heard of thdt  
19 objection. That's ridiculous.

20 MR. RAPPAPORT; I've never heard --

21 MR. FAZIO: That's like saying if the  
22 psychiatrist interviewed the defendant I can't talk  
23 to him about his conclusion based upon his interview

24 of the defendant because I could therefore  
25 cross-examine the defendant.

26 THE COURT: What I'm going to do is take a  
27 recess so my reporter can have a break. Let's take a  
28 ten minute break after which we will resume and I'll

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1 give you a ruling.

2 (Recess.)

3 THE COURT: Counsel are present. Mr.  
4 Anderson is present.

5 Before we took our recess Mr. Fazio on behalf  
6 of the People made a demand for the right to inspect  
7 and review the file of materials produced by Dr.  
8 Of she, to which reference was made in the course of  
9 direct examination.

10 MR. RAPPAPORT: Do you need a response, your  
11 Honor?

12 THE COURT: Let me finish. Mr. Rappaport has  
13 asserted an objection based on attorney work product  
14 to a demand for the right to review this before Mr.  
15 Fazio conducts his cross-examination.

16 The grounds that have been raised are work  
17 product, is that correct, Mr. Rappaport?

iP MR. RAPPAPORT: I was goin~j to add, your  
19 Honor, that I've reviewed my California Courtroom  
20 Evidence before me, I am withdrawing my objection.

21 THE COURT: You don't get my learned

22 analysis.

23 MR. RAPPAPORT: I'll ask after we're off the  
24 record.

25 THE COURT: Then what I would like to do is  
26 mark for identification or in some fashion, maybe you  
27 can supply a copy -- let me restate this. If it is  
28 satisfactory we can give Mr. Fazio the materials to

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1 review or you can work out however you want to do  
2 this. I think we should make part of the record that  
3 which is being referred to by the witness in the  
4 course of the examination.

5 MR. RAPPAPORT: May I ask the witness what he  
6 has referred to for the purpose of the record?

7 THE COURT: You may.

8 DIRECT EXAMINATION (Reopened:)

9 By Douglas Rappaport, Deputy Public Defender:

10 Q. Dr. Of she, what have you referred to and is  
11 now before you here on the witness stand during the  
12 course of your direct examination?

13 A. These seven pages of handwritten notes. And  
14 I made reference to an 8th page which I believe I  
15 left in Berkeley. And the Public Defender's Office  
16 transcript of the interrogation which is necessary  
17 because my notes are coordinated to this.

18 I believe that. the marginal notes on the  
19 transcript indicate three -- three times the word  
20 "prior" appears, I believe that's everything that's  
21 also on my missing page. But I'll bring the page  
22 with me tomorrow.

23 Q. Okay. I will have the notes -- you can take  
24 them out of your legal pad -- marked as defense  
25 exhibit, I believe it should be B.

26 THE CLERK: B.

27 MR. RAPPAPORT: And being marked as defense  
28 Exhibit B, the seven pages of handwritten notes on

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i yellow legal paper.

2 Q. (By Mr. Rappaport:) And you indicated you  
3 also referred to a transcription of the tape?

4 A. 36 pages.

5 MR. RAPPAPORT: 36 page document with  
6 handwritten notes in the margin. I'll have that  
7 marked as Defense Exhibit C.

8 THE COURT: Defendant's B, the seven pages of  
9 handwritten notes is marked for identification. And  
10 Defendant's C is the 36 pages of typed transcription  
11 from Dr. Ofshe's file.

12 (Defendant's Exhibits B & C  
13 were marked for identification.)

14 MR. RAPPAPORT: We will have photocopies made

15 both for the Court and the prosecution. The Court  
16 has one, for the prosecution.

17 THE COURT: In order that Mr. Fazio has the  
~i8 'natsriei~ ~va'lab:lc for him t~ rcvie~' tcn:ght ~ h~'~  
19 prepared to proceed in the morning will you do this  
20 forthwith.

21 MR. RAPPAPORT: Yes, I will. I'm also going  
22 to provide him with the tapes, I don't know if  
23 Proposition 115 or the reciprocal discovery  
24 provisions apply to this case that is in issue. This  
25 case arose clearly before that proposition was  
26 passed, I provided a witness list simply because the  
27 sanctions of exclusion is far too drastic to take a  
28 chance. So I mean also it prevents a mistrial in

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1 that one of the jurors Ultimately realizes that they  
2 live next door to Dr. Of she or that they're one of  
3 his students and they like his class or the  
4 reciprocal, they got an F in his class. So therefore  
5 it was provided for those reasons.

6 MR. FAZIO: Judge, just comment, I don't know  
7 any defense attorney in this building who ever  
8 provided a witness list to the prosecution prior to  
9 the enactment of Prop 115. It's my position that  
10 Prop 115 is a procedural change in the law and does,

11 in fact, apply retroactively to those cases which are  
12 tried after the effective date of the passage of  
13 Proposition 115. It's not -- there is no substantive  
14 changes that Proposition 115 had that we're currently  
15 speaking or addressing ourselves to.

16 THE COURT: That issue is not now before me.

17 MR. RAPPAPORT: No.

18 MR. FAZIC: The oikiy other out~ta-iding bit of  
19 discovery then apparently is that this is a taped  
20 statement made by the defendant I guess to the  
21 doctor. I'm not certain, but Mr. Rappaport indicated  
22 to me that there was a taped statement and his office  
23 did not have a high speed copy machine and otherwise  
24 he would make it available to me, so I'm asking for  
25 it now.

26 MR. RAPPAPORT: We don't have a copy machine,  
27 period, high speed or otherwise.

28 MR. FAZIO: We do.

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1 THE COURT: Why don't you make a copy on Mr.  
2 Fazio'S copy machine.

3 MR. FAZIO: I would be more than willing to  
4 allow him to do that.

5 THE COURT: There is another matter that we  
6 discussed yesterday related to the exclusion of  
7 witnesses. I don't think Mr. -- Dr. Ofshe needs to

8 remain throughout this discussion, or through this  
9 discussion if he chooses to step down. We do need to  
10 set a time for your return, sir. So maybe you have  
11 to stay for a few minutes.

12 MR. RAPPAPORT: Is 10:30 available for the  
13 Court?

14 THE COURT: Yes. It is my expectation that I  
15 will get through the morning calendar by 10:30 or  
16 earlier, 10:15, in order that we may resume at that  
17 time. Then I'm afraid we will not be able to begin  
8 jury selection.

19 MR. FAZIO: Until 2:00 o'clock.

20 THE COURT: Until after lunch. Let us  
21 address for a moment the question of the exclusion --

22 MR. RAPPAPORT: Is Dr. Ofshe excused for the  
23 day to return tomorrow at 10:30?

24 THE COURT: Yes, sir. Will you, having left  
25 the materials with the Court and Mr. Rappaport,  
26 you're free to go and check with Mr. Rappaport as to  
27 the time that we resume tomorrow. It will probably  
28 be 10:30.

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1 THE WITNESS: Is it possible for me to get a  
2 copy of my notes and transcript? I have overnight in  
3 case I should want to look at them.

4 THE COURT: Yes. Mr. Rappaport will make  
5 those copies. He's to make one for Mr. Fazio to use

6 tonight and he'll make one for you too.

7 MR. RAPPAPORT: Okay. In fact, we'll do  
8 that.

9 (Excerpt continued to Thursday, February 2,  
10 1995, 10:30 a.m.)

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THURSDAY, FEBRUARY 2, 1995

2

3 THE COURT: We resume today the trial of  
4 People vs. Robert Anderson with the  
5 cross-examination --

6 MR. FAZIO: Yes, your Honor.

7 THE COURT: -- of Dr. Ofshe. You may  
8 proceed.

9 CROSS-EXAMINATION (Resumed:)  
10 By William Fazio, Assistant District Attorney:

11 MR. FAZIO: Good morning, Doctor.

12 THE WITNESS: Good morning.

13 MR. FAZIO: One minute, your Honor. I'm  
14 looking for something else actually.

15 Q. Doctor, as I said off the record, thank you  
16 for providing that information to me yesterday, to  
17 Mr. Rappaport, I think that will actually make my  
18 examination of you a littl~ quicker.

19 You mentioned yesterday that there were  
20 several types of confessions and if I could just go  
21 over them very briefly, you said there was the true  
22 confession where somebody actually admits truthfully  
23 to those questions which have been asked of him or  
24 her, correct?

25 A. Correct.

26 Q. Then there is a problem I guess which is  
27 somewhat endemic to the law enforcement community  
28 where people come in and volunteer, voluntarily

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1 Confess to crimes which clearly they had nothing to  
2 do with?

3 A. Called voluntary false confession.

4 Q. In your experience is that one of the reasons  
5 that police officers oftentimes hold back certain  
6 information which isn't published in the newspaper so  
7 they could sort of test these voluntary false  
8 confessions?

9 A. Precisely.

10 Q. Then you went on to state what you described  
11 as a coerced compliant confession?

12 A. Correct.

13 Q. Where the party making the statement gives  
14 the statement knowing it is false but he gives it in  
15 order to avoid some type of punishment, in an extreme  
16 example would that be fair?

17 A. That or usually to escape the stress of the  
18 ir.terroqation.

19 Q. In an extreme situation how would you  
20 describe this type of a confession where somebody has  
21 been incarcerated, somebody is arrested, I'm thinking  
22 of the Pueblo incident where some members of the  
23 American military were incarcerated I think by North  
24 Koreans for a period of time and they signed  
25 confessions and then when they were released and  
26 returned to the United States they disavowed any  
27 truth to the confessions that they had signed, how  
28 would you characterize that type of confession?

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1       A.    Depending on what they say about how they  
2    were made, how they were threatened to sign the  
3    confession, you probably categorize those as coerced  
4    compliant, although my guess would be that the  
5    interrogation may have gone on for days, weeks or  
6    months before they elicited the statements from them.

7       Q.    Would that nonetheless be a coerced compliant  
8    confession?

9       A.    I mean if you put it into one of the  
10   categories, that would be the right category for it.

11      Q.    Then you said, just going through the  
12   categories that you laid out for us yesterday,  
13   coerced internalized false confession, where the  
14   person being interrogated, because of the nature and  
15   extent of the interrogation becomes -- comes around  
16   to actually believing what he's confessing to?

17      A.    That's how it is described as actually  
18   ) -'eJieving. I don't think that de~zr'rption fr  
19   accurate because those that I've studied the person  
20   becomes I think more certain than not and their  
21   belief that they did it rather than did not do it is  
22   very fragile and usually collapses shortly after  
23   they're removed from the interrogation.

24            I've worked occasions in which someone was  
25   interrogated, came to believe they committed a crime  
26   that they simply did not commit, they, in fact, were  
27   some place else at the time but they had forgotten

28 that, it was an interrogation about a crime, six

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1 weeks later they forget they were with a number of  
2 other people that night. That person over the course  
3 of the weekend continued to believe that he had  
4 probably committed the crime. The key to that is  
5 undercutting the person's confidence in their own  
6 memory of the period during which the crime was  
7 committed. But once the pressure of the  
8 interrogation is removed, usually the confidence, the  
9 belief that they committed the crime collapsed very  
10 rapidly.

11 Q. The ability to generate that type of a  
12 confession, is that also dependent on the mental  
13 state, the intelligence and the psychological makeup  
14 of the person that the interrogators are examining?

15 A. In the work that I've done on that, and what  
16 I know from the literature, there doesn't seem to be  
17 a necessary component of either intelligence or  
18 v'ental illness, alth~mgh the levs confident ~o'neu~e  
19 is in oneself, either because you know you have a  
20 history of mental illness or you know that you failed  
21 at everything you've done in life the more  
22 suggestible people tend to be, but there is no  
23 necessary relation between mental illness or  
24 intelligence. It's really a product of the

25 introduction of certain interrogation tactics at key  
26 points in the interrogation.

27 Q. Doctor, would you agree that there is a  
28 difference between a false confession and a coerced

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i confession?

2 A. Certainly.

3 Q. Coerced confession -- how would you describe  
4 the difference since you're the expert in the field?

5 A. Well, one, a confession that's elicited  
6 through coercion --

7 MR. RAPPAPORT: At this point I'm going to  
8 object because it's beyond the scope and it's not  
9 part of this hearing, it's not relevant to this  
10 hearing --

11 MR. FAZIO: What part of the question isn't  
12 relevant?

13 MR. RAPPAPORT: The difference between a  
14 coerced and a false confession.

15 MR. FAZIO: I think --

16 THE COURT: I'm going to overrule the  
17 objection.

18 Q. (By Mr. Fazio:) Coerced, )et me ask you  
19 this. I would like you to answer me, first of all, a  
20 coerced confession may be truthful or may be false,

21 correct?

22 A. That's correct.

23 Q. A false confession by definition is not a  
24 truthful confession?

25 A. Correct.

26 Q. And the reason, in your experience, why we  
27 tend not to rely on coerced confessions is because of  
28 the circumstances surrounding the nature in which the

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1 confession was retrieved, it tends to damage its  
2 reliability?

3 A. That if improper overly threatening  
4 techniques are used, you know, create the condition  
5 of certainty and then offer of induced punishment and  
so on, if those things are used, the fact that  
someone has given a confession does not discriminate  
8 between a true and a false confession. The only  
9 thing that discriminates would be the post-admission  
1 narrative which might then reveal whether the person  
1 who is now giving the statement for whatever reason  
12 actually has guilty knowledge of the crime or is  
13 ignorant of the crime.

14 Q. I wanted to give you the opportunity to  
15 answer the question I asked you a moment ago and that  
16 simply was your definition of a coerced confession  
17 and a false confession.

IF A. A coerced confess'on is one that- i~ elicite..i  
19 through coercive tactics and a false confession is  
20 one that is inaccurate.

21 Q. People can give false confessions for various  
22 reasons, I take it, in your experience?

23 A. Yes.

24 Q. He could give it because they simply want to  
25 get out of the situation, they're tired of the  
26 interrogation and by their disagreeing with their  
27 interrogators that's one way of having reason to give  
28 a false confession, correct?

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1 A. That describes the reasons that people have  
2 given for why they did exactly that.

3 Q. Have you come across cases when you've been  
4 involved in a criminal justice system throughout your  
5 career where people have told you, just asking you  
6 general questions that, well, you know, I never  
7 really did commit the burglary but I thought I would  
8 admit to it anyhow just to get it over with, the D.A.  
9 made me a good deal. Something along those lines?

10 A. No, that's largely because my experience  
11 deals -- has been restricted pretty much to murder  
12 cases.

13 Q. Now, I'd like to get into, Doctor, a couple

14 of areas, or before we do that I think you said  
15 yesterday that one of the major themes in police  
16 interrogations is to demonstrate to the person being  
17 interrogated the overwhelming evidence that the  
18 police agencies have at their command and convince  
19 them of the certainty of the guilt of the person  
20 they're interrogating. Is that a technique used?

21 A. That describes the impact or the purpose and  
22 impact of a number of different techniques one sees  
23 in interrogation.

24 Q. Did you state that overstatement of evidence  
25 is a commonly used tactic all over the United States?

26 A. That's my experience, yes.

27 Q. Why would one do that?

28 A. Because if one looks at interrogation from

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1 the perspective of eliciting an admission from  
2 someone who knows they committed the crime and there  
3 is good evidence that the person did commit the  
4 crime, then the strategic use of a additional  
5 evidence, the eyewitness, if the person knows that  
6 they did, in fact, leave the apartment at three  
7 o'clock in the morning and so on and so forth,  
8 they're very vulnerable to being told that there is  
9 an eyewitness, or your fingerprint was found, or your  
10 blood sample matches, or any of those things, that

11 may make the difference between the evidence that's  
12 actually there which points to the person which is  
13 what leads the officer to interrogate, and convincing  
14 the person that the evidence is overwhelming.

15           So engrossing or overstating the evidence is  
16 a tactic that's frequently used.

17       Q.    And we all agree that the purpose in taking a  
18 statement by the police, the purpose of interrogating  
19 is to obtain a statement, additional evidence that  
20 they could use in the case, generally speaking?

21       A.    Correct.

22       Q.    Do you think it's inappropriate to engage in  
23 the tactic of overstating evidence in order to have  
24 an individual make a statement?

25       A.    I'd like to answer that in two different  
26 ways.  One, professionally I don't think it's my job  
27 to have an opinion on that, although there are --  
28 that's a disputed area and there are people who think

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1 or write about legal ethics and feel different ways  
2 about it.  So in terms of analyzing interrogations it  
3 is simply a tactic that is used and it is regarded as  
4 a legitimate tactic, that's how I approach  
5 it.  Personally I don't have any objection to it  
6 because I think it's a necessary tactic because most  
7 of the time interrogators are interrogating someone

8 for whom there has been evidence. It may sway the  
9 ways that that person is going to lie to them, and so  
10 it's an adversarial game, if you will, going on, and  
11 overstating the evidence is a tactic. I can  
12 understand why it is, could be a very effective  
13 tactic.

14 Q. I think you also indicated that another  
15 tactic, if we might stick with the use of that term  
16 for a moment, is in indicating to the person being  
17 interrogated the benefit that will inure to him or  
18 her if they give a statement. Do you remember making  
19 -- do you know how does that come about?

20 A. Well, generally anything that suggest you're  
21 better off by giving a statement is an inducement to  
22 give the statement. And the kind of benefit that can  
23 be suggested can run from you'll feel better, get it  
24 off your chest. You know, I know you feel terrible,  
25 so on and so forth to, as was stated in a  
26 interrogation I reviewed recently the detectives  
27 simply said to the person, we're here to deal time  
28 and charges. You tell us this and you'll get 25

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1 years. You don't tell us and you'll get life. I  
2 think it's generally agreed that that offer of a  
3 benefit is over the line.

4 Q. You agree, and I think the courts in  
5 California agree that would be inappropriate to  
6 threaten somebody with a death penalty in order to  
7 secure a confession? That would tend to be coercive,  
8 would it not, in your opinion?

9 A. I would think so, yes.

10 MR. RAPPAPORT: That calls for a legal  
11 conclusion.

12 THE COURT: The objection is overruled.

13 Q. (By Mr. Fazio:) Doc, did you have any  
14 problem with the tactic of indicating to the person  
15 being interrogated that they will secure some  
16 benefits by cooperating, making a statement with the  
17 police, or does it depend on the nature of the  
~8 hc'i~fits ti,at are tuld to them?

19 A. Again, I think there is a range of benefits.  
20 One can identify what is suggested. And one can look  
21 at how the suggestions come up in the course of the  
22 interrogation. What impact they seem to have,  
23 especially when the person comments on it. And it's  
24 by tracking those things that one takes in many cases  
25 that the benefit was the motivator for giving the  
26 statement. And then depending on what the benefit  
27 was, it could either get evaluated in different  
28 ways.

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1           So in the course of a particular  
2   interrogation there is a lot of discussion about how  
3   you'll feel better, you grew up in this religion, so  
4   on and so forth, and this and expiates your guilt, so  
5   forth. The person gives a statement and says I feel  
6   much better for that. That's one thing.

7           If, on the other hand, it focuses on levels  
8   of punishment and the person -- again, in an  
9   interrogation I looked at recently after the  
10  interrogation was concluded the detective was doing  
11  some research on interrogation and throughout the  
12  interrogation the detective had been saying your only  
13  hope is for me to tell the jury because you won't be  
14  called to the witness stand, I'm the person who is  
15  the professional witness, I will speak to the jury  
16  and so on, and they will believe me, and so on and so  
17  forth, so you got to tell me something. And then  
18  formatted a self-serving statement from the  
19  individual. After the interrogation was over the  
20  detective who was doing some research asked a series  
21  of questions and one of the things he asked was why  
22  did you, and this is one of the series of a standard  
23  questionnaire, why did you give the statement? And  
24  the individual said because you told me that the jury  
25  would believe it from you and they wouldn't believe  
26  it from me. That's a clear indication of the offer  
27  of the motive on the part of the individual and  
28  giving the statement for that purpose.

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1 Q. Doctor, as somebody who has a background both  
2 psychological and sociology, can you tell us why do  
3 people confess?

4 A. I think they confess because they are  
5 convinced that their situation is hopeless and at  
6 that point some immediate advantage, offer of  
7 friendship from the investigator, it becomes easy to  
8 confess once you believe that your situation is  
9 hopeless. So in accomplishing, creating that  
10 subjective state of certainty that you're caught,  
11 then makes marginal or substantial rewards easier to  
12 accept in exchange for giving the statement.

13 Q. You mentioned something in your answer a  
14 moment ago about a friendship, it's also another  
15 tactic for the interrogator to attempt to identify  
16 with the person that they're investigating, correct?

17 A. Certainly.

18 Q. That Jr ~nd itsKlf there is no rapport --

19 A. No, it's part of establishing rapport.

20 Q. Why is that, this is a little far afield, I  
21 don't have the opportunity of talking to people like  
22 you very often, why is it that you'll hear situations  
23 where somebody will be apprehended for a crime and  
24 they'll say, oh, I'm so glad you arrested me and then  
25 they'll start talking to him all about the crime when  
26 they could have at any point in time walked into the  
27 nearest police station and done it voluntarily?

28 A. I don't know --

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1 MR. RAPPAPORT: At this point I have to

2 object.

3 MR. FAZIO: He doesn't know --

4 MR. RAPPAPORT: Okay.

5 Q. (By Mr. Fazio:) Now, Doctor, what I'd like

6 get into, Mr. Rappaport also gave me a copy of the

7 conversation you had with Mr. Anderson on January

8 17th of this year, do you recall that?

9 A. Yes.

10 Q. And I just want, I took some notes on it, I

11 want to ask you some questions about it.

12 You basically went over with some degree of

13 patience and understanding for about, oh, about 45

14 minutes or little over 45 minutes about the

15 circumstances surrounding the statement that, in the

16 background to the statement that Mr. Anderson gave to

17 the police, correct?

18 A. Corr'?.ct.

19 Q. Do you recall him telling you that he knew

20 what he had been charged with before the inspectors

21 arrived from San Francisco to bring him back to

22 California?

23 A. Not without your directing me to that, where

24 that is in the interrogation.

25 Q. Let me ask you, see if this refreshes your

26 recollection. Do you recall him saying that he read  
27 an article in the local New Hampshire newspaper  
28 detailing in some degree of specifics about the

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1 circumstances of the arrest and what he was wanted  
2 for in California? And he had read this before the  
3 the inspectors actually arrived there'

4 A. Without going through the interrogation,  
5 without going through the interview, I recall that  
6 there was discussion of his reading something.

7 Q. Do you recall him saying that the -- that the  
8 lawyer in New Hampshire said, don't even fight the  
9 extradition, you'll deal with it better. So he, in  
10 fact, waived extradition. Do you recall a  
11 conversation he had about that?

12 A. As I sit here -- I did this interview, I have  
13 not reread the transcript and I didn't use this  
14 material as part of my preparation for today so the  
15 interview is here, it is presumably an accurate  
16 transcription and if it's in there it's in there.

17 Q. This is an interview -- this is a  
18 transcription of your interview.

19 A. Correct.

20 Q. Okay. Let me look at it, maybe I can direct  
21 you because I just listened to this last night. I  
22 didn't see this. Why don't you read, this is on page  
23 1, this answer by Mr. Anderson and I'll ask you a

24 couple of questions, onto the next page, one

25 relatively short paragraph.

26 A. "Well, right --"

27 Q. You can read it to yourself.

28 A. Oh, I'm sorry.

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1 Q. okay, and in that statement Mr. Anderson  
2 states to you that he knew about the nature of the  
3 charges right at the time he was arrested by the  
4 authorities there in New Hampshire, correct?

5 A. Correct.

6 Q. And he said, "I had a lawyer out there,"  
7 meaning in New Hampshire, "and the lawyer said, lit's  
8 not even worth fighting extradition. Your best  
9 interest is to get out there and start fighting it."  
10 Do you remember him saying that?

11 A. Yes.

12 Q. Mr. Anderson told you they never talked until  
13 "We got in the car and we started down the freeway in  
14 New Hampshire to the Boston airport and they said  
15 stuff like, well, you know, do you want to talk and  
16 stuff, and then they read me my rights." Do you  
17 recall that?

A. Yes.

19 Q. This paragraph here on page 4 that relates, I

20 think, just so you could refresh your recollection,  
21 you read that to yourself one moment.

22 Have you looked at that, Doctor?

23 A. Yes, I have.

24 Q. And that relates to the question I asked you  
25 earlier about Mr. Anderson reading in the front page  
26 of the local newspaper the circumstances surrounding  
27 his arrest, correct?

28 A. Correct.

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1 Q. Do ~OU recall him telling you that when the  
2 police got there they bought him some Big Macs and a  
3 milkshake, they were kind of nice to him?

4 A. Yes.

5 Q. And that they went down and he had some  
6 property, some camping type equipment, and the police  
7 officers told him, "you can't take all of that with  
8 you on the plane," and they allowed him to go through  
9 and he apparently chose some property he wanted to  
10 bring with him, do you recall that?

11 A. Yes.

12 Q. Do you recall him at some point in time  
13 telling you that he was very interested in what  
14 evidence they had about his involvement in the

15 killing?

16 A. Yes.

17 Q. And he was asking the officers quite a few  
18 questions?

19 A. Yeah, I believe at that point we may have  
20 been talking about what was already on the tape.

21 Q. And on the tape itself, that's a good point,  
22 the taped transcript, which has been marked, the tape  
23 and the transcription of that tape, there is a lot of  
24 inquiry by him, Mr. Anderson, asking the officers  
25 questions?

26 A. Correct.

27 Q. Is that unusual that the party, subject of  
28 the interrogation, is allowed to ask questions to the

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1 investigator?

2 A. Not in my experience.

3 Q. In your opinion is someone with your  
4 background, do you think that this particular  
5 confession was taken, shall we say, not under the  
6 best circumstances, moving vehicle on a highway?

7 A. It couldn't make for the best tape recording,  
8 but if I were to look at an interrogation textbook,  
9 you know, teaching officers how to do interrogation,  
10 it would recommend different things than that, but  
11 this was their opportunity.

12 Q. That's what I was going to ask you next. If  
13 one has the opportunity to take a statement from a  
14 defendant in a criminal case, particularly a serious  
15 criminal case, it's better tactic to \*take advantage  
16 of that opportunity rather than to deny the party the  
17 opportunity and say, well, we'll talk to you later  
18 because he or she may change their mind, correct?  
19 Would you agree with that?

20 A. I didn't necessarily say "deny the party the  
21 opportunity."

22 Q. Well, in other words, if I'm an interrogator  
23 and I'm transporting somebody from one location to  
24 another and the individual says to me, "yeah, I'd  
25 like to talk to you right now, Mr. Fazio." It would  
26 probably behoove me to sit down wherever I was and  
27 take the statement rather than to say, just sit  
28 tight, wait til we get to my office and then I'll

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1 talk to you?

2 A. It would make sense but your -- your example  
3 presumes that the person out of the blue says I want  
4 to talk to you now as opposed to being encouraged to  
5 start the conversation.

6 Q. Right. The example I gave did do that, but  
7 you would agree that that would be more appropriate  
8 to take the advantage of the situation as an

9 investigator when it is presented to you?

10 A. If someone is being transported says they  
11 want to talk about the subject I want, I would think  
12 a detective would be foolish not to take the  
13 opportunity.

14 Q. May I look at that transcript.

15 MR. FAZIO: I think I only have a few more  
16 questions, your Honor, then I'm finished with the  
17 doctor.

18 Q. Mr. Anderson, before making a statement to  
19 the inspectors, seems -- was concerned as to why it  
20 took them so long to arrest him. Do you remember him  
21 inquiring of the officers about that?

22 A. Yes.

23 Q. In fact, at one time in this taped statement,  
24 says, I asked him at least ten times about what  
25 evidence they had against me. Do you remember that?

26 A. Yes.

27 Q. And this is a quote here on page 6. Your  
28 question was, "how did that make you feel?" He said,

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1 "I don't know cause it said from the newspaper  
2 article it happened in 1985. If they had so much  
3 evidence against me why would they wait until  
4 December 6 of '93 --" it should be '93 or 4?

5 MR. RAPPAPORT: '93

6 MR. FAZIO: p1993 to place a warrant on me?"  
7 He made those statements to you, correct? As  
8 reflected in the transcript?

9 A. As reflected in the transcript.

10 MR. FAZIO: I don't think I have any other  
11 questions. Thank you very much, Doctor.

12 THE COURT: Redirect?

13 REDIRECT EXAMINATION

14 By Douglas Rappaport, Deputy Public Defender:

15 Q. Mr. Fazio asked you some questions in the  
16 abstract about benefits and I believe you said that  
17 the more the suspect is convinced they're helpless  
18 the easier it is to accept the benefit, is that  
19 correct?

20 A. Yes.

21 Q. And here in this particular case involving  
22 Mr. Anderson, based on your review of the  
23 interrogation, do you believe a benefit was given or  
24 offered to Mr. Anderson by the police inspectors?

25 A. Yes.

26 Q. And what is the nature of that benefit?

27 A. That by giving a statement that it would  
28 result in a lesser charge. And the difference

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a. between, as expressed, the possibility of spending

2 the rest of his life in jail or spending a period of  
3 time in jail.

4 Q. And do you believe that Mr. Anderson gave the  
5 statement or confession to the inspector based on or  
6 based on this benefit?

7 MR. FAZIO: I'm going to object to that  
8 question because that causes this witness to  
9 basically get into the defendant's mind. I don't  
10 think that he's the best witness for that, why he  
11 gave the statement.

12 THE COURT: I will sustain the objection  
13 because I think you have not laid the foundation to  
14 establish this witness may answer the question. That  
15 does calls for speculation

16 MR. RAPPAPORT: Okay.

17 Q. Let me ask this. You reviewed the transcript  
18 of the interrogation, is that correct?

19 A. That's correct. You reviewed the language in  
20 the transcript both before and after the confession,  
21 is that correct?

22 A. Correct.

23 Q. You, from that language in the transcript you  
24 determined that, in fact, a benefit was conveyed to  
25 Mr. Anderson, is that correct?

26 A. That's correct.

27 Q. And the benefit conveyed to Mr. Anderson was  
28 that of lenient treatment in the hands of the

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1 prosecution? In other words, charging decision, is  
2 that correct?

3 A. That's correct. That's what's indicated by  
4 the statements in the transcript.

5 Q. Okay. Based on the statements in the  
6 transcript can you determine whether Mr. Anderson was  
7 interested in accepting this benefit?

8 MR. FAZIO: The same objection lies, your  
9 Honor, he just asked him common knowledge.

10 THE COURT: Sustained

11 MR. RAPPAPORT: Mr. Fazio's objection is  
12 different now --

13 THE COURT: This is a speculation  
14 objection. It calls for this witness to offer an  
15 opinion concerning the defendant's state of mind.

16 MR. RAPPAPORT: Okay.

17 Q. Do you see language in the transcript after  
18 the confession in which Mr. Anderson discusses time?

19 A. Yes.

20 Q. And looking at that language, do you have  
21 training and experience and expertise in the area of  
22 the conveyance of benefits by interrogators, is that  
23 part of your practice in looking at those --

24 A. That's one of the issues that has to be  
25 tracked in the course of evaluating an interrogation  
26 and I do it routinely.

27 Q. Is it also part of your training and  
28 experience and expertise looking and making a

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1 determination based on the language used, whether  
2 someone has accepted that benefit?

3 A. Yes.

4 Q. Based on that training and experience do you  
5 believe in this case that Mr. Anderson accepted the  
6 benefit conveyed by the prosecution, or excuse me, by  
7 the inspectors?

8 MR. FAZIO: I object on the same  
9 grounds. Mr. Anderson did, in fact, answer  
10 questions. Why he answered the questions I think is  
11 speculation.

12 THE COURT: I am not persuaded that you have  
13 laid a sufficient foundation to allow this witness to  
14 offer an opinion as to whether there is an acceptance  
15 of a benefit.

16 MR. RAPPAPORT: Okay.

17 Q. How do various suspects -- how can you  
18 determine that a suspect has accepted a benefit?

19 A. One way would be if they say that that is the  
20 reason that I did what I just did. And we have that  
21 sort of example in this transcript.

22 Q. Where do you find that sort of example?

23 MR. FAZIO: Excuse me, Judge. If that's the  
24 answer then we obviously don't need expert testimony  
25 for that and the transcript speaks for itself.

26 MR. RAPPAPORT: I think that this gentleman  
27 is an expert in the field of evaluation of  
28 interrogations. He's looked at many interrogations

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1 to determine if somebody has accepted the promise by  
2 the inspector, by the interrogator.

3 MR. FAZIO: The point I'm trying to make,  
4 your Honor, is that --

5 THE COURT: This is an opinion that goes  
6 beyond, or that is the subject -- is not beyond the  
7 ability of the lay fact finder --

8 MR. FAZIO: Correct.

9 THE COURT: -- to decide.

10 MR. FAZIO: Correct. The expert testimony,  
11 with all due respect, is not required as to that  
12 particular question.

13 THE COURT: I will overrule the objection.  
14 You may answer the question, sir.

15 THE WITNESS: A. Yes, at the end of the  
16 interrogation there is an attempt to get Mr. Anderson  
17 to repeat his statement on tape and he makes a  
18 statement on page -- on pages 47 and 48 of the  
19 district attorney's transcript where part of the  
20 discussion of repeating a statement on tape occurs.

21 Mr. Anderson says -- I'll read from my  
22 transcript, quote: "You don't think without that on

23 tape I could get a dropped to a lesser?" Now this is  
24 in the context of the negotiation of whether or not  
25 to repeat. Mr. Anderson at that point is making  
26 clear what he expects to be the benefit for having  
27 first made the statement off the tape and now being  
28 asked to repeat that statement. He expresses at the

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1 time his Concern about getting jt dropped to lesser.  
2 Now that comes at the end of the  
3 interrogation. And over the course of the  
4 interrogation I've identified perhaps 30 to 35 other  
5 places where the offer is developed that it's  
6 communicated and so on, and now Mr. Anderson is  
7 expressing that the idea that he would get a lesser  
8 charge by first giving the statement as he insist off  
9 the tape and now the negotiation is whether to repeat  
10 the statement on the tape, he's looking -- he's  
11 expressing one reservation about repeating the  
12 statement on the tape and whether or not without it  
13 on the tape he could get it dropped to a lesser.  
14 So that's clearly on his mind as expressed  
15 there and that would be, given the context of the  
16 interrogation, an indication that the suggestions  
17 that had been previously made have been understood by  
18 him. He had acted and he was expressing concern that

19 he actually get the lesser charge that he thought he  
20 would obtain by giving the statement and now the  
21 discussion is whether or not to repeat it on  
22 tape. He expresses concern about that possibly  
23 creating a worse situation for him, but the reason to  
24 do it is to make sure he gets the lesser.

25 Q. Is this also reflected on page 46 of the  
26 prosecutor's transcript when the inspector asked Mr.  
27 Anderson, "Wait, do you want to tell us what you told  
28 us while we were off tape?" Mr. Anderson's response

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1 is "I'll still get the same amount of time, right"

2 A. Correct

3 Q. Is that also an example of or an indication  
4 that Mr. Anderson has accepted the offer, the promise  
5 conveyed by the interrogator here for a lesser charge?

6 A. Well, it shows that that concern is on his  
7 mind at the time. And would, you know, would have to  
8 infer from that statement that that's the reason he  
9 gave the statement in the confession, of all of the  
10 other suggestions that you don't have to spend the  
11 rest of your life in jail, the only question  
12 remaining is what you're going to be charged  
13 with. The suggestions about a scenario in which he  
14 is threatened in some way.

15 All of this contributes to this final

16 statement that he makes which indicates that that's  
17 what's motivating him, that particular concern.

18 I~R. RAPPAPORT: Tha?'k you very much, nothing  
19 further.

20 RE CROSS-EXAMINATION

21 By William Fazio, Assistant District Attorney:

22 Q. Doctor, I'm curious because I read that too  
23 this morning. On page 47 the operative terms we're  
24 talking about in the language is when the inspector  
25 states -- are you there, Doc? Page 47? You read it  
26 to us initially.

27 A. Yes.

28 Q. Inspector says, "alright. As you told us

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1 when you were off tape you did it." And then there  
2 is some other language --

3 MR. RAPPAPORT: Where are you?

4 MR. FAZIO: Page 47, second entry of  
5 inspector.

6 Q. And, "Airight. As you told us when you were  
7 of f tape you did it." To which Mr. Anderson says  
8 "you don't think that without that on tape I could  
9 get it dropped," do you recall that?

10 A. Yes.

11 Q. And the inspector says, "well, I -- I really  
12 don't understand. Let's -- let's just do this.

13 Let's just, I really don't understand what you're  
14 asking us." And then the -- then Mr. Anderson says,  
15 "With that on tape, you guys can get me for more  
16 (inaudible)." Doesn't that appear to you, Doctor,  
17 that what Mr. Anderson has effectively done, he's  
18 made a statement to the inspectors which isn't  
19 memorialized on the tape recorder, which according to  
20 the inspectors, implicated him in the killing,  
21 correct?

22 A. Correct.

23 Q. Now he's sort of hedging his bets, he's  
24 telling the inspectors, "Well, I don't want to put  
25 that on tape because if I put it on tape then I might  
26 get more." Is that one way of interpreting the  
27 language that was transpiring at that point in time?

28 A. Yes. He's concerned about leaving the tape

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1 recorder, because --

2 Q. Right.

3 A. -- because it could be used in an adverse

4 way, but the attractive reason, the attraction to

5 giving it is getting the lesser, that's why, in my

6 judgment, he later says, "I couldn't get it dropped

7 if it's not on tape.'t

8 Q. And, okay, let me go back for a

9 moment. During the course of the statement Mr.  
10 Anderson initially asks a lot of questions, as you  
11 indicated earlier on cross-examination as to what  
12 evidence the police have, correct?

13 A. Correct.

14 Q. And then he initially denies any  
15 responsibility for the killing, doesn't he?

16 A. Correct.

17 Q. And then they continue to tell him, "We want  
18 to know why you did it." And they tell him that "it  
19 could be first degree murder, second degree murder,  
20 voluntary manslaughter, involuntary manslaughter, we  
21 don't know. We want you to tell us why." Correct?

22 A. Correct.

23 Q. And since they don't know what he's going to  
24 say they really have no way of knowing what he's  
25 responsible for as far as what you know about the  
26 police investigators at that point in time?~

27 A. Well, they're taking the position in their --

28 Q. They're taking the position that they know

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1 he's responsible for the death, right?

2 A. Correct.

3 Q. But they're telling him, whether it's  
4 truthful or not, they're telling him, "we don't know

5 what led up to the killing with the circumstances  
6 surrounding the killing," correct?

7 A. Right, they're telling him that repeatedly  
8 and in a way which is emphasized periodically that,  
9 for example, "don't go off the edge or the deep end,  
10 you know, you don't have to spend the rest of your  
11 life in jail," so on. There is interwoven with this  
12 the clear indication or the clear suggestion that by  
13 telling a story and telling a certain kind of story  
14 you get a lesser charge, you won't spend the rest of  
15 your life in jail.

16 Q. Right, it would depend, of course, on the  
17 nature of the story?

18 A. And they suggest to him something involving  
19 threat, you know, something that would result in a  
20 lesser charge.

21 Q. They also suggest to him that "if you planned  
22 it, then it's first degree murder." They tell him  
23 that, don't they?

24 A. Right, they warn him essentially not to tell  
25 them that.

26 Q. He could have said, you guys are right, I  
27 preplanned it," that's a possibility, right?

28 A. I don't believe -- in the confession, you

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1 know, they're telling him it could have been

2 preplanned, meaning first degree murder. If that's  
3 the case, whereas if it's something else, if it  
4 followed from threat, this or the other thing, then  
5 we have all these other sentencing options. We are  
6 your conduit to the prosecutor, you tell us  
7 essentially what's being -- there is a negotiation,  
8 you tell us what we need to hear and we'll get you a  
9 lesser charge.

10 Q. They also basically told him that it could  
11 have been self-defense, right, at some point in time?

12 A. They're giving him suggestions about how to  
13 format the scenario.

14 Q. And if he wanted to take their best offer, if  
15 you will, he could have said "The victim came at me  
16 and I killed him in self-defense and tell the  
17 district attorney that and he'll see the way and  
18 he'll] -- he'll drop charges --

19 MR. RAPPAPORT: Objection, speculation as to  
20 what --

21 THE COURT; Overruled. This is part of a  
22 hypothetical I assume.

23 MR. FAZIO: It's a hypothetical.

24 Q. That's a possibility based on the way the  
25 police officer's directing him, wouldn't you say  
26 that?

27 A. He could have formatted any one of a number  
28 of different ways.

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1 Q. But what he did, according to the police  
2 officers, while he was ofVtape he said in so many  
3 words Satan made him do --

4 MR. RAPPAPORT: Objection, misstates the  
5 testimony. He also -- he also testified as to other  
6 reasons, that the victim wanted to engage in sexual  
7 conduct with him --

8 MR. FAZIO: That's not the testimony of the  
9 inspector --

10 THE COURT: One at a time.

11 You may respond, Mr. Fazio, to the  
12 objection.

13 MR. FAZIO: It's cross-examination, your  
14 Honor.

15 THE COURT: The objection is overruled.

16 Q. (By Mr. Fazio:) You saw the handwritten  
17 notes done by Inspector Johnson as to the  
18 conversation he had with the defendant off tape, have  
19 you not?

20 A. I've seen that, yes.

21 Q. And Mr. Anderson says, "while I was choking  
22 him to death I said, Satan help me, Satan help me,"  
23 right?

24 A. I believe that that's what the notes say.

25 MR. FAZIO: Do we have those here,  
26 Roger?

27 Q. The note says -- there is three pages of  
28 notes. He says initially -- let me -- you can read

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1 over my shoulder here. The inspector took notes as  
2 to where the defendant said he met the victim  
3 initially, that he went to the victim's home, that he  
4 spent the night there. That the victim, I'm sorry,  
5 that Mr. Anderson was evasive as to any sexual  
6 activity between Mr. Anderson and the victim. That  
7 the victim wanted to wrestle in the nude in the  
8 morning. That Mr. Anderson wrestled but did not want  
9 to do so in the nude. Mr. Anderson choked the victim  
10 to death in an arm lock type hold, stabbed the victim  
11 after he was dead. States he made several trips to  
12 the sink in the bathroom where he left the  
13 knives. States he did not plan to kill the victim,  
14 it was caused by his desire to please Satan. While  
15 choking victim he said, Satan help me. Okay?

16 A. Okay.

17 Q. Now, the police officers did not suggest in  
18 anyway that you're aware of that Mr. Anderson should  
19 say "I stabbed him to death and I while --" I'm  
20 sorry, "I stabbed him. While I was stabbing him I  
21 said, Satan please help me." There is nothing in the  
22 interview where the police officers suggested that  
23 answer to Mr. Anderson, is there?

24 A. I didn't see anything like that, no.

25 MR. FAZIO: I think that's all I have. Thank  
26 you.

27 THE COURT: Redirect?

28 MR. RAPPAPORT: Yes. Briefly.

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1 REDIRECT EXAMINATION

2 By Douglas Rappaport, Deputy Public Defender:

3 Q. The police officers, the inspectors never  
4 suggested a particular or specific details to Mr.  
5 Anderson, did they?

6 A. No.

7 Q. And you wouldn't, in your experience, you  
8 wouldn't see that in the confession, would you? To  
9 suggest that -- give the defendant a particular  
10 details as to which he should thereafter confess to?

11 A. I've seen that, I mean it can be formatted  
12 more or less specifically. I've seen examples of  
13 both.

14 Q. But in this case there were suggestions to --  
15 were there suggestions to Mr. Anderson telling him  
16 that the charge may be reduced should he confess as  
17 to whether the victim threatened him or there is some  
18 mitigating circumstances?

19 Well, I guess I'm being vague. Let me be  
20 more specific by referring to the transcript.  
21 Initially the inspectors suggest to Mr. Anderson that  
22 it's first degree premeditated murder, is that  
23 correct?

24 A. Correct.

25 Q. In other words, that he planned the crime  
26 from the beginning, from the time he entered the  
27 home, is that correct?

28 A. It's what I would understand first degree

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1 premeditated murder to suggest.

2 Q. Right, and the police inspectors kept  
a suggesting to Mr. Anderson that there has to be a  
4 reason for this, is that correct?

5 A. There has to be a reason for the crime. If  
6 it's not going to be premeditated there has to be  
7 something else about why the killing occurred has to  
8 be offered.

9 Q. Right. In fact, based on your review of the  
10 transcript, did you see a spot where, in fact, the  
11 police investigators showed Mr. Anderson photographs  
12 of the crime scene?

13 A. I believe so.

14 Q. Specifically I'm referring to --

15 MR. FAZIO: Page 44. Top of the page.

16 Q. (By Mr. Rappaport:) Mr. Anderson says, "I  
17 hate even looking at them pictures." On page 44.

18 And then he goes on to say, "You know, you guys have  
19 a pretty sick job." And as a -- prior to that the

20 inspectors do have the case file and they opened up,  
21 Mr. Anderson wants to know what's in there, is that  
22 correct?

23 A. Yeah, he wants to know what the information  
24 is, he expresses that throughout.

25 Q. And when he says -- right before the tape is  
26 turned off the inspector, the last question-he ask  
27 is, "First off I don't think you planned this murder,  
28 I don't think you --" Mr. Anderson ask to have the

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1 tape recorder shut off.

2 Does that mean to you that, in fact, the  
3 inspector is really Saying, in essence, I don't think  
4 it's first degree murder, tell me what happened or  
5 for a lesser charge --

6 MR. FAZIO: Judge, I'll have to object. When  
7 he said what the inspector was meaning when he said  
8 what he said, it calls for speculation.

9 THE COURT: I'm going to overrule the  
10 objection. I heard the question differently. That  
11 is regards to what he sought.

12 Do you have it in mind, sir?

13 THE WITNESS: Yes, I do.

14 THE COURT: You may answer the question.

15 THE WITNESS: A. That's a tactic, it's a  
16 suggestion, it's giving guidance, it's saying I don't

17 believe you committed first degree murder and it's --  
18 in the context of everything else we're g~ttin~j is  
19 guidance being given to him about what he should  
20 offer as an explanation.

21           So the detective at this point is indicating  
22 a willingness to accept some -- something that adds  
23 up to less than first degree murder, which is moving  
24 off the earlier position of saying, you're going to  
25 be charged with premeditated murder.

26           So this is guidance and suggestion and  
27 shaping of what statement should be given. And a  
28 willingness to accept whatever statement is

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1 ultimately given. That's repeated throughout on the  
2 interrogation.

3       Q. Isn't it true that in the record of this  
4 interrogation police inspectors indicate to Mr.  
5 Anderson, "If you don't tell us what happened we're  
6 going to be back to what other people think, other  
7 people think the worst of you." I can point you to  
8 specific sessions on that if you give me a second.

9           Okay. On page 9 Inspector Fagan toward the  
10 bottom says, "Airight. Let's put it this way,  
11 Robert. There is enough evidence here that we can  
12 show it's you in the house at the time the guy was  
13 killed. We can show that you backed the guy's car  
14 out and you drove the car down to wherever it was,

15 Long Beach, and when the car was dropped  
16 off." Then -- Inspector Johnson. And, "There's, and  
17 the question is, most people tend to think  
18 ~he worst about you, you know? The big question is,  
19 why."

20 Again, also I believe it's on page  
21 ii. Inspector Fagan toward the top: "But we're  
22 talking specifically about a murder. And do you know  
23 exactly what it was? And it's just a matter whether  
24 you want to explain it to us and give your version of  
25 it or we go back with what other people have  
26 said. And that's, that's the bottom line."

27 MR. FAZIO: I'm sorry, what's the question?

28 MR. RAPPAPORT: Certainly. I was going to --

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1 Q. What other people think is impliedly first  
2 degree premeditated murder,\* is that correct?

3 MR. FAZIO: Excuse me, but that calls for  
4 legal conclusion without the proper foundation.

5 THE COURT: I'm going to have to ask you to  
6 rephrase the question because at this juncture in  
7 your examination I think it is leading and improperly  
8 leading. If you want to make an argument that's  
9 fine, you can make it --

10 Q. (By Mr. Rappaport:) Do you know, based on

11 your expertise in interrogation, what is the point or  
12 purpose of referring to what other people think or  
13 other people think the worst of you?

14 MR. FAZIO: Judge, that question is vague and  
15 ambiguous?

16 MR. RAPPAPORT: In the context of this  
17 transcript.

18 MR. FAZIO: In the context of this transcript  
19 is even more ambiguous.

20 THE COURT: Overruled.

21 THE WITNESS: A. That tactic indicating  
22 that there is somebody else who's advocating, you  
23 know, a severe Draconian punishment is a tactic  
24 that's used to position the interrogator as the  
25 friend of the suspect, as the person who is willing  
26 to help the suspect. So by inventing the outside  
27 person, the one who is advocating a severe  
28 punishment, the investigator is at the time setting

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1 himself up to say, I want to help you, I want to be  
2 the conduit, you have to give me something to work  
3 with. Essentially that theme is repeated. If we  
4 were to go through every citation that I've listed  
5 for the offer, what one would see is that over the  
6 course of the interrogation the emphasis on the  
7 Draconian punishment is where we begin. Then there

8 is a movement towards, it can be lesser and the  
9 investigator is positioning himself to be the person,  
10 if the suspect cooperates, who will now be able to  
11 provide the benefit. This is a tactic, it's  
12 illustrated in the statements.

13 Q. And in this case, the tactic in this case,  
14 the threatening the defendant with statements such as  
15 this taking on the role of ally against this  
16 Draconian or this other force that wants to impose  
17 the most severe penalty, what is the benefit? What  
18 i~ -- how can I phrase this? What is the purpose --  
19 let me -- I want to get this question -- I want to  
20 make this question very precise.

21 In this case by befriending the defendant is  
22 it apparent in the transcript that what they will be  
23 doing is going to the prosecutor to secure a lower  
24 charge or lesser charge than the most ultimate  
25 penalty here, first degree murder?

26 MR. FAZIO: Object to that question as calls  
27 for speculation.

28 THE COURT: Overruled.

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1 MR. FAZIO: Can I be heard Of1 that? Fine.  
2 withdraw the objection. i mean the objection stands  
3 but I don't have to be heard On it.

4 THE WITNESS: A. Could you repeat, just get  
5 me close to it.

6 MR. RAPPAPORT: May we have it read back?

7 THE COURT: You may.

8 (Record read by the Reporter.)

9 THE WITNESS: A. Yes.

10 MR. RAPPAPORT: Thank you very much. Nothing  
11 further.

12 RE-CROSS-EXAMINATION

13 By William Fazic, Assistant District Attorney:

14 Q. Doctor, how can you make that -- how can  
15 you -- why did you respond in the manner you did to  
16 that last question?

17 The question was by befriending the  
18 prosec~utor is it apparent that they'll be -- by  
19 befriending the defendant is it apparent that they'll  
20 be going to the prosecutor with the ultimate decision  
21 of getting something less. How did you come to that  
22 conclusion?

23 A. Based on specific statements in the  
24 transcript. We will be your conduit. We're your  
25 conduit to the prosecutor. They talk about the range  
26 of charges. They assure him he doesn't have to go  
27 off the deep end. He doesn't have to spend the rest  
28 of his life in jail. He indicates that he is

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1 understood, that in his statements made towards the  
2 end, when you work it through and you isolate all the

3 particular statements you see the development of the  
4 offer, how they're positioned by making themselves,  
5 or any interrogator by making him or herself a friend  
6 and a broker for the suspect, then they're in very  
7 good position to enhance the sense of authority and  
8 power that interrogators are trained to try to  
9 portray during an interrogation and now it's, "I'm  
10 your one friend," so to speak. "I will try to do  
11 these things for you." Or "I will do these things  
12 for you." All of this has to do with how one  
13 structures and manipulates the tactics in an  
14 interrogation.

15           So by making somebody else, I mean in one  
16 sense, good guy, bad guy, is an example of the same  
17 thing, "I'm your friend. My partner is a terrible  
18 guy. He wantc~, you know, the worse, but I want to  
19 help you." Get somebody to turn to.

20       Q.    So what they were trying to do was to cause  
21 Mr. Anderson to make a statement to them, right?  
22 That was their whole goal here, was to have him make  
23 a statement?

24       A.    Have him make a statement and they use the  
25 idea that making the statement would recreate a  
26 material benefit for him in terms of a lesser charge.

27       Q.    And that might very well have been true  
28 depending on what that statement was, correct?

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1       A.    It's my understanding it doesn't make any  
2 difference whether it's true or not.

3       Q.    How did you get come to that conclusion?

4           MR. RAPPAPORT:   Well, objection, calls for  
5 speculation unless --

6           MR. FAZIO:    Well, may his answer be stricken  
7 unless I can get into what his understanding is?

8           MR. RAPPAPORT:   I think if you refer to the  
9 transcript of the interrogation the police explained  
10 that --

11          THE COURT:    There is a legal objection.

12          MR. RAPPAPORT:   Okay.

13          THE COURT:    The answer is responsive in a  
14 way that sets forth the legal conclusion,    in my view.  
15 I will strike the answer and disregard it.

16       Q.    (By Mr. Fazio:)  Doctor, the officers gave  
17 him the opportunity making the statement and had Mr.  
18 Anderson said,  "I killed him in self-defense," Mr.  
19 Anderson had every expectation, based on your  
20 analysis of the statement, that the officers would  
21 come back and talk to the prosecutor about that,  
22 correct?

23       A.    Yes.

24       Q.    And had that happened hypothetically and had  
25 we decided that that was more likely than not  
26 truthful, then hypothetically the charges could have  
27 very well been dismissed against Mr. Anderson?

28          MR. RAPPAPORT:   Objection, compound question,

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1 vague and calls for expertise beyond his scope as to  
2 what happened in the prosecutor's office.

3 THE COURT: Overruled.

4 Q. (By Mr. Fazio:) Hypothetically, do you  
5 follow me?

6 A. Had he given an ideal self-defense story and  
7 had that been accepted then that might have happened.

8 MR. FAZIO,: Okay, nothing else.

9 MR. RAPPAPORT: Nothing else.

10 THE COURT: I have a couple of questions that  
11 I would like to ask Dr. Ofshe if there is no  
12 objection.

13 MR. FAZIC: Well, I'd like to hear the  
14 question first.

15 THE COURT: One question is, sir, so that I  
16 understand your testimony, would you point out to me  
17 in the transcript where you believe there is any  
3~ offer of a benefit.

19 MR. RAPPAPORT: There is no objection to the  
20 Court asking that question.

21 MR. FAZIO: I have no objection.

22 THE WITNESS: I answer that in part by  
23 saying every citation on the pages that I've labeled  
24 as offer go to that question and it's done in a  
25 variety of different ways and it's cumulative. We

26 begin --

27 Well, without going through everything, but I  
28 want to point out that every reference is noted in my

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1 notes.

2 on page 3 of the public defender's version,  
3 which would be --

4 THE COURT: Let me summarize or recite what  
5 I understand to be the references and that is on  
6 pages of the Exhibit 2, 2 to 3, pages 45 to 46 and  
7 page 47.

8 Now, where on pages 2 to 3, that is what is  
9 the testimony that you believe constitutes an offer  
10 of a benefit? Reference to the inspector being a  
11 conduit?

12 THE WITNESS: There is -- that's one part of  
13 it. First there is the education that occurs as to  
14 we're going to be the ones that talk to the  
15 prosecutor and it doesn't have to be first degree  
16 murder, it could be voluntary, involuntary, second  
17 degree, first degree or manslaughter. Manslaughter,  
~ invc~luntary anc~ so on. On the. public def~nder's  
19 version on page 9 its stated, "Well, you don't have  
20 to spend the rest of your life in jail." Mr.

21 Anderson is expressing his concern about -- he says,  
22 "you know, I don't want to spend the rest of my life  
23 in "jail. And the answer is, "Well, you don't have  
24 to spend the rest of your life in prison." He says,  
25 "I don't want to spend the rest of my life in  
26 prison." And then when we interrogators reply,  
27 "Well, you don't have to spend the rest of your life  
28 in prison --"

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1 THE COURT: I want to stop you and see if I  
2 can find that in the transcript.  
3 THE WITNESS: That would be on page 12  
4 towards the top. The second statement by Mr.  
5 Anderson on page 12.  
6 THE COURT: Okay.  
7 THE WITNESS: So he expresses a concern about  
8 spending the rest of his time in prison and they tell  
9 him "you don't have to spend the rest of your life in  
10 prison. And what I tried to explain to you is, don't  
11 go off the deep end on this. This happened a long  
12 time ago, you were a young kid, and like I said,  
13 there is a reason for it. But we weren't there, Mike  
14 and I weren't there. You were though, and you know  
15 why it happened and how it happened, and you know why  
16 it happened. And that's what we want to know --  
17 why?"

18           Clearly they're linking --

19           THE COURT:   I'm just asking you, sir, for  
20 the -- to identify the references.

21           THE WITNESS:   Yes.

22           THE COURT:   Then --

23           THE WITNESS:   Then on page 18 about  
24 two-thirds of the way down the inspector says -- Mr.  
25 Anderson first says, "I don't know what the hell  
26 happened."   The inspector then says, "Airight.  Let  
27 me ask you this.  You just answsr me,  and you can  
28 tell me anything you want.  You just tell me the

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1   truth."

2           Let me go back a minute to page 13 of the  
3 transcript, the inspector says towards the middle of  
4 the page, "Do you understand what I'm saying?  It,  
5 it, you know, and you just think you -- you just need  
6 to think about it, you know.  Because, see -- it's  
7 your opportunity -- this is your opportunity,  it  
8 isn't -- it doesn't really help Mike or I any.  
9 Nothing changes, nothing changes in this, book.  What  
10 it does do --" Mr. Anderson breaks in, expresses his  
11 concern about being caught to emphasize that they've  
12 got him -- they're constantly making reference to an  
13 advantage following from making an admission.

14                   We continue on on page 22. One of the  
15 interrogators says, "I don't think we need to talk  
16 anymore. What I'm trying to, what I'm trying to tell  
17 you is, it's your opportunity to explain what  
18 happened, and I've asked you -- did he threaten you,  
19 were you afraid of him?"

20                   On page 27, Mike says, "Hey Robert? We know  
21 you killed the guy. The only question is why, and if  
22 you don't want to tell us, that, that's fine. But I  
23 mean, that's to your advantage. I mean, right now  
24 we're thinking you went to the guy's house and you  
25 planned on killing him, and that's how you did  
26 it. You planned it from the beginning, that's first  
27 degree murder. The only question is why did you kill  
28 him. Was there some reason? Was there a fight,

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1 what happened? Is there some kind of circumstance  
2 that led up to it that will help explain it and --  
3 and modify it. That's the only issue. That's the  
4 only question."

5                   On page 29 the inspector says, "Robert,  
6 Robert -- do me a favor, Why don't you, I want you  
7 to understand something, Mike and I don't know you  
8 from Adam. We're not trying to trick you. We're not  
9 threatening you. What I'm trying to tell you is --  
10 and I'm only going to tell you one more time, because

11 if anything we're starting to waste each other's  
12 time. What I gave you is an opportunity to explain  
13 why you did it. So that I can explain to the D.A.,  
14 so the D.A. can decide how he wants to proceed. As  
15 it stands now, nobody knows why you did it except  
16 you. And you know you did it, we know you did it.  
17 In your heart you know you did it, and eventually --  
18 not today, not tomorrow -- but you're going to have  
19 to get this off your chest. Human beings cannot hold  
20 this type of thing, we don't forget."

21 On page 44, Mr. Anderson says, "I don't care  
22 anymore. Nobody's ever gave a shit about  
23 me. Somebody thinks I stabbed him you know, I think  
24 my punishment should be stabbing, not life in  
25 jail." The inspector says, "Well, they don't do  
26 that, and the point is I think that you're -- first  
27 off, I don't think you planned this murder. I don't  
28 think, I don't think you -- " And that's when the

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1 tape recorder is turned off.

2 THE COURT: Sir, you've already made  
3 reference to page 46, page 47.

4 THE WITNESS: And 45 also.

5 THE COURT: I have a time problem and that is  
6 that it's seven minutes after twelve --

7           MR. FAZIO:    Just comment also appears any  
8   statement made after the alleged confession was made  
9   would tend to be irrelevant as to causing him to  
10   confess.  After he's already done so.

11           THE COURT:   I have another question and that  
12   really is with regard to the accuracy of the  
13   transcript in a few instances and the witness has  
14   made reference, for example, at page 45 to a response  
15   of Mr. Anderson at about one-third of the way down  
16   the page.  The transcript reads, "This will hurt me  
17   if I don't put it on (inaudible), right," question  
18   m~k.

19           I would like to listen to the tape and see if  
20   there is a word there that is audible.

21           There is a second point where the witness  
22   has, I believe, given an answer which included  
23   quotation of the defendant's statement as it appears  
24   on the transcript at page 47 about a quarter of the  
25   way down the page, Mr. Anderson states, quote, you  
26   don't think that without that on tape I could get  
27   it -- " and then the transcript reads (inaudible.)

28           MR. RAPPAPORT:   On People's transcript it

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1   says "get it dropped," and then inaudible.

2           THE COURT:    I misspoke, you are correct, mr.  
3   Rappaport.  I believe the witness gave a response

4 that attempted to set forth what the inaudible is.

5 MR. RAPPAPORT: I believe on our tape we had  
6 that, I believe it read to lesser, to a lesser.

7 THE COURT: Well, that's what I wrote down  
8 before I heard any testimony from anybody except  
9 Officer Johnson. There is another instance at page  
10 13, about two thirds down the page the response to  
11 the question of the inspector or a statement of Mr.  
12 Anderson reads on the transcript as follows:

13 "Inaudible) you guys really -- really uh,  
14 (inaudible.) You guys talk and just be straight,  
15 okay?"

16 I thought I might have heard words that were  
17 audible at the second reference of the term  
18 (inav'dible,) in other words, after the words "really  
19 uh," is it possible over the lunch hour for the  
20 parties to listen to the tape and see if you can  
21 figure out what's there? Or can we listen to it  
22 again?

23 My second question is I want to give each of  
24 you the opportunity to make an argument and I want to  
25 give you a ruling and we have a jury set to return or  
26 to arrive this afternoon at two o'clock. What do you  
27 want to do?

28 MR. FAZIO: I listened to the tape several

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1 times, your Honor, I can't make anymore out of it.

2 MR. RAPPAPORT: I believe at one point -- I  
3 concur with Mr. Fazio except one difference is I  
4 believe that on page 47 I heard in, our transcript  
5 reflects this fact, "Don't you think that without  
6 that on tape I could get it dropped to a lesser."  
7 believe the Court heard that when it listened to the  
8 tape as well, that's the only portion of the tape  
9 that I believe I could -- that I heard where it says  
10 (inaudible) I actually derived some words from. I  
11 don't know if Mr. Fazio agrees with that.

12 MR. FAZIO: I didn't catch that.

13 THE COURT: On page 45 I think I cited that  
14 reference approximately a third of the way down Mr.  
15 Anderson says, "This will hurt me if I don't put it  
16 on--" What I thought I heard in place of the word  
17 (inaudible) is "tape" comma, "right?"

18 Do you want to go ahead with jury selection  
19 and reserve this issue until another time?

20 MR. FAZIO: No, because this issue is  
21 dispositive of this case.

22 MR. RAPPAPORT: I would prefer to resolve the  
23 issue prior to selecting the jury.

24 THE COURT: Then what we will do is resume at  
25 two o'clock because I have a meeting that I must  
26 chair at the Folsom Street courthouse at 12:15 and  
27 you will each have the opportunity to make a brief  
28 argument, and I will give you a ruling. And we're

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1 going to have to ask the jury commissioner to hold  
2 our jurors for another 30 minutes until 2:30.

3 MR. FAZIO: Can we release the doctor and can  
4 he be excused?

5 THE COURT: Yes, I have no further questions  
6 of Dr. Ofshe.

7 Then let us take our luncheon recess and  
8 we'll resume at two o'clock.

9 (Dr. Of she's pretrial testimony concluded.)

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1 FRIDAY, FEBRUARY 10, 1995

2

3 THE COURT: Our 15 jurors are  
4 present. Counsel are present and the defendant is  
5 present.

6 Mr. Rappaport, you may proceed with your  
7 evidence.

8 MR. RAPPAPORT: Thank you. Your  
9 Honor, ladies and gentlemen of the jury we would call  
10 Dr. Richard Of she to the stand.

11 THE COURT: Sir, please step forward to be  
12 sworn.

13 RICHARD J. OFSHE, Ph.D.,  
14 called as a witness by and on behalf of the  
15 Defendant, having been first duly sworn, was examined  
16 and testified as follows:

17 DIRECT EXAMINATION

18 By Douglas Rappaport, Deputy Public Defendr~r:

19 Q. Good morning, Doctor.

20 A. Good morning.

21 Q. Could you please tell the jury how you are  
22 currently employed?

23 A. I'm a professor in the Department of  
24 Sociology at the University of California at  
25 Berkeley.

26 Q. How long have you been so employed?~

27 A. Since 1967.

28 Q. And can you please tell the jury your

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1 educational background?

2 A. I have a bachelor's degree in psychology from  
3 Queens College of the City University of New York. A  
4 master's degree in sociology from the same  
5 institution and a Ph.D. in the sociology department  
6 but in the area that's called social psychology from  
7 Stanford University, that was awarded in 1960 --  
8 January 1968.

9 THE COURT: Sir, please speak into the end of  
10 this mike, pull it closer to you.

11 Q. (By Mr. Rappaport:) Would you please  
12 indicate -- do you have a particular area of study?

13 A. Yes, my work from the very beginning has been  
14 on the subject of influence and decision making.

15 And since the early part of the 1970's I  
16 started specializing in extreme forms of influence  
17 and decision making under extreme ordinary high  
18 pressure circumstances.

19 Q. What would you consider high pressure

20 circumstances?

21 A. Well, my work has covered the subject of the  
22 way in which high control groups induct people into  
23 them, manipulate people and get them to participate  
24 in violent crimes, crimes that would ordinarily not  
25 be expected of these individuals.

26 Also, situations in which psychology  
27 therapist come to manipulate and convince people of  
28 things that simply never happened such as being

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1 kidnapped by Space aliens and recovering memories of  
2 past life traumas, for example.

3 And also the subject of police interrogation  
4 and eliciting in particular false confessions.

5 Q. Now going back to something you said like  
6 being taken over by or captured by aliens, are these  
7 just theories or do you practice with both theory and  
8 actual in fact cases?

9 A. Well, that particular subject there is  
10 actually a significant number of psychotherapists who  
11 practice space alien kidnap therapy. It's something  
12 that's a bit ludicrous but nevertheless they do it.

13 What I would study would be the way in which  
14 otherwise ordinary folks can be made to believe that  
15 such things happen to them when there is no reason to

16 believe that they really did happen. It's a very  
17 complex and extraordinary kind of influence.

18 Q. Drawing your attention to scwetl ing you also  
19 mentioned, which is police interrogation, has this  
20 been a prime area or have you studied this as part of  
21 your expertise?

22 A. Yes, I spent at least half of my time doing  
23 work on the subject of police interrogation and  
24 particularly false confession since probably 1987.

25 Q. Now is something called false confession a  
26 theory or does it, in fact, occur in real life?

27 A. No, there is no question as I know in the  
28 literature, whether it's law review or literature of

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1 sOcial science, social psychology, that in fact  
2 people can with some, and it happens with some  
3 frequency, be made to falsely confess to crimes,  
4 including murder, that they did not commit.

5 Perhaps the most widely known and respected  
6 study on that is a study done by Adam Bedou (ph.) and  
7 Michael Ratlid (ph.) that was published in the  
8 Stanford Law Review in November 1987. It identified  
9 350 cases, instances, examples, in which miscarriages  
10 of justice had occurred in capital cases. They used  
11 very high standards for determining that a  
12 miscarriage, in other words, the justice system had

13 convicted someone who was indeed innocent had  
14 occurred and in their breakdown of these 350 cases 49  
15 of them were caused by police induced false  
16 confession.

17           It was the leading cause of miscarriage of  
18 justice wher the study was broken down on the b'sis  
19 of the way in which the error occurred.   Whether it  
20 was misidentification by a witness, or in this case  
21 police error inducing a false confession.

22       Q.   So is it generally accepted within the field  
23 that, in fact, police interrogation may produce false  
24 confession if not done properly?

25       A.   Yes.  It is generally accepted.

26       Q.   And have you worked on specific cases  
27 involving false confessions?

28       A.   Yes, I have.

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1       Q.   And have you worked on these cases recently?  
2 For example, can you please tell the jury your  
3 background in the area specifically of police false  
4 confession?

5       A.   Well, since about 1986 or '87, I started  
6 becoming -- became interested in the subject.  It  
7 followed naturally from the work that I had been  
8 doing and since that time I began doing research on  
9 this and reviewing interrogations of individuals in

10 ongoing cases and have studied these, testified about  
11 these, all over the country. And have worked on some  
12 cases that have become quite famous.

13 Perhaps the most well-known of the cases on  
14 which I worked was a case of, generally called the  
15 Phoenix Temple murder. This was a case  
16 that occurred or a mass murder that occurred in  
17 Phoenix Arizona, Maricopa County several years ago.  
1.8 It invol~d the execution, sl.bying of nThe folks at a  
19 Buddhist Temple just outside of Phoenix, they were  
20 Thai Buddhist, they were six monks, a nun and two  
21 individuals associated with the Temple, and they were  
22 killed in a manner that could only be described as  
23 execution style.

24 This, of course, caused a great deal of  
25 attention. A 75 man task force was assembled to look  
26 into the crime and six weeks into the investigation  
27 the task force had no real suspects. At about that  
28 point an individual by the name of Mike McGraw, who

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1 happened to be resident of a psychiatric hospital in  
2 Tucson, Arizona at the time called and said he was  
3 along, he saw the killings happen and he knew who did  
4 them. He was brought to Phoenix, he was  
5 interrogated.

6 I've read his interrogation and he could not

7 describe the facts of the crime, he couldn't even get  
8 the fact that it was a 75 year old nun not an  
9 adolescent girl, as he described it, who was  
10 killed. He couldn't get any of the facts correct but  
11 he said that there were five people who had committed  
12 these murders and he named five young men that he  
13 knew from Tucson. They didn't necessarily even know  
14 one another.

15           The police grabbed these individuals. They  
16 didn't arrest them, they literally grabbed them and  
17 hauled them up to Phoenix and interrogated them and  
~8 elicited what we know to be false confessions to mass  
19 murder from three of the five of them and we know  
20 that those are false confessions because about five  
21 or six weeks later by accident the police discovered  
22 that they already had the murder weapon in their  
23 possession. Went out and located the two young men  
24 from whom they had gotten the weapon, discovered the  
25 loot from the robbery and eventually got confessions  
26 from those young men.

27           The young men from Tucson were released and  
28 even the county prosecutor has admitted publicly that

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1 a terrible mistake was made. And that's the Phoenix  
2 Temple murder case.

3           I was retained on behalf of two of the

4 defendants shortly after their arrest and then  
5 reviewed all the materials in connection with the  
6 case but then the case never went to trial because  
7 charges were dismissed.

8 Q. Have you ever been retained by a prosecutor's  
9 office or police department for the purpose of  
10 reviewing interrogations?

11 A. Yes, I have.

12 Q. And so, in fact, false confessions are not  
13 simply something out of a book, they do occur, is  
14 that correct?

15 A. They occur and I study interrogations that  
16 may or may not be leading to false confessions on  
17 very regular basis.

18 Q Are there different types of false  
19 confessions, Doctor?

20 A. Yes, it's generally recognized that there are  
21 three kinds of false confessions that occur. The  
22 first kind is called a voluntary false  
23 confession. And that's the sort that Mike McGraw  
24 gave, the person I mentioned before.

25 High profile crime attracts a lot of  
26 attention, someone who may very well be mentally ill,  
27 wants attention, calls the police and says, "I did  
28 it."

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1           And this kind of false confession is so  
2 well-recognized that police agencies generally have a  
3 strategy for handling the problem. They make sure  
4 that not all the facts of the crime are known so that  
5 when someone calls up and says "I did it" they can be  
6 asked really to prove that you did it. Tell me  
7 something about this killing that is not known to the  
8 general public. Make me sure that you did it. And  
9 if the person can't do that, as they can't most of  
10 the time, they're ignored, because they've  
11 demonstrated that they really don't have particular  
12 knowledge of this crime. They can't corroborate  
13 their false confession. And so the police don't  
14 waste their time with them.

15           The second kind of recognized false  
16 confession is called a coerced compliant false  
17 confession. What that describes, it's a confession  
18 given by an individual who knows that they are giving  
19 a false confession at the moment that they give  
20 it. And this comes about out of the process of  
21 police interrogation. It's generally accepted that  
22 it comes about for one of two reasons: Either the  
23 stress of the interrogation has gotten overwhelming  
24 and the person simply cant stand it anymore and in  
25 order to escape the pressure of the interrogation,  
26 the anxiety, the accusations, the fear that .they  
27 have, the sense that their lives are falling apart,  
28 the sense that they're now powerless, they just make

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1 up their minds to say anything they need to say to  
2 end the interrogation. That's how they describe it  
3 afterwards.

4           The other reason that people give coerced  
5 compliant false confessions is because they have been  
6 put in a position in which they're essentially being  
7 threatened. It would go something like this: If you  
8 don't confess to this, if you don't tell us what  
9 happened, you're going to maybe spend the rest of  
10 your life in jail, but this is your chance to avoid  
11 that. You cooperate and I'll do the best I can for  
12 you and, you know, there is assurances given that the  
13 punishment that you get won't be that severe.

14           Now what happens to an innocent individual  
15 who finds himself in that kind of circumstance, who's  
16 presented with this choice, either stick to by  
17 definition we know to be the truth that you didn't  
18 commit this crime, or give a false confession and  
19 this may be the way of saving your life or not  
20 spending the rest of your life in jail.

21           And the problem is whether you're innocent or  
22 guilty, putting someone in those circumstances can  
23 get someone to give a confession, if the person is  
24 guilty it may be a true confession, if the person is  
25 innocent they are giving a false confession in order  
26 to minimize the punishment that the police are  
27 telling them they will get if they keep silent. And

28 that's a choice that's very difficult and can make

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1 people panic, it's like the train is leaving the  
2 station. You got three minutes, you either do this  
3 now or it's going to be too late. And faced with  
4 that choice some people will say all I can do is try  
5 to save my life and they'll give a false confession.

6 Q. Doctor, how would the police put someone in  
7 that position?

8 A. By convincing the person that there is  
9 overwhelming evidence that will convict them, whether  
10 there is any evidence at all or marginal evidence.  
11 What a police will do is overstate the evidence.  
12 Sometimes, and this is all over the country, and it  
13 is a tactic of interrogation that I understand and do  
14 not disapprove of.

15 Sometimes police will invent an eyewitness or  
16 physical evidence and tell someone that we have this  
17 evidence that shows that you committed the  
18 crime. Because convincing an individual that they're  
19 caught causes people to give confessions. If they're  
20 guilty it causes them to give the confession because  
21 there is no reason not to. All the evidence shows  
22 that they did it. The problem is, of course, it can

23 also cause someone who is innocent to give the  
24 confession.

25           So this tactic of overstating evidence,  
26 convincing someone that they're caught is a valuable  
27 but potentially dangerous interrogation tactic.

28       Q.   How does a skilled interrogator know if they

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1    have gotten a true or a false confession?

2       A.   Interrogation can be looked at as having two  
3 major parts.  The first part involves getting the  
4 admission.  I did it.  And every one who doesn't  
5 study interrogation sort of usually identifies that  
6 moment as the high point, that's the dramatic moment  
7 in the interrogation.  All right, I did it.  But  
8 that's only one of the two things that happens in an  
9 interrogation.

10           The second part is what's called the  
11 post-admission narrative.  The story of the crime  
12 after the person has admitted that they did it,  
13 because it is what the interrogator elicits after  
14 getting the admission that I did it.  That  
15 distinguishes between a true and false confession.

16           If an innocent person is falsely confessing  
17 and the interrogator ask them questions about the  
18 crime, chances are they're going to make major  
19 mistakes in their description of the crime.  They're

20 not going to know things. They'll leave things  
21 out. They'll attribute the cause of the death to one  
22 thing when it's really another and so on. So a  
23 well-trained skilled interrogator after getting an  
24 admission will elicit a detailed step by step  
25 narrative of the crime and it's this the course of  
26 telling that story that the person will demonstrate  
27 whether this is a confession based on their memory of  
28 having committed the crime or a story that they're

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1 making up because they feel that they just have to  
2 satisfy the police for anyone of a number of  
3 different reasons.

4 Q. Doctor, would a skilled interrogator present  
5 a suspect who is being interrogated with photographs  
6 of the crime scene?

7 A. That would not be a good idea because that  
8 would communicate information that someone who might  
9 be panicked into giving a false confession could now  
10 used to give a story that's sort of fits with the  
11 crime. Mike McGraw for example thought that a 75  
12 year old nun was an ad do less sent girl and if they  
13 had shown him photographs of this womans dead body  
14 he probably would not have made that mistake.

15 Q. Doctor, would it be proper interrogation  
16 enable to determine if a confession is true or false

17 if a suspect N an article written approximately 7  
18 days after they were arrested after -- excuse me 7  
19 days before they were interrogated about the crime?

20 A. Well, if someone already has that clearly  
21 that fact has to be taken into account and that  
22 information, the information is contained in that  
23 article needs to be evaluated and disregarded as  
24 evidence indicating that the person has actual  
25 knowledge of the crime.

26 Q.

27 MR. RAPPAPORT: Thank very much I have  
28 nothing further.

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1 THE COURT: Cross-examination.

2 MR. FAZIO: Thank you.

3 CROSS-EXAMINATION  
4 By William Fazio, Assistant District Attorney:

5 MR. FAZIO: Good morning, Dr. Of she.

6 THE WITNESS: Good morning.

7 Q. What prosecutor's office have you consulted  
8 with before?

9 MR. RAPPAPORT: I'm sorry?

10 Q. (By Mr. Fazio:) What prosecutor's office  
11 have you consulted with before?

12 A. Over the years I've consulted for the Mann

13 County Sheriff's Department, the Office of the  
14 Attorney General --

15 Q. Excuse me, Doctor, I asked you  
16 specifically -- let me be more specific.

17 What district attorney's office or  
18 prosecutor's office? Not sheriff's office.

19 A. The Office of the Attorney General of the  
20 State of California, the Office of the Attorney  
21 General of the State of Arizona --

22 Q. Excuse me. Those aren't prosecutors, those  
23 are attorney general --

24 MR. RAPPAPORT: Objection --

25 MR. FAZIO: I'll rephrase the question.

26 THE COURT: Mr. Fazio, please rephrase your  
27 question so it is not vague.

28 MR. FAZIO: I will do that.

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1 Q. What district attorney's office, if any, have  
2 you consulted with?

3 A. The Fort Lauderdale, Florida, State's  
4 Attorney's Office, which is the district attorney's  
5 office there.

6 Q. When was that?

7 A. When was that? 1992 through 1994.

8 Q. And what other prosecutor's office?

9 A. The Los Angeles County District Attorney's

10 office.

11 Q. When was that?

12 A. In the mid '80's. And I'm currently  
13 consulting for the Los Angeles County District  
14 Attorney's Office at this time.

15 Q. What case in the 1980's did you consult with  
16 them about?

17 MR. RAPPAPORT: Objection, relevance.

18 MR. FAZIO: He brought up it up on --

19 THE COURT: Overruled.

20 A. Case involving Synanon.

21 Q. Synanon. That was part of your study, was it  
22 not, Synanon? Why don't you tell us what Synanon is.  
23 Some people might not recall Synanon

24 A. Synanon is a group that initially started as  
25 a drug rehabilitation organization that turned into a  
26 violent cult group. It was a group that I had  
27 studied, done research on before it became a violent  
28 organization, and then in the latter part of the

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1 1970's became involved with the two people who owned  
2 and published the Point Reyes Light Newspaper and we  
3 did the journalism that culminated in winning the  
4 Pulitzer Prize in 1979 for public service for the  
5 Expose that we did of Synanon.

6           subsequent to that I consulted for all manner  
7 of police and prosecutorial agencies in connection  
8 with prosecution of the crimes that had been  
9 committed by people associated with Synanon.

10       Q.   That consultation was directed to your  
11 expertise as someone who is involved in cults,  
12 correct?

13       A.   Correct.

14       Q.   And that was in the 1970's?

15       A.   That's correct.

16       Q.   What case are you currently consulting with  
17 the district attorney's office?

18       A.   I'm not at liberty to identify the case.    I  
19 haven't been identified as a prosecution expert in  
20 that case yet.

21           MR. FAZIO:    May that reference then be  
22 stricken if I can't adequately cross-examine him on  
23 that, your Honor?

24           THE COURT:    The objection is sustained.    The  
25 motion is granted.    The portion of the witness's  
26 answer with regard to his service for the Los Angeles  
27 District Attorney's office at this time is to be  
28 disregarded concerning this witness's

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1   qualifications.

2       Q.   (By Mr. Fazio:)    Doctor, yOU talked on direct

3 examination, as I recall, about three areas of  
4 expertise, the cults and what happens when people  
5 become involved in cults as typified by your  
6 discussion with the jurors about Synanon, correct?

7 A. That's correct. I don't mean to -- well, be  
8 out of line, but I hadn't finished answering the  
9 question about prosecutor's offices.

10 Q. Okay. Well, I will ask you another  
11 question. I will give you that opportunity --

12 MR. RAPPAPORT: May the witness please have  
13 the opportunity to finish his answer?

14 MR. FAZIO: Judge, I will not cut a witness  
15 off and I will ask him that.

16 Q. You told us, Doctor, that you consulted with  
17 Los Angeles regarding cults in 1980. You told us you  
18 consulted with Florida State Prosecutor's Office  
19 between 1992 and 1994. What case was that on,  
20 Doctor?

21 A. It was a case called Williamson.

22 Q. And was that a cult case also?

23 A. No, it was a case in which an individual had  
24 been pressured into remaining silent by the two  
25 actual killers in the case. He had witnessed a home  
26 invasion murder and they had threatened to kill his  
27 family in the most awful manner if he were to  
28 speak. He eventually became -- was indicted for that

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1 killing, and I assisted the prosecutor in getting the  
2 grand jury to withdraw the bill of indictment against  
3 him and then testified in the case as to how he had  
4 been terrorized into remaining silent.

5 Q. So that particular case, rather than  
6 confessing, that individual refused to make a  
7 statement because of threats which were placed  
8 against him by two other parties, correct?

9 A. Correct.

10 Q. Okay. Now I'm giving you that opportunity,  
11 Doctor, that you've asked of me as to additional  
12 district attorney's offices that you have consulted  
13 with.

14 A. Also the Thurston County, Washington  
15 prosecutor's office. Thurston County being the  
16 county in which Olympia, Washington, the capital of  
17 the state is located.

18 Q. When was that?

19 A. That was 1989, in that general time period.

20 Q. What was the purpose of your consultation  
21 with them in 1989?

22 A. That was a case in which the gentleman by the  
23 name of Paul Ingram, who was third in command of the  
24 sheriff's department, in the course of police  
25 interrogation had come to believe, and confessed  
26 based on those beliefs, that he was the leader of a  
27 Satanic cult that was murdering people and had been  
28 doing such in Olympia, Washington for 17 or more

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1 years. I was called in to the case by the  
2 prosecutor's office to assist in making sense out of  
3 the case because, although he was confessing to ever  
4 increasing numbers of crimes, nothing made any  
5 sense. It didn't add up. There was no  
6 corroboration, and over the course of my work in that  
7 case, and again it's a case that has become  
8 internationally famous, it was written about  
9 initially in the New Yorker in a two part series  
10 called Remembering Satan and was then written about  
11 in a book published by Lawrence Wright, a New Yorker  
12 staff writer, who wrote the articles also called  
13 Remeinberinci Satan.

14 In the course of my work on that case I was  
15 able to demonstrate that Mr. Ingram was so highly  
16 suggestible that in the course of my interview with  
17 him I could elicit a false confession to a crime that  
18 I invented on the spot within 24 hours. Within 24  
19 hours he handed me a three page written confession to.  
20 a crime that I made up in the course of my interview  
21 with him.

22 Q. Did he have some mental problems, Doctor, in  
23 your opinion?

24 A. No, he was third in command of the sheriff's  
25 department. He had been -- he was at the time of his  
26 arrest Republican county committee chairman, had been  
27 a candidate for the state legislature on a law and

28 order ticket and, in fact, I don't believe was

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1 mentally ill at all. He just had responded to the  
2 interrogation techniques that were brought to bear on  
3 him and this was an entirely recorded interrogation.

4 Q. As you answered that question I was thinking  
5 to myself one might argue that because of his  
6 political activity he was mentally  
7 incapacitated. But we'll leave that there.

8 Doctor, let me ask you this --

9 MR. RAPPAPORT: So stipulated.

10 THE WITNESS: If we're going to play liberal  
11 games I'm happy to engage in them.

12 Q. How much will you be paid for your services  
13 in this particular case?

14 A. Ordinarily my consulting rate is \$250 an hour  
15 and in this particular case I've accepted what the  
16 public defender's office can pay, which I believe is  
17 \$150 an hour.

18 Q. How much will you be paid for your entire  
19 services in this case?

20 A. \$150 times the number of hours I've put in.  
21 I haven't totalled it up, probably 25 hours or  
22 more. I was asked to review the following.

23 Q. Excuse me, Doctor, I didn't ask you what you  
24 were asked to review. I simply asked you a question  
25 which if you could come up with an calculator here,

26 150 times 25 hours, at least 25 hours?

27 A. It would be some total, I don't know what the  
28 total is.

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1 Q. \$3,750 does that seem to be a nice round  
2 figure?

3 A. If the estimate of the number of hours is  
4 correct I'm sure your multiplication is accurate.

5 Q. And it's possible that, I guess, some of it,  
6 depending on the extent of my cross-examination how  
7 many hours you're going to bill the Public Defender's  
8 office, correct?

9 A. No, mostly the dough arises out of the  
10 preparation work that I did, reviewing all of the  
11 materials and the case file, reviewing the transcript  
12 of the interrogation, enter viewing Mr. Anderson and  
13 generally becoming sufficiently familiar with the  
14 facts of the case that I could analyze what had  
15 happened.

16 Q. And that's -- your estimate at the moment is  
17 about 25 hours of work, right?

18 A. That's my off the top of my head guess.

19 Q. To get back now, are you finished with the  
20 areas of consultations with district attorney's  
21 offices? You mentioned Washington, Florida and Los  
22 Angeles. Are there any others, Doctor?

23       A.    I got a call yesterday from a prosecutor in  
24   Canada who asked me if I would be willing to work on  
25   a case that he was working on, I said I would. He  
26   would get back to me next week in the event that he's  
27   not able to dispose of the other side's expert  
28   testimony or alleged expert testimony in motion, in

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1    which case I will be working with wherever it was in  
2   Canada that he called me from.

3       Q.    Now you said another area of your expertise  
4   was recovered memories, is that right?

5       A.    That's correct --

6       MR. RAPPAPORT:   Objection, well, misstates  
7   his testimony on direct.

8       THE COURT:       Overruled.

9       Q.    (By Mr. Fazio:)   And that had to do with  
10   people who are allegedly kidnapped by aliens and then  
11   through some process relate back to what happened?

12       A.    No, principally recovered memory has to do  
13   with the phenomena of psychotherapist misusing  
14   techniques of influence, particularly misusing  
15   hypnosis and causing people to come to believe that  
16   they are recovering decades long, previously unknown  
17   to them, supposed memories of being sexually abused,  
18   usually by their parents. These are believes that  
19   form in the course of therapy, that stretch out over

20 perhaps 15 or 20 years. They come to believe that  
21 literally from birth often through age 15, sometimes  
22 age 20, that their parents, often both parents have  
23 been victimizing them in the mcst horrendous ways,  
24 raping them literally daily and that they were  
25 ignorant that this had happenec~ to them until they  
26 entered therapy and are exposed to the techniques of  
27 this very small but noticeable percentage of  
28 psychotherapist practicing in America.

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1 Q. So is it your Opinion, Doctor, that recovered  
2 memory in and of itself is not accurate, is not --

3 HR. RAPPAPORT: Objection, relevance. We're  
4 not dealing with this issue at all in this trial.

5 MR. FAZIO: He's an expert. He was brought  
6 forth forth as an expert. Three separate areas were  
7 brought forth on direct examination, I think I have a  
8 right to cross-examination as to --

9 THE COURT: The objection on the grounds of  
10 relevance is overruled.

11 Q. (By Mr. Fazio:) Are you saying, Doctor, that  
12 recovered memory does not exist?

13 A. I'm saying that this phenomena called  
14 recovered memory defined properly, and one has to  
15 distinguish between someone who chooses to report  
16 sexual abuse that they have always known about,

17 whether they have choosing to report it the day  
18 after, a week after, a month after or a year after or  
19 the decade after, one has to distinguish that which  
20 is not recovered memory from a phenomena in which  
21 someone when they enter psychotherapy when asked,  
22 "were you ever sexually abused," would say, "no," and  
23 be certain of it and a few months later come to  
24 believe that they have discovered a decade's worth of  
25 vicious sexual abuse based on what happened in  
26 therapy.

27 It is the process of influence in therapy  
28 that defines recovered memory, not simply reporting

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1 sexually abuse.

2 Q. so in some cases, in other words --

3 MR. RAPPAPORT: Objection, if we're going to  
4 go into this area, it's not relevant to the trial --

5 THE COURT: Overruled.

6 Q. (By Mr. Fazio:) In some cases, Doctor, in  
7 other words, people who come forth with a recovered  
8 memory or recalling information that happened in the  
9 past are factually and accurately recalling  
10 information that occurred to them in the past,  
11 correct?

12 A. They are sincere in their belief, but the  
13 belief is based on misinterpretations of things that

14 happened in the course of therapy.

15 Q. In every case, Doctor?

16 A. In cases in which someone suddenly discovers  
17 or comes to believe that they were victimized for a  
18 decade or 15 years and were absolutely ignorant of it  
19 before they entered therapy. All of the scientific  
20 evidence on that subject shows that the human mind  
21 does not work that way and all of the research on  
22 influence in response to the use of certain  
23 techniques such as hypnosis are sufficient to explain  
24 why it is that people would come to sincerely believe  
25 what they have come to believe.

26 Q. Are you saying, Doctor, that there is no  
27 experts in the field that would disagree with what  
28 you just said?

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1 MR. RAPPAPORT: At this point, your Honor,  
2 object on 352 grounds as well as relevance. We're  
3 talking about the area of the police interrogation in  
4 this courtroom and not repressed memory of past  
5 abuse.

6 THE COURT: The objection on the grounds of  
7 relevance is overruled. The objection on the grounds  
8 of 352 is also overruled.

9 Q. (By Mr. Fazio:) Are you saying, Doctor, that

10 no experts disagree with the statements you just made?

11 A. Oh, I'm saying quite clearly that there are  
12 therapists who do this, whose careers are on the  
13 line, who continue to refuse to believe that what  
14 science shows about the impact of hypnosis is  
15 explaining the mistakes that they're making in  
16 therapy.

17 Q. So your answer is there are experts who  
18 disagree with you, Doctor, correct?

19 A. The only experts I know of who disagree are  
20 people who have done it.

21 Q. And, in fact, this whole theory, this whole  
22 case, this whole repressed memory was a subject of a  
23 trial not too long ago in Napa County, wasn't it?

24 MR. RAPPAPORT: Objection, 352.

25 THE COURT: Sustained.

26 Q. (By Mr. Fazio:) Let move on to another area,  
27 Doctor. Police interrogations. You mentioned there  
28 were three different areas of false interrogation,

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1 voluntary false confession, which you indicated was  
2 typified by Mike McGraw in the Phoenix case wherein  
3 somebody comes out of nowhere and says to the police  
4 officers, "I did it." We're all familiar with  
5 situations like that, correct?

6 A. Correct.

7 Q. And you told us that oftentimes people use  
8 techniques to protect themselves from that kind of  
9 disturbance and interference with their investigation  
10 by withholding certain information and only the  
11 perpetrator of the crime would know, correct?

12 A. Correct.

13 Q. And in the particular case you referred to in  
14 Phoenix, Arizona, apparently the police officers were  
15 only all too willing to accept the statements made by  
16 Mr. McGraw in light of the fact that he had no  
17 information regarding the age of the particular  
18 victim. Would you agree with that?

19 A. There are a number of other reasons.

20 Q. There was a terrible -- it was a case that  
21 involved an awful lot of pressure to solve by the  
22 local authorities, wouldn't you agree with that?

23 A. In my experience interrogations leading to  
24 false confessions often come about when there is a  
25 lot of pressure on the police to involve solve a  
26 crime.

27 Q. And in that particular case there was a  
28 massacre in a Buddhist Temple and there was a lot of

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1 pressure to solve that case, wasn't there?

2 A. Right, and that's why the police grabbed at

3 straws and Coerced false confessions to mass murder  
4 from three of the five individuals that they had  
5 interrogated.

6 Q. In that particular case Mike McGraw came in  
7 and the police officers perhaps, if they weren't too  
8 enthusiastic about solving that case, would have  
9 realized initially that what he had to say was not,  
10 in fact, supported by the evidence that they knew to  
11 exist, correct?

12 MR. RAPPAPORT: Calls for speculation.

13 MR. FAZIO: He's been speculating on a lot of  
14 other matters.

15 THE COURT: Overruled.

16 Q. (By Mr. Fazio:) Wouldn't that be fair to say?

17 A. They should have recognized that, but they  
18 followed up on his identification of five people.  
19 The real problem, of course, was the fact that they  
20 coerced false confessions from three of the five  
21 people that they interrogated.

22 Q. Now you said that there is a coerced  
23 compliant wherein the person who is making the false  
24 confession knows he's making a false confession as  
25 he's making it, correct?

26 A. Correct.

27 Q. And the reason they do that is because, as  
28 you indicated on direct examination, they want to get

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1 out of the Situation that they find themselves in,  
2 among other reasons, correct?

3 A. Either the immediate pressures of the  
4 interrogation or because they've become panicked  
5 thinking that they're going to be very severely  
6 punished. The only way to minimize the punishment is  
7 to admit that they committed a crime.

8 Q. One of the ways, of course an extreme  
9 example, is if one were to, for example, put a gun  
10 against somebody's head and say, "Unless you sign  
11 that confession I'm going to kill you." One might  
12 sign the confession because of the extreme pressure  
13 placed upon him, correct?

14 A. Gun at the head is certainly one way to do it  
15 but threats of life, long incarceration can also do  
16 it.

17 Q. At the time the people confess under coerced  
18 compliant confession they know that it's false, don't  
19 they?

20 A. By definition, yes.

21 Q. By definition. Now the gentleman who  
22 confessed to committing all kinds of crimes up in the  
23 State of Washington that you told the jurors a little  
24 bit about on cross-examination a moment ago, the same  
25 person who confessed to crimes that you made up, he  
26 wasn't -- he knew -- I mean he didn't know at the  
27 time he was making those confessions?

28 A. That's correct, that illustrates how the

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1 third category of interrogation is done, induced  
2 false confession, what's called a coerced  
3 internalized false confession, and that has to do  
4 with someone actually being persuaded that it's more  
5 likely than not that they committed the crime.  
6 Usually this occurs because the person's confidence  
7 in their own memory has also been attacked and so  
8 because they lose confidence in their memory and they  
9 believe that there is all this evidence out there  
10 saying that they did it, they come to the conclusion,  
11 "I guess I must have done it," and they are persuaded  
12 that they committed a crime that, in fact, they're  
13 innocent of.

14 Q. Okay. And so that's the third area, you said  
15 there were three types of false confessions, and one  
16 being a voluntary false, one being coerced compliant,  
17 the other one being -- how did you say --

18 A. Coerced internalized.

19 Q. You did not talk about that on direct  
20 examination, did you?

21 A. I don't think I mentioned that but it was the  
22 third category, I don't believe that I have  
23 illustrated it with the account of Mr. Ingram but I  
24 don't think I labeled it in direct.

25 Q. We're talking about -- in talking about  
26 police interrogations you mentioned that it- is a  
27 perfectly acceptable manner used by police in

28 encouraging someone to confess or make a statement to

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1 embellish or enhance the evidence that they have  
2 against the person being investigated, correct?

3 A. Correct.

4 Q. Now that, of course, is to convince the  
5 person to talk to them, correct?

6 A. No, it's to convince the person to give a  
7 confession because the research on interrogation  
8 shows that people confess when they are convinced  
9 that they have no hope of talking the interrogator  
10 out of his or her belief that they committed the  
11 crime.

12 Q. I asked you the question, the purpose of that  
13 is to get them to talk then you said no, the purpose  
14 is to get them to confess. A confession is, by  
15 definition, a communication back to the person asking  
16 the question, be it written or spoken to, correct?  
17 Can we agree with that?

18 A. But they're already talking to them when this  
19 tactic is used, so I took "talk to" as being engaged  
20 in the interrogation as opposed to breaking it off,  
21 and this tactic is a tactic that's used after the  
22 interrogation is ongoing, so it is designed to elicit  
23 the confession.

24 Q. We can assume that when a police officer or  
25 agency is involved in attempting to solicit a  
26 statement or confession from a suspect that-they're  
27 not -- their entire goal isn't to talk about the  
28 weather or their favorite restaurant, it's to elicit

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i information from the person being examined relative  
2 to their information about the case in which they're  
3 investigating. Can we assume that?

4 A. It's to elicit a confession ultimately.

5 Q. Or an explanation as to what happened,  
6 correct? A confession by definition is an admission  
7 on the part of the party that he or she committed all  
8 of the elements necessary to have been found guilty  
9 of the particular offense.

10 Now when police officers are speaking to  
11 people and taking a statement from them, oftentimes  
12 they're trying to find out what happened, aren't  
13 they?

14 MR. RAPPAPORT: Objection, compound.

15 THE COURT: Sustained. You may restate your  
16 question.

17 Q. (By Mr. Fazio:) What is a confession?  
Give

18 us your definition of a confession.

19 A. A confession is a statement indicating that

20 the crime at issue was committed by the individual.

21 Q. Oftentimes -- are you familiar with the law  
22 of homicide at all, Doctor?

23 A. In general outline.

24 Q. Oftentimes, Doctor, would you agree that in  
25 crimes involving murder, oftentimes the issue isn't  
26 simply whether or not the person charged with the  
27 offense committed it, but what his or her degree of  
28 responsibility is, would you agree with that

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1 statement?

2 MR. RAPPAPORT: i guess it assumes a fact not  
3 in evidence and beyond his area of expertise.

4 THE COURT: Sustained.

5 Q. (By Mr. Fazio:) Well, Doctor, you've talked  
6 about confessions and homicide cases, haVen't you?  
7 Isn't that part of your expertise.

8 A. I've talked about the dynamics of  
9 interrogation and the decision making of people in  
10 response to interrogation.

11 Q. Okay. Now, do you have any experience in  
12 taking confessions in homicide cases? Because I want  
13 to ask you some questions about the distinction, if  
14 there is any, in your opinion between investigating a

15 homicide, a murder case, and, say, a burglary case or  
16 a stolen auto case.

17           So the question is, Doctor, do you have any  
18 expertise in the field of eliciting confessions in  
19 homicide cases?

20           A.   Most of the cases on which I work, most of  
21 the cases in which interrogations are sent to me to  
22 analyze involve murder.

23           Q.   So then, Doctor, the question becomes would  
24 you agree that often times in homicide cases the  
25 issue is not one of whether or not the party  
26 committed the crime but the degree of responsibility  
27 to be attached to the person who committed the  
28 crime?

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1           MR. RAPPAPORT:   Same question same  
2 objection.

3           THE COURT:       Sustained.

4           Q.   (By Mr. Fazio:)   Judge, excuse me -- Doctor,  
5 do you think that one engages in the same type of  
6 interrogation in attempting to elicit a confession in  
7 a homicide case as one would in attempting to elicit  
8 an investigation in a burglary case --

9           MR. RAPPAPORT:   Again beyond his area of

10 expertise. He's not a police officer.

11 MR. FAZIO: Judge, that's his whole purpose  
12 in being called here.

13 THE COURT: I will allow the question,  
14 objection overruled.

15 THE WITNESS: A. The techniques of  
16 interrogation remain the same, it is interrogation,  
17 it doesn't really matter what the crime is.

18 Q. What if, Doctor, the officer wasn't so much  
19 interested in whether or not the party committed the  
20 crime but his degree of responsibility for having  
21 committed the crime, do you have any experience in  
22 confessions designed to elicit that kind of response?

23 A. Well, it's a common tactic in interrogation  
24 to suggest to the suspect that there is a  
25 self-serving minimizing explanation for the crime and  
26 that that tactic of offering to accept and support a  
27 minimal description of the crime is a tactic that is  
28 used in interrogation all the time. And it sometimes

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1 is used as a way of opening the door and then the  
2 skilled interrogator goes back and refines the story  
3 and shows that the self-serving story simply does not  
4 fit the description of the crime and ultimately gets

5 the person to admit an accurate description of the  
6 crime. I've seen skilled interrogators do that  
7 beautifully, but it starts with the suggestion that  
8 well, somehow in these circumstances you lost your  
9 temper, suggesting that you didn't plan this, that it  
10 was just something that occurred and that's a way of  
11 getting someone to talk about something even though  
12 what's being solicited at that point may be wholly  
13 inaccurate as one of many steps in a properly  
14 conducted interrogation.

15 Q. There is nothing wrong with doing that, is  
16 there, Doc, in a properly conducted interrogation?

17 A. The dividing line between --

18 Q. Could you answer that yes or no then explain  
19 your answer?

20 MR. RAPPAPORT: I believe he is answering the  
21 question.

22 THE COURT: You may answer that question, sir.

23 THE WITNESS: A. Sometimes if done properly  
24 that's a tactic that works, and I believe it is a  
25 legitimate tactic and sometimes if done improperly  
26 it's a tactic that can work but is improper. And  
27 whether it is done properly or not, in part, depends  
28 on whether or not someone is threatening an

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1 individual with severe punishment or minimal

2 punishment. And suggesting to them that you just  
3 need to give me some kind of a story that will allow  
4 me to make sure that you get minimal punishment. If  
5 it's done that way there is a big problem with it.

6 Q. If it's done that way, the way you just  
7 described, one would be more than not likely to  
8 accept the theory propounded by the interrogator  
9 which would cause him to be viewed as less or least  
10 responsive, correct?

11 A. It's an invitation to give a fabricated story  
12 in which there is an excuse for it in order to  
13 guarantee that they'll get minimal punishment.

14 Q. In a hypothetical, Doctor, if an officer,  
15 somebody who was engaged in interrogation and asked  
16 the person being interrogated if it happened this  
17 way, you're going to have these consequences which  
18 are very dire.

19 If it happened the second way I'm going to  
20 relate to, you're going to have these consequences  
21 which are not quite as bad but they're uncomfortable  
22 and not very pleasant.

23 If it happened a third way, you know, you  
24 could probably deal with that or if it happened a  
25 fourth way you wouldn't have any consequences because  
26 if it happened the fourth way, sir, then you'll be  
27 absolved of any responsibility.

28 It would be more likely than not that the

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1 person would accept the fourth theory, would he or  
2 she not?

3 A. It would depend on one, whether the person  
4 has been convinced that they are going to get  
5 convicted, and two, whether or not what you're laying  
6 out is actually part of a larger scheme to convince  
7 the person that all they need to do is tell this  
8 minimal story and I, the powerful interrogator, will  
9 make sure that you get a minimal punishment. You  
10 can't isolate these choices from the context in which  
11 they arise. The context is extremely important. In  
12 one context it could be simply telling law students  
13 about the penalties that attach to a crime. In  
14 another context it could be a suggestion, hey, all  
15 you need to do is tell me this story that fits this  
16 way and I'm trying to help you and I'll make sure  
17 that you're taken care of. Done that way it's very  
18 different.

19 Q. Do you like to be called professor, Doctor,  
20 by the way?

21 A. Whatever you feel comfortable with.

22 Q. Doctor, you're aware of the concept of a  
23 hypothetical question, aren't you, as an expert  
24 witness?

25 A. Yes.

26 Q. One presumes facts -- the hypothetical I gave  
27 you, Doctor, I thought was quite specific, we're not

28 talking about law students, we're talking about

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1 somebody who's been charged with a crime, an  
2 interrogator who is doing his darneest to convince  
3 this person he's guilty of that crime, follow me so  
4 far?

5 A. Yes.

6 Q. And then that interrogator basically gives  
7 this person four options. You could say it happened  
8 this way, and you'll be in serious problems. Or  
9 contrast with the least serious, you can say it  
10 happened this way, sir, and I want to know what  
11 happened because I wasn't there. And if you come up  
12 with the last statement, then nothing happens to  
13 you. Under which what you've been saying, isn't it  
14 true, Doctor, that one would be more likely to accept  
15 the least serious consequence rather than the most  
16 serious consequence?

17 A. Sure, and it makes no difference whether  
18 you've committed the crime or not in making that  
19 choice, that's the problem.

20 Q. Thank you. I didn't ask you that but I  
21 appreciate that comment.

22 You are not saying, Doctor, by the way, that  
23 every time a confession is given that it's false?

24 A. No, absolutely not.

25 Q. And, in fact, other than your involvement in  
26 this case have you ever testified in San Francisco  
27 criminal courts as an expert in the field of false  
28 confessions?

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1 A. This is the first time I've ever testified in  
2 San Francisco.

3 Q. Have you ever testified in Alameda County  
4 Superior Courts as an expert in the field of false  
5 confessions?

6 A. Yes.

7 Q. When and where?

8 A. In a civil case in I believe it was in  
9 Hayward in the latter part of the 1980's.

10 Q. I should have been more specific. In any  
11 criminal cases?

12 A. No.

13 Q. Have you testified in any Bay Area counties  
14 in any criminal cases as an expert in the field of  
15 false confessions?

16 A. Yes, in whatever county Fairfield is located  
17 in.

18 Q. When was that and what was the name of the  
19 case?

20 A. Three or four years ago a case called

21 Johnson, or a case in which the defendant's name was  
22 Johnson.

23 Q. I take it in that case you testified for the  
24 defense, is that correct?

25 A. That's correct.

26 Q. Any other cases in the Bay Area counties?  
27 That's Solano County I believe by the way.

28 A. The next closest would be Sacramento.

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1 Q. And when was that?

2 A. Last year. And a month or so ago, two months  
3 ago.

4 Q. The name of the defendant?

5 A. The most recent one was Wright, and prior to  
6 that Gonsalves.

7 Q. I take it in both those cases you've  
8 testified for the defense, is that correct?

9 A. That is correct.

10 Q. Now, you told us -- I'm almost finished,  
11 Doctor -- would the coerced compliant wherein the  
12 party making the statement knows that it's false but  
13 nonetheless to get to extricate him or herself from  
14 the situation they go ahead and they basically  
15 concede to the wishes of the interrogator?

16 A. Correct.

17 Q. Now, in criminal -- in confessions involving  
18 the criminal law you know that no party can be forced  
19 to give a statement against themselves, they have  
20 certain Constitutional Rights which we try to honor  
21 in this country, among them being the Fifth  
22 Amendment. You're aware of that, aren't you?

23 A. Yes, I am.

24 Q. You're aware of the Sixth Amendment which  
25 guarantees counsel to people even if they don't have  
26 any money or the resources to pay for counsel,  
27 correct?

28 A. Correct.

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1 Q. Are you therefore aware of the Miranda  
2 decision?

3 A. Yes, I am.

4 Q. And in a Miranda decision, basically what do  
5 you understand the Miranda decision --

6 MR. RAPPAPORT: Objection, beyond the scope  
7 of his expertise. He's not an attorney as well as  
8 relevance under 352, primarily outside of his area of  
9 expertise.

10 MR. FAZIO: He's an expert on confessions in  
11 criminal cases among others, he should certainly be  
12 aware of the Miranda decision.

13 THE COURT: The objection is overruled. The  
14 question goes to his understanding. It is not to  
15 elicit a statement of the standard or what the law  
16 is. That comes from the Court.

17 Q. (By Mr. Fazio:) What is your understanding  
18 of the Miranda decision, the rights it gives to  
19 people about to be interrogated for criminal matters?

20 A. My understanding of the Miranda decision,  
21 having read the Miranda decision several times, is  
22 that in the Miranda decision the Supreme Court  
23 discusses the question of the use of the third degree  
24 which by this time in the 1960's --

25 MR. FAZIO: Excuse me, your Honor, that is  
26 nonresponsive to my question. I object to that.  
27 I'll rephrase my question, it's very specific.

28 MR. RAPPAPORT: He asked him as to his

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1 understanding of Miranda. He apparently does have  
2 an understanding of that and now is explaining that.

3 THE COURT: Counsel -- ladies and gentlemen,  
4 let me clarify. The witness may be asked questions  
5 concerning information upon which he basis an opinion  
6 and you may consider his response to this question in  
7 assessing this witness's opinions. And it is his  
8 understanding of this particular legal case that the

9 witness has set forth, and what he states in answer  
10 to the question is not to be considered by you as a  
11 statement of the law.

12 Mr. Fazio, will you restate your question?

13 MR. FAZIO: I will restate my question.

14 Q. Doctor, the question I'm asking you is what  
15 is your understanding to the rights, not the history  
16 of it, not the philosophy behind it, what is your  
17 understanding of the rights the Miranda decision has  
18 conferred upon suspects before they make a statement  
19 to the police?

20 A. Having read the Miranda decision several  
21 times, and paid attention to what the Court discusses  
22 in Miranda culminating in the Miranda rule, the  
23 Court, Supreme Court of the United States discusses  
24 the fact that third --

25 MR. FAZIO: Judge, excuse me. Again he's not  
26 answering, the question's very specific, I cannot  
27 make it anymore specific. I will try again. I'm  
28 withdrawing the last question.

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1 MR. RAPPAPORT: I believe the witness is  
2 entitled to answer the question.

3 THE COURT: The objection is the answer is  
4 nonresponsive. And to the extent that the answer  
5 attempts to simply summarize what this legal decision  
6 states and what the law is I believe the answer is

7 nonresponsive.

8           Mr. Fazio, I am going to ask you to restate  
9 your question to make it clear that the witness is to  
10 set forth his understanding to the extent that it  
11 relates to and bears on the opinions that he's  
12 expressed.

13           MR. FAZIO:    Doctor, I will try again.

14           Q.    If you don't understand my question please  
15 let me know.

16           The question was what rights, what rights  
17 does a defendant have under the Miranda decisions?

18           A.    Because of the possibility of psychological  
19 coercion --

20           MR. FAZIO:    Objection, nonresponsive.    I  
21 withdraw the question.

22           I'll proceed unless you order him to answer  
23 properly.  I think that response was nonresponsive to  
24 the question.

25           THE COURT:    The question has a problem built  
26 into it which is obvious,  and Mr. Fazio,  I will ask  
27 you to withdraw your question and state a new  
28 question.

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1           MR. FAZIO:    I Will rephrase it.

2           THE COURT:    You may restate it,  but restate  
3 it so that it doesn't ask this witness to express a

4 legal opinion as to what Miranda --

5 MR. FAZIO: I've been trying to do at that.

6 THE COURT: -- provides.

7 MR. FAZIO: I will try again.

8 THE COURT: Why don't you relate it to the  
9 subject of confessions and his opinions.

10 Q. (By Mr. Fazio:) Miranda relates to  
11 confessions, doesn't it, Doctor? Yes or no.

12 A. My understanding of the Miranda decision has  
13 to do with the issue of coercion and police  
14 interrogation.

15 MR. FAZIO: Objection, your Honor.

16 That's nonresponsive. The question is  
17 simply does it relate to confessions -- then I'm  
18 withdrawing the question and I'm proceedir'g in this  
19 manner if I may.

20 I have the right to withdraw my question,  
21 don't I?

22 THE COURT: You may.

23 Q. (By Mr. Fazio:) Under the Miranda decision,  
24 Doctor -- I'll ask you more direct, under the Miranda  
25 decision the defendant is told by the police that he  
26 has a right to an attorney, correct?

27 A. I believe that's the interpretation that has  
28 evolved for satisfying the decision that was

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1 articulated in Miranda.

2 Q. Can you answer a question with yes or no and  
3 then --

4 MR. RAPPAPORT: Excuse me, that's improper.  
5 The --

6 THE COURT: State a legal objection.

7 MR. FAZIO: The objection is his answer was  
8 nonresponsive.

9 THE COURT: Mr. Rappaport.

10 MR. RAPPAPORT: It was responsive and he's  
11 under no legal obligation to answer yes or no.

12 THE COURT: Mr. Rappaport, you state a legal  
13 objection.

14 MR. RAPPAPORT: Argumentative.

15 THE COURT: Sustained.

16 Q. (By Mr. Fazio:) All right, Doctor. I will  
17 try to make this question such that it requires a yes  
18 or no answer. One which may be explained if  
19 necessary.

20 Does the Miranda decision require police  
21 officers to advise defendants that they have the  
22 right to a lawyer?

23 A. I don't recall the specific language in  
24 Miranda sufficiently to answer that question based on  
25 my reading of the Miranda. What I do understand is  
26 that that is how Miranda is interpreted and-has  
27 resulted in warnings being given to defendants that  
28 they do not have to undergo interrogation without

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1 presence of an attorney.

2 Q. So would it be fair to say, Doctor, that as  
3 an expert on confessions that you do not know whether  
4 or not the Miranda decision requires police officers  
5 to ask -- to advise defendants that they have a right  
6 to a lawyer?

7 A. No, I said I don't recall the words in  
8 Miranda and whether they articulate exactly that but  
9 I do understand that from the Miranda decision, which  
10 is quite lengthy, and goes into a number of subjects,  
11 that the standard has evolved to satisfy the Miranda  
12 decision that suspects must be warned and must be  
13 advised that they can have an attorney present and  
14 they do not have to engage in the interrogation, they  
15 have a right to remain silent.

16 Q. In all of the expertise that you've testified  
17 to regarding confessions in criminal cases is it your  
18 -- have you ever heard of the Miranda Rights being  
19 articulated to a defendant?

20 A. Oh, I've reviewed a line of cases showing the  
21 changes since Miranda was first handed down --

22 Q. (By Mr. Fazio:) That wasn't the question,  
23 Doctor.

24 THE COURT: Mr. Fazio --

25 MR. FAZIO: Nonresponsive.

26 THE COURT: Overruled.

27 THE WITNESS: I'm familiar not only

28 generally with the impact that Miranda has had, I'm

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1 familiar with the research that shows how much effect  
2 it's had. I'm familiar with the line of case that  
3 shows how Miranda has been reinterpreted over the  
4 years and the circumstances and changes that have  
5 occurred since Miranda was first handed down almost  
6 thirty years ago.

7 MR. FAZIO: Object to that response being  
8 totally nonresponsive to the question I asked of the  
9 witness.

10 THE COURT: Overruled.

11 0. (By Mr. Fazio:) Doctor, the last confession  
12 case you had in a criminal case, what was the  
13 defendant told by the police officers before the  
14 statement was taken from him?

15 MR. RAPPAPORT: Objection, relevance.

16 MR. FAZIO: Goes to his very expertise on  
17 this whole issue. If he doesn't even know what the  
18 police officers tell the defendants before taking a  
19 statement from him --

20 THE COURT: The objection is overruled.

21 THE WITNESS: A. In the last case before  
22 this one, which I believe was in Flagstaff, Arizona,  
23 the woman was read the particular version of the

24 Miranda warnings that were in use by that particular  
25 police agency.

26 Q. Doctor, as an expert in confessions, tell us  
27 what police officers should read relative to the  
28 Miranda decision before taking a statement from the

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1 have to talk if they don't want to, correct?

2 A. Correct, and many others.

3 Q. Okay, and many others. Among them being?

4 A. Among them being that if a statement is  
5 obtained through the use of threat or physical  
6 assault, that the statement will not be used against  
7 them.

8 Q. Correct.

9 A. That if a person is kept up for 20 hours  
10 deprived of food that there are a number of  
11 circumstances that can lead to an interrogation being  
12 regarded as produced through coercion and therefore  
13 not a statement that should be taken seriously.

14 Q. Correct.

15 A. One of those conditions being if the person  
16 is threatened and the threat is a coercive threat,  
17 such as you will spend the rest of your life in jail  
18 if you don't give me a statement.

19 Q. And you know, Doctor, that the criminal law  
20 allows the Court to make those determinations,

21 correct?

22 MR. RAPPAPORT: Objection, calls for a  
23 legal --

24 THE COURT: Sustained.

25 MR. FAZIO: He offered it. i'm questioning  
26 him, your Honor, with all due respect on response to  
27 my previous question.

28 THE COURT: The last question was objected

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1 to and that objection was sustained.

2 Q. (By Mr. Fazio:) Doctor, defendants also are  
3 afforded the right to an attorney, aren't they?

4 A. Yes, they are.

5 Q. And they are afforded, I'm not talking about  
6 this case, I'm talking about general cases, so we  
7 know that they are afforded the right to decide if  
8 they wish to testify or do not wish to testify,  
9 correct?

10 A. Correct.

11 MR. RAPPAPORT: "Testify" I believe he means  
12 speak to the police officers --

13 MR. FAZIO: No, I do not. I mean they have  
14 Fifth Amendment right, the defendant's decision in a  
15 criminal case whether to testify or not to testify?

16 A. That's my understanding.

17 Q. In other words, that nobody can force anyone

18 in the United States of America to present evidence  
19 against themselves, correct?

20 A. That's my understanding.

21 Q. However, on the other hand, a defendant has  
22 the opportunity to present whatever evidence he or  
23 she wishes to present against him or herself,  
24 correct?

25 MR. RAPPAPORT: Objection, improper opinion.

26 MR. FAZIO: What is improper, your Honor?

27 MR. RAPPAPORT: It's a state of law, also  
28 352, not relevant to this case.

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1 THE COURT: That objection is sustained, the  
2 352 objection --

3 MR. FAZIO: I have no other questions. Thank  
4 you very much.

5 THE COURT: Redirect?

6 MR. RAPPAPORT: Nothing, thank you.

7 THE COURT: Is Dr. Of she excused?

8 MR. RAPPAPORT: He is.

9 THE COURT: Sir, you may step down.

10 Ladies and gentlemen, I have told you  
11 previously that it is the role of the Court to  
12 determine issues of the admissibility of evidence as  
13 well as issues of law. You are the sole judges of  
14 the believability of witnesses and the weight to be

15 given to the witness's testimony.

16 By the Court's limitations on Dr. Ofshe's  
17 testimony, his testimony on direct examination and on  
'8 cress-examination di~ not reach thc~ issue of the  
19 believabilty and the weight of the evidence of the  
20 defendant's confession.

21 At this time, Mr. Rappaport, do you have any  
22 other witnesses?

23 MR. RAPPAPORT: At this point, your Honor,  
24 ladies and gentlemen of the jury we would rest on the  
25 state of the evidence as well as the testimony of Dr.  
26 Ofshe. Thank you.

27 (Dr. Oshe's testimony completed.)

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1 on the subject that You're focusing Of1. Let's avoid  
2 eliciting from this witness opinion on issues of  
3 law. That is, don't ask the witness to state the  
4 law.

5 MR. FAZIO: I'm sorry, I will try not to do  
6 that.

7 Q. Are you aware of any protections that  
8 defendants are given in criminal cases?

9 MR. RAPPAPORT: Objection, same --

10 MR. FAZIO: -- as it relates to confessions?

11 MR. RAPPAPORT: If it calls for a legal  
12 conclusion, which I believe it does, I'm objecting,  
13 it's also vague.

14 THE COURT: The vagueness objection is  
15 overruled. The improper opinion objection is  
16 overruled. Once again, ladies and gentlemen, I  
17 restate what I've stated before, this witness may be  
18 asked about certain matters that form the basis of  
19 his analysis and upon which he based his opinion, the  
20 reasons for his opinion, and you may not consider his  
21 answers to these questions as a statement of the  
22 law. That comes from the Court.

23 Mr. Fazio, you may restate your question.

24 Q. (By Mr. Fazio:) Are you aware of legal  
25 protections afforded defendants in criminal cases  
26 regarding confessions?

27 A. Yes.

28 Q. And among those are the fact that they don't

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1 country. The question of whether or not Miranda was  
2 sufficient is not usually a question that comes  
3 before me. It's a technical question what was done,  
4 whether that satisfied Miranda is not an issue of  
5 influence but rather is a technical legal question as  
6 to whether or not a sufficient warning was given.

7 Q. Well, I asked you the question, Doctor, and I  
8 want you to reiterate for a moment, you said there  
9 were two things that you understand a police officer  
10 has to tell. What were those again? Would you  
11 reiterate --

12 A. You have the right to remain silent and if  
13 you want an attorney one will be obtained for you.

14 Q. How about advising them that every statement  
15 they make will be used against them? Isn't that a  
16 rather important admonition?

17 A. I can recall Jack Webb saying that, yes.

18 Q. Actually I think, Doctor, Jack Webb was on  
19 television before Miranda decision came about, so  
20 maybe it was NYPD Blue or something.

21 A. Could have been.

22 Q. A defendant in a criminal case has the right  
23 to an attorney, doesn't he or she?

24 MR. RAPPAPORT: At this point objection --

25 MR. FAZIO: Rephrase the question. Withdrawn  
26 and rephrase.

27 THE COURT: Mr. Fazio, why don't you state a  
28 hypothetical if you wish to have this witness comment

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1 suspect?

2 MR. RAPPAPORT: Objection, relevance. Also  
3 assumes -- it's beyond his area of expertise.

4 MR. FAZIO: He's told us historically, he  
5 wanted to tell us about the entire history of the  
6 case of Miranda --

7 THE COURT: Mr. Fazio --

8 MR. RAPPAPORT: Certainly --

9 THE COURT: No colloquy, please. The  
10 objection on the grounds of relevance is overruled.

11 MR. RAPPAPORT: Improper opinion.

12 THE COURT: Sustained.

13 Q. (By Mr. Fazio:) What should a police officer  
14 tell the defendant before engaging him in  
15 conversation?

16 MR. RAPPAPORT: Improper opinion.

17 MR. FAZIO: He's an expert --

18 THE COURT: Overruled. Overruled.

19 Q. (By Mr. Fazio:) What's a police officer  
20 suppose to tell a suspect in a criminal case before  
21 attempting to take a statement?

22 A. My understanding is, is that generally a  
23 suspect has to be warned or admonished that they have  
24 the right to remain silent, and if they want an  
25 attorney, an attorney will be obtained for them.

26 Q. That's all?

27 A. Maybe more to it, I have to go back and try  
28 to remember Dragnet like everybody else in the

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