

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

October 21, 2005

- - -

The following proceedings were held out of the presence of the jury:

THE COURT: Case Number 165368, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: The defendant?

MR. ROGERS: Ready, Your Honor.

THE COURT: And I understand the jury is ready?

DEPUTY COURT MARSHAL: The jury is ready.

THE COURT: All right. You may return them to the courtroom.

MR. ROGERS: Your Honor, one preliminary matter. Your Honor, yesterday we had an oral motion for judgment of acquittal at the close of the state's evidence.

THE COURT: You can bring the jury in.

MR. ROGERS: Be supplemented. I would now file the written motion.

(Motion filed.)

MR. ROGERS: Thank you, Your Honor.

- - -

The following proceedings were held in the presence of the jury:

1 THE COURT: Good morning, ladies and gentlemen. If
2 you would be so kind as to answer as the clerk takes
3 attendance here.

4 (Roll call by Julie Smith, Deputy Clerk.)

5 THE COURT: You may be excused.

6 (Clerk excused.)

7 THE COURT: Defendant may call his next witness.

8 MR. ROGERS: Your Honor, defendant calls
9 Dr. Elizabeth Loftus.

10 THE COURT: Would you raise your right hand, please.

11 - - -

12 ELIZABETH LOFTUS,

13 being first duly sworn by the Court, testified as follows:

14 THE COURT: Would you take the witness stand,
15 please.

16 And let's see if we've turned on the mics. We have.
17 The small, flat, black metal device there is a live
18 microphone. And you may need that to amplify your voice.
19 The other mics will not amplify your voice.

20 - - -

21 DIRECT EXAMINATION

22 BY MR. ROGERS:

23 Q. Good morning, Doctor.

24 A. Good morning.

25 Q. Would you please tell us your name for the record.

1 A. My name is Elizabeth Loftus.

2 Q. And I called you doctor. What kind of doctor are
3 you?

4 A. Well, I have a PhD in the field of psychology.

5 Q. I am going to hand you what has been marked for
6 identification as Defendant's Exhibit Z and ask you what that
7 is.

8 A. This is a copy of my vitae as of September 2005.

9 Q. And what's a vitae?

10 A. It's a record of my education, publications, work
11 experience, speeches, and other -- other professional
12 experience.

13 Q. Okay. And that appears to be quite voluminous.

14 A. Well, it's 33 pages.

15 MR. ROGERS: Your Honor, I would at this time offer
16 Defendant's Exhibit Z, with the understanding we are not
17 seeking to publish it to the jury at this time, but that
18 should they have questions concerning Dr. Loftus's
19 qualifications, they might be allowed to request it and look
20 at it during their deliberations.

21 MR. CRANE: Well, I've seen that. It is voluminous.
22 I -- I guess if it's only offered to establish her
23 foundationally, I don't have an objection. I don't think
24 it's appropriate -- I mean, she can testify to her
25 qualifications. It doesn't necessarily go back to the jury.

1 But I guess you're not asking for that.

2 MR. ROGERS: I'm not asking for it to be published
3 at this time. I would want it in evidence so if the jury
4 wishes to review it, they can. I do intend to ask about some
5 excerpts of this, but I'm not going to go through all 33
6 pages.

7 THE COURT: Do you have an objection to the
8 admissibility of Defendant's Exhibit Z?

9 MR. CRANE: Well, with the limitations stated by
10 defense counsel, which I think we can take up later, I don't
11 have any trouble with him showing it to her and having it
12 marked and offered for purposes of foundation.

13 THE COURT: Okay. Do you object to its being
14 admitted so that it would be available to the jury at some
15 future time if they care to look at it? Because it's been
16 offered for that purpose as well as for foundation, to
17 determine this witness being an expert.

18 MR. CRANE: Yeah, I guess I don't mind that.

19 THE COURT: Defendant's Exhibit Z, as in zebra, is
20 admitted.

21 - - -

22 Defendant's Exhibit Z admitted into evidence.

23 - - -

24 Q. You started with telling us you have a PhD in
25 psychology. Would you first go through your formal education

1 for which you have received degrees.

2 A. Well, just starting with college, I went to the
3 University of California-Los Angeles as an undergraduate, and
4 I received a bachelor's degree in mathematics and in
5 psychology in 1966. And then I went --

6 Q. Excuse me. Let me stop you there. Was that degree
7 qualified in any way? In other words, was it just a regular
8 bachelor's degree or --

9 A. Do you mean with honors or --

10 Q. Yes.

11 A. I -- I think I received highest honors, but I --
12 some -- or high honors, or something like that, but --

13 Q. That was 1966?

14 A. 1966.

15 Q. Okay.

16 A. After UCLA, I moved to Stanford. I received a
17 master's degree in psychology in 1967, and then a PhD in
18 psychology in 1970.

19 Q. And what is your current job?

20 A. Currently I hold the title of distinguished
21 professor at the University of California-Irvine. And I have
22 positions in several departments, but the main departments
23 are psychology and social behavior. And my second department
24 is criminology, law, and society.

25 Q. And how long have you been at the University of

1 California-Irvine?

2 A. I'm just going into my fourth year of teaching
3 there.

4 Q. Okay. And before that, where did you teach?

5 A. I taught at -- for a long time at the University of
6 Washington in Seattle. I was on the regular faculty at UW.

7 Q. You said, "for a long time." Do you know when you
8 started there?

9 A. I think my -- I became an assistant professor in
10 1973, and then worked my way up to full professor.

11 Q. And in what departments there?

12 A. In the psychology department.

13 Q. And do you still hold any position on the faculty of
14 the University of Washington?

15 A. I still am an adjunct professor at the University of
16 Washington, in the psychology department, and also an adjunct
17 professor of law, but those are pretty much courtesy
18 positions. I still have some collaborations. I just
19 finished -- one of my PhD students just finished her PhD,
20 still at Washington. So I do still have connections and
21 collaborations.

22 Q. And have you served as a visiting professor at any
23 colleges or universities?

24 A. I have, yes. I -- well, I was a visiting professor
25 at Harvard in 1975. I was a visiting professor at the

1 Georgetown Law Center, which is the law school for Georgetown
2 University, in 1986. And I was a visiting faculty at the
3 National Judicial College at the University of Nevada in
4 Reno. And that is a school for state-level judges. I taught
5 there for -- during -- taught some courses in the summers,
6 for about 13 years.

7 Q. Have you -- and I don't want to go into details --
8 have you also received honorary degrees from various
9 institutions around the world?

10 A. I have. I've -- I have five honorary doctorates
11 from universities in the United States and in Britain and the
12 Netherlands and in Israel.

13 Q. Have you been awarded grants and contracts by
14 various government agencies in the United States?

15 A. I have, yes. I have -- well, the National Science
16 Foundation and the National Institute of Mental Health and
17 some other government agencies have supported my laboratory
18 research in the area of memory.

19 Q. And calling your attention to other awards and
20 honors you have received, and I'm just selecting maybe one or
21 two here, tell us what is the American Academy of -- excuse
22 me, the National Academy of Sciences?

23 A. The National Academy of Sciences is an organization
24 of scientists that I think may have begun in the 18th
25 century. And it is probably the most prestigious

1 organization that an American scientist can be elected to,
2 that we have.

3 Q. Have you been elected to the National Academy of
4 Sciences?

5 A. I was elected in 2004, yes.

6 Q. And I don't think it's on Exhibit Z, but have you
7 read a published article about the 100 greatest psychologists
8 of the 20th century?

9 A. There was an article that ranked the 100 most
10 eminent psychologists of the 20th century -- or influential
11 psychologists or something of the 20th century.

12 Q. And were you ranked in that body?

13 A. I was.

14 Q. What number?

15 A. Well, I happen to have been number 58. But it had
16 Freud and Piaget and B. F. Skinner at the top, so I was proud
17 to be number 58.

18 Q. Were there any women ranked above you?

19 A. No.

20 Q. Moving now to the area of professional memberships,
21 are you a member of the American Psychological Society?

22 A. I am, yes.

23 Q. And have you served in any position as an officer of
24 this organization?

25 A. Yes. I was president of the American Psychological

1 Society in 1998-99.

2 Q. And do you also belong to other professional
3 organizations?

4 A. I do, yes.

5 Q. Have you done any consulting for governmental or law
6 enforcement agencies?

7 A. I've done quite a bit of consulting for different
8 government agencies, yes.

9 Q. And could you name some of those?

10 A. Oh, I did some work for the Department of Justice on
11 the national crime survey, which is a survey of crime
12 victimization, trying to get better information from victims
13 of crimes, to understand crime. I've consulted with the U.S.
14 Secret Service and the Federal Bureau of Investigation and
15 the CIA and the IRS. Those are a few of the agencies with
16 whom I've done consulting over the years.

17 Q. And have you published extensively in the field of
18 psychology?

19 A. I have. I -- it's just an estimate, but
20 approximately 20 books and maybe 400 scientific articles and
21 chapters since I received my PhD.

22 Q. And are some of these books textbooks?

23 A. Well, I do have some textbooks. A textbook in
24 memory that was used in human memory courses. A textbook --
25 content of psychology and introductory psychology textbook.

1 But many of them are books that are more exclusively about
2 the subject of memory.

3 Q. Okay. And with regard to your 400 and some
4 scientific articles that have been published, have these been
5 published in peer-reviewed journals?

6 A. Yes. The majority of them in peer review journals,
7 yes.

8 Q. And have you also, over your career, been invited to
9 address conferences of psychologists or to address university
10 classes or graduate programs and seminars in the field of
11 psychology?

12 A. Well, I do, every year, give lectures at other
13 institutions than the one where I'm primarily teaching. And
14 sometimes they are colleges and universities and sometimes
15 they're organizations of lawyers or judges or police or
16 others that might be interested in the subject of memory.

17 Q. And have you been to Columbia, Missouri, before?

18 A. I have, yes. I was invited and came in the early
19 1980s and spent three days at the university.

20 Q. What were you doing there?

21 A. Lecturing.

22 Q. Okay. Have we basically covered the highlights?

23 A. I think so. Probably more than you really wanted to
24 know.

25 Q. Let me now move to the question of human memory.

1 And is that a focus of your research and study and writing
2 and teaching at this time in your career?

3 A. Well, that -- it has been throughout my career. The
4 study of human memory.

5 Q. Is there a generally accepted theory for how human
6 memory works, in the scientific field in which you practice?

7 A. There is a generally accepted theory. The theory --
8 there's a theory about how memory does not work. That it
9 does not work like a video tape recorder. You don't just
10 record the event and play it back later the way a videotape
11 would work. The process is much more complex than that.

12 And what -- what actually happens when people are
13 trying to remember something is they take bits and pieces of
14 experience and they construct something. So memory is
15 actually a very constructive process.

16 But what that also means is that people will take
17 bits and pieces of information that they pick up, from other
18 times, from other sources, and integrate it into their
19 recollection and construct something, often something that's
20 different from the way things really happened.

21 Q. Okay. What are some of the things that might affect
22 memory?

23 A. Well, what one of the -- and at some point maybe I
24 could have a piece of paper or -- just to illustrate
25 something for the jury.

1 Q. We can do this. Are you used, Doctor, in your
2 teaching work, to using visuals to help teach?

3 A. Well, it does help. Usually works better when I
4 don't have a sprained ankle, but.

5 THE WITNESS: Your Honor, I'm sorry to put my back
6 to you, but.

7 THE COURT: I'd only ask that you speak up enough so
8 that the reporter will be able to take down what you're
9 saying to make a record. And she had and may still have a
10 bad case of laryngitis, so she may not be able to speak to
11 you and ask to you speak up. But if you'd be mindful of
12 that, please.

13 A. In response to your question, when some event
14 occurs, and we lay down information into the memory system,
15 after the event is completely over, individuals are sometimes
16 exposed to post-event information. And when this post-event
17 information becomes available to witnesses, they will
18 frequently incorporate it into their recollection, and it can
19 cause an alteration or a distortion or a change in somebody's
20 recollection.

21 So, this is one of the most important factors that
22 influences the accuracy of somebody's memory, because if
23 post-event information is inaccurate, it's going to make a
24 person's memory inaccurate.

25 Q. And what would happen to someone who -- would

1 someone who had been exposed to post-event information be
2 able to distinguish what portion of the memory was derived at
3 the time of the event and what portion was derived from the
4 post-event information?

5 A. Well, I can give you an answer based on one of my
6 many experiments in this area, studying post-event
7 information.

8 In some of the studies that we've done, what we've
9 done is we've shown people at the event a simulated accident.
10 And let's say at the time of the accident the car goes
11 through a stop sign. But later on we might ask our witnesses
12 a leading or a suggestive question that essentially
13 insinuates that it was a yield sign. We might ask them a
14 leading question that -- such as: "Did another car pass the
15 red Datsun while it was at the intersection with the yield
16 sign?" So we have insinuated this information.

17 And later on -- I've run out of paper here, but when
18 we test our witnesses, say, "What do you remember seeing at
19 the accident," many people will tell us they saw the yield
20 sign. They have succumbed to this post-event information.
21 They claim they saw the yield sign. And they're not even
22 aware that their recollection was influenced by this
23 post-event information.

24 Q. I'm trying to get you a bigger piece of paper to
25 draw on, if you'd like.

1 So the person whose memory has been influenced does
2 not distinguish between the event information and the
3 post-event information.

4 A. That's correct. In these studies, people frequently
5 become convinced that they saw the yield sign. And they are
6 unaware of the fact that it really is something that they
7 were exposed to after the accident was completely over.

8 Q. Let's move this over. Let's move this one up.
9 There's more paper, if you need it.

10 A. Thank you.

11 THE COURT: May she resume the stand now?

12 MR. ROGERS: Yes.

13 Q. And this is part of a generally accepted scientific
14 theory of how memory works?

15 A. It is. It's part of the evidence for the
16 reconstructive nature of memory. And there now have been
17 hundreds of studies of post-event suggestion, showing how it
18 can contaminate or distort or change somebody's recollection.
19 And I've given an example of a study that showed that when
20 you question people in a leading fashion, when you insinuate
21 erroneous details, that people will pick up that information
22 and adopt it as their own memory.

23 But in our studies and in the real world, people
24 pick up information from conversations with other people;
25 they pick up information from media coverage; they pick up

1 information from other sources. And those details can be
2 incorporated into the memory and can cause a distortion, an
3 alteration, or sometimes just a supplementation of the
4 memory.

5 Q. And has this -- I think you've already answered
6 this. Has this phenomenon been frequently documented and
7 replicated in scientific studies?

8 A. Well, my answer is yes. That it's not only been
9 documented and replicated, but you almost will not be able to
10 pick up a textbook in the -- any textbook in the area of
11 human memory or cognitive psychology, or possibly even
12 introductory psychology, and not find some reference to this
13 phenomenon and this basic work.

14 Q. And is there any -- in the experiments that have
15 been done, is there any attempt to determine how confident
16 the experimental subjects are of their memories, in relation
17 to whether they are actual memories from the event or
18 memories induced by some post-event information?

19 A. Well, I can say that when people adopt post-event
20 infor -- when they're exposed to the post-event information
21 and they adopt it as their own recollection, they are often
22 very confident that that's what they personally experienced.

23 And the -- the -- the post-event information
24 problem, I should add, is even more severe when a long
25 interval of time has passed since the event occurred. And --

1 perhaps I could illustrate what I mean.

2 Q. Do you want to move across the board to this other
3 piece of paper?

4 A. Well, I'll move over to this one.

5 So if -- if an event occurs, and we want -- of
6 course, it's a matter of some common sense that when time
7 goes by, our memory is going to fade. Studies have shown
8 that, and personal experience bears that out. So if I were
9 to plot how good a person's memory is likely to be, where at
10 this end of the axis we have good memory, and down here we
11 have poorer memory, and along this X axis time's passing,
12 then you expect to see a forgetting curve. So memory is
13 fading. This is something of a matter of common sense.

14 What's not so much a matter of common sense is: As
15 that memory is fading as time is passing, the memory becomes
16 more and more vulnerable to this post-event information
17 problem. So, if you try to distort somebody's memory here
18 while it's very fresh and good, then it's going to be harder
19 to distort it. Not impossible, but harder. But if you let
20 time pass, then the memory is weaker. It becomes more
21 vulnerable to post-event information. And people then become
22 more likely to embrace the post-event information as their
23 own memory and become confident about it.

24 Q. How does this fit in with the notion that we might
25 have, after the passage of time, a fairly weak memory, but if

1 you're shown a diary that you wrote the next day, then you
2 might be -- you might think that you would remember or remind
3 you of something? How does that work?

4 A. Well, of course people can be reminded of things
5 that they haven't thought about for a long time. They can --
6 a reminder is something that we call a retrieval cue. You
7 can -- you can be shown a retrieval cue of some sort. You
8 can be reminded of something you haven't thought about. You
9 can even be reminded of something that was perhaps
10 unpleasant, that you haven't thought about for a long time.
11 And you just have to go to a high school reunion, and you can
12 experience that for yourself.

13 But that -- that being said, it's also the case that
14 sometimes a true retrieval cue can be inserted into your
15 memory. It can almost feel like it's a memory, but you're
16 actually getting a piece of information that just happens to
17 be accurate information. And you're feeling -- you can feel
18 like you're remembering it. But in a way it's being
19 reconstructed again. It just happens to be accurate.

20 Q. And you've performed and read and analyzed studies
21 that replicate that phenomenon?

22 A. Well, we have -- we have also given people
23 post-event information that's accurate. And it can boost
24 their memory performance.

25 Q. So it wouldn't be inconsistent with anything over

1 here about the erroneous -- deliberately erroneous post-event
2 information interfering with memory and the phenomenon of
3 somebody who gets accurate post-event information, which
4 might either help them retrieve a real memory or create an
5 accurate but interfered-with memory? Is that a --

6 A. Right. There's nothing inconsistent about that.

7 Q. Okay. Now, if somebody had given -- have you done
8 experiments where somebody is given a deliberately false type
9 of retrieval cue?

10 A. Well, of course in my experiments, including the
11 stop sign/yield sign experiment, we are deliberately giving
12 people a detail that we know is false, because we know what
13 they originally saw. We've got the film. We know in this
14 example that it was originally a stop sign. So we know our
15 detail is false. Out in the real world, you don't really
16 know what truly happened. So you can -- you don't usually
17 know what truly happens, so you don't usually know that the
18 detail you're giving is false. In other words, I think
19 things may be happen a little more inadvertently out in the
20 real world, rather than deliberately, the way they do in the
21 experimental situation.

22 But if -- I'm not sure if you were also asking
23 whether we have planted larger false memories than just --

24 Q. That's where I was going to go --

25 A. Okay.

1 Q. -- but I haven't gotten there yet. I'll ask you
2 that. Have you done that?

3 A. Yes. So I've given you an example here. And again,
4 there are hundreds of these studies. And they -- the stop
5 sign/yield sign is just one example of it, where there have
6 been deliberate attempts to change a detail here and there
7 about an event that actually was experienced.

8 In other work that I and other psychologists who
9 study memory have done, we've gone even further than this.
10 We've tried to plant entirely false memories into the mind of
11 people, for things that didn't happen.

12 Q. Could you give an example of that?

13 A. Well, the first -- our first effort to do this --
14 and you have to keep in mind that, as researchers, we have to
15 devise a method for planting an entirely false memory so that
16 we can study the process, but we don't want to harm people.
17 And so the method that we came up with was to convince people
18 that, when they were a child, they were lost in a shopping
19 mall for an extended period of time. That they were
20 frightened; they were crying; and ultimately they were
21 rescued by an elderly person and reunited with the family.
22 And we managed, in our first study, to plant that false
23 memory in the minds of about a quarter of our sample of
24 adults.

25 Q. One in four people who had never experienced that

1 came away from your study with that memory?

2 A. Exactly. Now --

3 Q. How did you do that?

4 A. Well, the way we -- the way we did it is we talked
5 to their family members. So, for example, we talked to their
6 parents. We found out some things that happened to the
7 subject, who's now older. Let's say a young adult.

8 Q. Some real historical events.

9 A. Yeah. We found out some true things that happened
10 when the subject was younger. And then, with the parents, we
11 made up the story about being lost in a particular shopping
12 mall, for an extended time, frightened, crying, and rescued,
13 and so on. We presented the information to the subject, the
14 true memories and then the false one, as if they were all
15 true, and tried to encourage the subject to remember those
16 experiences.

17 Over three suggestive interviews, we succeeded in
18 getting about a quarter of our -- as I said, a quarter of our
19 sample to fall sway to the suggestion and come to remember
20 this made-up experience.

21 Now I should add that the study got criticized, and
22 people said, "Well, getting -- getting lost is so common.
23 Even if it was lost for an extended time. Can't you show us
24 you can do this with an experience that would be less common
25 or more unusual or more bizarre or more painful?" And other

1 investigators came along, used this technique, and planted
2 false memories of being a victim of a vicious animal attack;
3 they planted false memories of being a victim of a serious
4 indoor or serious outdoor accident. One study from the
5 University of Tennessee, they planted a false memory of: You
6 nearly drowned and had to be rescued by a lifeguard.

7 And so these studies showed that it is possible to
8 take a person, and with the right amount of suggestion, to
9 get a significant number of people to come to believe that
10 they had these very rich, false -- rich experiences that are
11 completely made up, by the researchers, with the help of the
12 family members.

13 Q. And what do you mean by "rich"?

14 A. Well, I use "rich false memory" to refer to these --
15 not just changing a detail here and there: Turning a stop
16 sign into a yield sign; making somebody believe that a person
17 who ran from the scene had curly hair instead of straight
18 hair. That's easy. But to build a whole false memory in the
19 mind of someone, rich in detail, that's a little harder.

20 Q. And with regard to the false memories, they are put
21 in the context of actual events that the person has a real
22 memory of?

23 A. In the studies that take the form of the stop
24 sign/yield sign procedure, there really was a real event. We
25 really did show people an accident. A simulated accident.

1 It really did have a stop sign. We changed the memory and
2 converted it into a yield sign. But when we plant these
3 false memories about being lost for an extended time or
4 nearly drowning and have to be rescued by a lifeguard, there
5 you're creating a whole rich experience. You're planting a
6 whole memory. They may draw on bits and pieces of their own
7 life experience to build that false memory, but we talk about
8 those as very whole false memories. Or rich false memories.

9 Q. And once again, of those one in four people who
10 are -- who are made to remember these experiences that never
11 happened, can they distinguish between that false memory and
12 their other real memories?

13 A. Well, sometimes you can find -- in some studies you
14 can find that people are a little bit more confident about
15 particularly some of their real memories than the false one
16 that we've created. Sometimes you'll find they have a little
17 bit more detail about the genuine true memories than they do
18 about the false memory that we've planted. But when you get
19 somebody rehearsing a false memory, you know, over and over,
20 it can become very detailed; people can become very confident
21 about it; and they can even become very emotional about it.

22 Q. And -- I lost my thought there. If someone -- well,
23 let me ask it this way. You've shown us on the diagram the
24 impact of time in weakening memory and making it more
25 susceptible to these types of false memories. Are the

1 studies that you've done all things that people end up
2 remembering happening to them as children? Or does this
3 happen with experiences that people are taught they
4 experienced as teenagers, adults, whatever?

5 A. Well, in many of the examples I just gave, it is
6 taking individuals and planting a childhood memory. But we
7 have other examples where people can be made to believe that
8 they experienced things more recently. So people can be led
9 to believe that, say, two weeks ago they came into a
10 laboratory situation and they performed certain actions that
11 they didn't actually perform.

12 Q. And the accident, stop sign/yield sign, would be
13 something of an adult memory, but a small detail; correct?

14 A. Well, right. And those, if you want to call them
15 the stop sign/yield sign type of study, those are certainly
16 distortions of memory for quite recent experiences.

17 Q. With regard to other studies concerning adult
18 memories, is there still the -- is it easier to distort as
19 time passes?

20 A. Yes.

21 Q. Even if something that somebody experiences as an
22 adult can be distorted with the passage of time.

23 A. Right. If I -- if I want to distort somebody's
24 memory, I know that if I just let a little bit of time pass,
25 I'm going to have an easier time doing it.

1 Q. With regard to the creation of what you referred to
2 as rich false memories -- whole memories of whole events that
3 never occurred?

4 A. Right.

5 Q. -- can you give us an example of a study which shows
6 the creation of that kind of rich false memory of an adult
7 experience?

8 A. Well, actually I -- there is a -- there's a recent
9 study that was sent to me by a professor from Wesleyan
10 University, in which adults were taken on a walk through the
11 campus. These are college-age adults. And later, through
12 imagination, and other techniques, were led to believe that
13 they did things that they didn't do on this walk,
14 including -- I know is going to sound somewhat unusual, but
15 including proposing to a Pepsi machine.

16 Q. Were they under the influence of anything at the
17 time?

18 A. No. But if -- if they walk through a campus and
19 they engage in a lot of behaviors, and then later on they
20 start imagine -- they are encouraged to imagine that they
21 engaged in other behaviors, they will sometimes believe that
22 they actually performed a behavior that they only imagined.

23 So -- this phenomenon is actually called imagination
24 inflation. It's another one of the ways that we get people
25 to believe that they did things they didn't do. You just

1 make them imagine it, and they imagine it -- especially if
2 they imagine it multiple times, they -- they soon start to
3 think they actually did it.

4 Q. Let me move from the creation, if you will, of
5 memory to the destruction or disregarding of memory.

6 A. The idea of repressed memory?

7 Q. The idea of repressed memory. Thank you. See. I
8 don't get to ask leading questions, but you can ask me
9 leading -- give me leading answers. Tell me about the idea
10 of repressed memory.

11 A. Well, there is a kind of hand-me-down Freudian idea
12 floating around our society that people can take horrific
13 experiences, usually it's -- you hear about it in the context
14 of, say, you know, years of brutalization banishes into the
15 unconscious, massively repress these memories, be completely
16 unaware that these things happened, until the person
17 undergoes certain techniques, maybe guided imagery or dream
18 interpretation, what have you, and the person then becomes
19 aware of these horrible experiences. And many individuals
20 have been accused in our society based on such accusations.
21 But, in fact, there really is no credible scientific support
22 for the idea that memory works this way.

23 Q. So you've talked about scientific support that's
24 published and peer reviewed and replicated and looked at and
25 challenged and debated in the profession with regard to the

1 phenomenon -- phenomena you have described in terms of
2 post-event interference or even creation of memory? Correct?

3 A. Yes.

4 Q. Is there anything like that to show that, the day
5 after a horrible event, somebody can decide not to remember,
6 and really won't?

7 A. I have not seen any credible support for the idea
8 that somebody, after some horrific event, a day later they
9 don't remember; two days later they don't remember; one year
10 later, when presented with strong retrieval cues, they don't
11 remember; two years later, with more retrieval cues, they
12 don't remember; and then suddenly they remember. There is no
13 credible scientific support for that, as -- as the way memory
14 works.

15 Q. Then -- by the way, when you say, "the way memory
16 works," is there a term in your field called confabulation?

17 A. Yes, there is.

18 Q. What's that?

19 A. Well, confabulation really just refers to filling in
20 the details of or the gaps in somebody's memory. I mean,
21 it's probably something we all do to some extent when we're
22 telling a story and we -- and we fill in a few details to
23 make the story make sense. But sometimes people confabulate
24 and they, you know, they throw a whole lot of erroneous
25 information into their story in order to tell a good story.

1 And filling the gaps with details is what confabulation is.

2 Q. Is that the same as consciously making up things to
3 try and plug holes in your story?

4 A. Well, when you put it that way, you're raising the
5 idea of deliberate lying.

6 Q. Okay. So there's a difference.

7 A. There's a difference between deliberate lying and a
8 -- kind of a honest effort to fill in gaps in memory that you
9 think might be right, that you draw an inference could have
10 happened, and so you fill in the gap in your memory and
11 suggest that it did happen. But it's often done without any
12 intention to deceive.

13 Q. Whereas if somebody came and deliberately added a
14 detail that they knew was -- they were making up, that would
15 not be confabulation; that would be lying.

16 A. Well, I would -- I would call that deliberate lying.
17 And if -- I study honest errors. And errors that are a
18 product of post-event suggestion or some other process. And
19 if somebody were interested in -- a deliberate liar, I would
20 send them to a different psychologist.

21 Q. Okay. Let me then turn your attention to the case
22 we're here about. Did you receive some materials to review
23 in this case?

24 A. I did, yes.

25 Q. And what did you receive?

1 A. Well, I received a large number of police reports
2 and deposition testimony and interviews and videotapes and --
3 so I -- I'm sure I didn't receive everything about the case,
4 but I did receive a great deal of information.

5 Q. You received, in particular, police reports
6 concerning the interview of Charles Erickson by Detective
7 Short that was not videotaped? Is that correct?

8 A. Well, information about that, yes.

9 Q. Yeah. And then you got three different videotaped
10 interviews of Mr. Erickson; one by a Detective Short, one
11 driving around in the car, and a third one by a Detective
12 Nichols?

13 A. Yes. Well, I have them organized by what time they
14 were done --

15 Q. Okay.

16 A. -- on March 10th.

17 Q. And did you also have a transcript of those
18 videotaped interviews to facilitate your review?

19 A. Yes.

20 Q. And were you able to find in those materials any
21 examples of this kind of erroneous post-event information
22 that you talked about that would create a suggestion?

23 A. Well, of course I don't know exactly what happened,
24 obviously, on the morning of November 1st, 2001.

25 Q. So you don't know what's erroneous and what's not.

1 A. Right. So -- but all -- what is apparent from these
2 materials is: A very long time passes before a key
3 individual purports to be recalling things about the
4 experience. And during that very long time, two years or
5 more, there are ample pieces of post-event information, that
6 come in the form of newspaper articles and other media
7 coverage, that come in the form of suggestive and leading
8 questions. Even if those suggestive and leading questions
9 were posed inadvertently, they contain information, and in
10 that sense, it is post-event information.

11 Q. And did you also view and read in the transcripts
12 and view in the videotapes Mr. Erickson even describing his
13 exposure to post-event information?

14 A. Right. Well, Mr. Erickson did explicitly say that
15 he was exposed to the news and the media -- some of the media
16 coverage, and even occasionally made reference to remembering
17 particular details from the media coverage.

18 Q. Calling your attention to the last interview of
19 Mr. Erickson on March the 10th, which would be the interview
20 with Detective Nichols, and I don't know what time it was
21 right now, but it was the last one --

22 A. 5:01.

23 Q. 5:01. Were you able to look at the interrogation
24 technique used by Detective Nichols after Mr. Erickson tried
25 to say that he might just be fabricating the whole thing?

1 A. Well, now, I don't remember exactly which interview
2 it was, but he did -- Mr. Erickson did receive pressure
3 during at least one interview that day, that the detective
4 didn't want to hear anything about fabrication.

5 Q. What would be the impact of that on somebody who was
6 expressing uncertainty as to the accuracy of their perceived
7 memory?

8 MR. CRANE: Judge, if I might, I'd like to object at
9 this point. The question is, for this witness, who I realize
10 is testifying as an expert, to speculate, though, on the
11 impact of this interview on other people, I don't know how
12 she has -- there's been any foundation laid for her ability
13 to do that.

14 MR. ROGERS: I'll back up a couple of steps, Judge.

15 THE COURT: You may.

16 Q. Have there been scientific studies in your field --
17 and by the way, would it be fair to characterize you as at
18 least one of the leading psychologists in the study of human
19 memory, especially with the aspect of post-event information
20 and those kinds of things?

21 A. Well, I'd prefer it if somebody else would
22 characterize me that way, but.

23 Q. Is that what they did when they put you on the list?

24 A. Right.

25 Q. Okay. Fair enough. Anyway, are you familiar with

1 studies that talk about the impact of various questioning
2 techniques on those kinds of memory things?

3 A. Yes.

4 MR. CRANE: Judge, that question's vague. "Those
5 types of questions on those types of memory things."

6 Q. Studies which would be relevant to your expertise to
7 answer the question to which Mr. Crane previously objected.

8 A. Yes.

9 Q. Okay. And is your analysis of --

10 MR. CRANE: Judge -- wait a minute. There's no
11 foundation. If he's going to ask the same question, there's
12 been no foundation.

13 MR. ROGERS: I'm --

14 THE COURT: I don't know what he's going to ask.

15 MR. ROGERS: I'm getting to the other -- another
16 aspect of the foundation.

17 Q. Is your analysis of the interviews of Mr. Erickson,
18 which you have reviewed both on videotape and in transcripts
19 and in police reports, based upon the knowledge derived from
20 those kinds of studies?

21 A. Yes.

22 Q. At least in part. And many other kinds of studies
23 as well.

24 A. Right.

25 Q. Based upon your entire professional experience and

1 expertise.

2 A. Correct.

3 Q. And based upon the scientific information you have
4 learned and developed and established through experimentation
5 and review of other psychologists' work, and having them
6 review yours, and all of those things, do you have an opinion
7 as to whether the techniques used by the detective who yelled
8 at Mr. Erickson and told him he didn't want to hear any
9 equivocation, he just wanted the straight facts, would have
10 on Mr. Erickson's perceived memory?

11 MR. CRANE: Would renew my objection, Judge.
12 There's been no testimony from this witness that she's ever
13 reviewed any studies that correlate to the set of
14 circumstances here. And that's what he's asking her. And
15 it's been just a real vague: "Have you seen studies?"
16 "Yeah." There's no foundation for this, Judge.

17 THE COURT: The objection as to foundation is
18 sustained.

19 Q. Have you reviewed studies which correlate to the
20 effect -- or which deal with the effect of interrogation
21 techniques, such as those used by Detective Nichols on
22 Mr. Erickson at that point in the videotape you reviewed, on
23 the memory of somebody who's subjected to those kind of
24 interrogation techniques?

25 A. Well, to clarify, I -- many of the studies that I

1 and others have done that show that, if you conduct
2 interviews that suggest details in the course of interviews,
3 that witnesses will pick up -- often pick up those details
4 and claim them as their own memory. And so that aspect is
5 something that I personally have studied. There are other
6 psychologists, I mean, most notably B. F. Skinner, who has
7 published many studies and many theoretical papers on
8 reinforcement and punishment. And so if you reinforce a
9 particular response or punish a particular response, you can
10 change the behavior of subjects. They'll conform to those
11 reinforcements.

12 Q. Is memory a behavior in the context of the kind of
13 B. F. Skinner type of thing?

14 A. Yes. A memory report is a behavior.

15 Q. The report of memory is a behavior.

16 A. Right.

17 Q. And is there any -- any studies which deal with the
18 strength of the suggestion, the forcefulness of the
19 suggestion, and how that might impact its influence on the
20 memory?

21 A. I -- I don't think I can name a study that really is
22 about the strength of the suggestion. There certainly have
23 been studies of repeated suggestion working better than a
24 single suggestion --

25 Q. Okay.

1 A. -- but...

2 Q. Let me ask you this. During your review of the
3 Erickson interview materials, that's shorthand for the police
4 report of the interview with Mr. Short that was not
5 videotaped, the three videotaped interviews and their
6 transcripts. Okay? And I'll also include in that the
7 October 1st police report of an interview that happened
8 October 1st, 2004. Did you see, in your review of those
9 materials, evidence of repeated suggestion by the
10 interviewers?

11 A. Well, I certainly saw evidence of repeated
12 suggestion in the sense that repeatedly details are being
13 introduced into the interview that are coming, not from
14 Mr. Erickson, but coming from the person who's doing the
15 interviewing. And then later on, Mr. Erickson's testimony,
16 or recollection or whatever you want to call it, changes.

17 Q. Okay. Would it help illustrate what you're talking
18 about to show a fairly short clip from one of those videos?

19 A. It -- it might, to illustrate the point of how
20 something can be introduced by the interviewer rather than by
21 the person being interviewed.

22 Q. If you will bear with us, we'll...

23 MR. ROGERS: Your Honor, for the record, we are
24 playing an excerpt of Defendant's Exhibit A.

25 MR. CRANE: This is in evidence?

1 MR. ROGERS: Yes, it's in evidence. They have seen
2 the whole thing before, and they've seen maybe a clip or two
3 before.

4 (Excerpt playing.)

5 THE COURT: Excuse me just a minute. Would you stop
6 it just a second?

7 MR. ROGERS: Stop it, Mr. Weis. Would you stop
8 that?

9 (Playback stopped.)

10 THE COURT: Pardon me. Is this of Short, as opposed
11 to --

12 MR. ROGERS: Yes. This is Short.

13 THE COURT: All right.

14 MR. ROGERS: Could you maybe start over again?

15 THE COURT: You can start over again. It did not
16 look like Detective Short.

17 MR. CRANE: He's got a hat on.

18 THE COURT: I was going to say, I didn't see his
19 shiny head.

20 Okay. You may start it again.

21 MR. WEIS: It's not very long.

22 (Excerpt played.)

23 Q. Now, let's start at maybe the most obvious thing at
24 the end. Did you hear Mr. Erickson say, "I don't remember if
25 I yelled at her or if I told her to go get help." Right?

1 A. Yes.

2 Q. And then what does the interrogator say?

3 A. Well, he gave her information. He gave her
4 post-event information about --

5 Q. Him. Erickson post-event information.

6 A. Right.

7 MR. CRANE: No, I think she was referring to
8 Erickson as a female.

9 MR. ROGERS: Well, right. And I'm trying to clarify
10 that.

11 A. Oh. Yes. I'm sorry.

12 Q. He gave him?

13 A. He gave -- thank you.

14 Q. Okay.

15 A. He gave -- the detective gave Mr. Erickson
16 information about what the cleaning lady supposedly said. Or
17 supposedly heard. So you can -- that is an example -- a
18 clear example of post-event information, where it's the
19 detective giving information to the person being interviewed.

20 That's what I meant by the "she." The cleaning
21 lady.

22 Q. She, the cleaning lady.

23 A. She, the cleaning lady.

24 Q. All right. So that's post-event information for
25 you, I guess. During the event, but.

1 Then you also saw the later interview by Detective
2 Nichols, that we talked about a minute ago.

3 MR. ROGERS: Play the part marked "cleaning lady."

4 THE COURT: What exhibit?

5 MR. ROGERS: For the record, Your Honor, this is
6 Defendant's Exhibit D, which has previously been introduced
7 and shown, and probably shown more than once.

8 (Excerpt played.)

9 Q. Okay. Now, how -- assuming that this was during the
10 5:01 to 5:22 -- or 23 p.m. interview, and that the earlier
11 clip we just looked at was from the 10:05 to 10:57 a.m.
12 interview, both on the same day, how does that reflect the
13 impact of the earlier, suggestive, post-event information
14 given by Detective Short?

15 A. Well, I think it's an example of post-event
16 information when the detective tells Mr. Erickson, "Here is
17 what the cleaning lady said the person said: 'Go get help.'"

18 Later on, if Mr. Erickson now remembers this, he can
19 be remembering it because he was told it during a prior
20 interview. That he picked up the post-event information and
21 accepted and adopted it. And it -- it by no means is a piece
22 of information that he could have only known if he'd been
23 there. Because he could have known it --

24 MR. CRANE: Judge, now I'm going to object to that.
25 That misstates the evidence and invades the province of the

1 jury.

2 THE COURT: That objection is sustained.

3 MR. ROGERS: Can she finish her answer first, Judge?
4 I think that was going to -- I think she had -- is going to
5 explain how she knew that.

6 THE COURT: Well, that objection, that it invades
7 the province of this jury, is sustained.

8 MR. ROGERS: Okay.

9 THE COURT: That is what the jury is to decide.

10 Q. With regard to the information about what was said
11 to the cleaning lady, have you observed at least one point
12 when Mr. Erickson was given that information? Didn't we just
13 see it here?

14 A. Yes.

15 Q. Okay. And so can you thereby assert that he could
16 have obtained that information from Detective Short?

17 MR. CRANE: Object to the form of the question.
18 Leading.

19 THE COURT: Sustained.

20 Q. Where could he have -- based on what you've seen,
21 where could he have gotten that information?

22 A. Well, based on what I've seen, he could have gotten
23 the information from the interview. I mean, anybody in this
24 courtroom could come along and now say, "I told the cleaning
25 lady, 'Go get help.'"

1 Q. And these were just some examples of suggestion,
2 post-event information given to Erickson during the
3 interviews that you reviewed.

4 MR. CRANE: Object to the form of the question.

5 THE COURT: Sustained.

6 Q. Could you tell us whether or not you also saw many
7 other examples of post-event information being given to
8 Mr. Erickson during those videotaped interviews.

9 A. Yes, there were other examples of details being
10 suggested during the course of the interviews. Just one
11 other example in one of the interviews from March 10th: A
12 detective essentially telling Mr. Erickson that car keys and
13 a watch appear to have been missing. Does he remember that.
14 An example of details being supplied and produced that then
15 figure into later versions of the recollection.

16 Q. Did you see any examples of the converse? Of
17 details that Mr. Erickson supplied being dismissed or denied,
18 and then him later remembering different details in their
19 place?

20 A. Well, his recollection certainly did change from one
21 point in time to another point in time. We know that one of
22 the major reasons why somebody's recollection does change
23 from one point in time to another is that they've been
24 supplied with post-event information, even if it's
25 inadvertent. And certainly you can see those changes in

1 numerous areas, with numerous details.

2 Q. Now -- first of all, you were here in Columbia three
3 days, 25 years ago. Right?

4 A. Yes.

5 Q. You're not familiar with the geography of downtown
6 Columbia.

7 A. No.

8 Q. Were you able to distinguish, in your review of the
9 October 1st report of the interview of Mr. Erickson when he
10 talked to the police and the prosecutor and the prosecutor's
11 investigator about this event, were you able to observe
12 different changes in his memory as he reported it at that
13 time?

14 A. Well, there are differences in what Mr. Erickson is
15 remembering in terms of the route that -- of supposedly
16 leaving the parking lot. The direction he had gone from
17 earlier -- from earlier -- from earlier attempts to recall
18 this.

19 Q. And calling your attention to the videotaped
20 interview on March 10th that took place in the police car,
21 the driving-around-town video, do you remember that?

22 A. Yes.

23 Q. Do you recall there being several locations where
24 Mr. Erickson claimed to have no memory of having been there?

25 A. That things did not look familiar, yes.

1 Q. And do you know whether or not those are the
2 locations that, on October 1st, he said that he did go to?

3 A. Well, I -- it's difficult for me to know for sure,
4 because not knowing the exact geography here, but it
5 certainly does appear as if he -- his recollection of that
6 direction's changed, from March to October.

7 Q. And were you able to detect what kind of post-event
8 information he had to lead to that change? Those changes, I
9 should say.

10 MR. CRANE: Judge, I'm going to object to the form
11 of that question.

12 THE COURT: That objection is overruled.

13 MR. CRANE: Object that it invades the province of
14 the jury.

15 THE COURT: That objection is sustained.

16 Q. Do you know whether or not during the intervening
17 time Mr. Erickson had access to police reports and diagrams
18 and things like that?

19 A. I'm not sure exactly how -- there did seem to be
20 some evidence that he was reading things and he was certainly
21 being exposed to information, but I don't know the extent of
22 his exposure.

23 Q. Let me move then to another issue dealing with
24 memory. You're aware that Mr. Erickson now states that he
25 had been drinking and earlier that evening had ingested some

1 cocaine?

2 A. Yes.

3 Q. What kind of effect would that have on accuracy of
4 memory?

5 A. Well, the alcohol is going to affect the formation
6 of new memories. If you are under the influence of alcohol,
7 even as few as two or three drinks is enough to affect the
8 formation of information -- the formation of memories or the
9 storage of an -- information into memory. So, with a lot of
10 drinking you're going to have a poorer memory to begin with.
11 And what a poorer memory to begin with means is that memory
12 is going to be even more vulnerable to post-event
13 contamination.

14 Q. How would that also relate to the concept of
15 confabulation that we talked about a few minutes ago?

16 A. Well, in a way it relates to the forgetting curve
17 that I've drawn. When a memory is in a weakened state,
18 either because time has passed or because not a very good
19 memory got formed in the first place, the memory is more
20 vulnerable to contamination, to picking up details from other
21 sources and filling in the gaps of memory.

22 Q. Would -- if someone actually experienced an event
23 while under the influence of alcohol, could -- to such extent
24 that the memory was not accurately stored, could that memory
25 somehow later be recovered?

1 MR. CRANE: Your Honor, that is so vague factually.
2 I don't know how there's any foundation for her to answer
3 that, based in any scientific studies.

4 MR. ROGERS: Let me rephrase it.

5 Q. Based upon your training, experience, research,
6 studies, basically your professional qualifications, what
7 would happen to a memory of an event experienced when
8 somebody was under the influence of three or four or five
9 drinks of alcohol?

10 MR. CRANE: Judge, here's my objection. This
11 witness is being asked a question, where she's going: "What
12 would happen to a memory?" Now what could happen under
13 certain circumstances is one thing. But for this witness to
14 be asked to answer -- to read someone's mind is impossible,
15 unless she's got a study on that.

16 Q. Would you rather have a different question?

17 MR. CRANE: Well, Judge --

18 THE COURT: The objection is sustained. If you want
19 to rephrase --

20 MR. ROGERS: Okay.

21 Q. You get a different question, whether you like it or
22 not.

23 What is the impact of the consumption of one or two
24 drinks of beer at a party earlier in the evening and the
25 consumption then of two or three or four mixed drinks later

1 in the evening on the formation of memory?

2 A. Well, I can tell you that what the research shows is
3 that as few as -- the equivalent of two or three drinks is
4 enough to affect the formation of new memory. So if you
5 store something in your memory while you're under the
6 influence of that much alcohol, later on you're not going to
7 remember it as well as if you stored it -- that same
8 information when you were sober.

9 Q. And once that information is imperfectly stored as a
10 result of the alcohol, can it be recalled better than it was
11 stored?

12 A. If you have poor storage, it's not going to return
13 later on.

14 Q. Can someone consciously decide to put a memory of a
15 bad event out of their mind?

16 A. Well, it's certainly possible, if something
17 unpleasant happened to you, that you can try not to think
18 about it. That you can -- if somebody dies and you are
19 grieving and you, you know, want to not be plagued by deep
20 feelings of grief, you can try to distract yourself and not
21 think about things. But that's very different from saying,
22 "I had -- have no conscious awareness that the thing
23 happened."

24 Q. Okay. If someone does not want to think about
25 something, would they be unaware of having been involved in a

1 very significant event which they read about in the paper two
2 days later?

3 MR. CRANE: Object to the form of the question,
4 Judge.

5 THE COURT: Sustained.

6 Q. Assume that an individual had been involved and had
7 participated in a very significant and traumatic event.
8 Assume that that person had decided not to think about it
9 because it was uncomfortable. Under those circumstances,
10 during -- based upon your experience, training, expertise,
11 scientific studies, et cetera, would such a person be
12 consciously aware of that event the next morning?

13 MR. CRANE: Judge, I don't think that -- and I'll
14 stand corrected, certainly, I don't think the witness has
15 ever done a study or that there has been a study done with
16 respect to the question being asked. And I would also
17 include the previous question with respect to reading about
18 it in the paper. I'll stand corrected if I'm wrong. So the
19 objection is: Foundation.

20 MR. ROGERS: It's a hypothetical question, Your
21 Honor. It -- I don't think the foundation requires that
22 there has been a specific Chuck Erickson study done, where
23 we've replicated Chuck Erickson somehow and had this --

24 MR. CRANE: No, I'm not suggesting that.

25 MR. ROGERS: But --

1 Q. Let me ask you this, Doctor. Do you think you have
2 enough professional expertise to give a professional -- an
3 answer, within the context of your professional
4 qualifications, to that question?

5 A. I think there is some scientific information that
6 bears on that question.

7 Q. Okay. Tell us what that is and what it may lead you
8 to conclude.

9 A. Well, there have been studies of people's
10 recollections of being in horrible hurricanes. There have
11 been studies of people's recollections of being in fires.
12 There have been studies of people's recollections of being
13 hospitalized or being in serious car accidents. I don't know
14 of any evidence that, one or two days later, people are
15 completely unaware that these things happened to them.

16 Q. And if somebody had been involved in the event, and
17 for some reason was not consciously aware of it, one or two
18 days later, if they read a newspaper article of the event,
19 what would that impact be?

20 A. Well, generally a newspaper article about an event
21 that you experienced ought to be a very good retrieval cue.
22 I mean, it ought to -- if you have a memory, it ought to
23 bring it back to mind. If it's something you haven't been
24 thinking about for a while, it ought to bring it back to your
25 mind.

1 Q. And if, in fact, you were trying not to think about
2 that memory, would that make a difference?

3 A. I suppose it's possible. I -- I just don't know any
4 good evidence for that.

5 MR. ROGERS: Might I have a moment, Your Honor?

6 THE COURT: Surely.

7 MR. ROGERS: Those are all the questions I have,
8 Your Honor.

9 THE COURT: Mr. Crane, is your cross-examination of
10 this witness more than, say, 15, 20 minutes, do you believe?

11 MR. CRANE: Probably, yeah.

12 THE COURT: She has been on the stand almost an hour
13 and a half, so I would anticipate that it would be.

14 We will take our mid-morning break, ladies and
15 gentlemen.

16 The Court again reminds you of what you were told at
17 the first recess of the Court. Until you retire to consider
18 your verdict, you must not discuss this case among yourselves
19 or with others, or permit anyone to discuss it in your
20 hearing. You should not form or express any opinion about
21 the case until it is finally given to you to decide. Do not
22 read, view, or listen to any newspaper, radio, or television
23 report of the trial.

24 Take about a 10- or 15-minute break. You'll let us
25 know when they're ready to come back.

1 And the witness may step down.

2 - - -

3 The following proceedings were held out of the presence
4 of the jury:

5 THE COURT: We'll be in recess.

6 (Recess taken.)

7 - - -

8 The following proceedings were held out of the presence
9 of the jury:

10 THE COURT: State's ready, Mr. Crane? Mr. Crane,
11 you ready?

12 MR. CRANE: Ready, Judge, yeah.

13 THE COURT: And defendant's ready, Mr. Rogers?

14 MR. ROGERS: Yes, Your Honor.

15 THE COURT: All right.

16 - - -

17 The following proceedings were held in the presence of
18 the jury:

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ELIZABETH LOFTUS,

resumed the stand and testified further:

THE COURT: You may inquire.

MR. CRANE: Thank you, Your Honor.

- - -

CROSS-EXAMINATION

BY MR. CRANE:

Q. Good morning, ma'am. Welcome back to Columbia.

A. Thank you.

Q. You have made a real good living off of this memory thing, haven't you?

A. Well, I do have a successful professional life.

Q. And you testify and have testified over the years frequently in criminal cases; is that right?

A. Yeah -- yes.

Q. You've testified for the defense in most of those cases?

A. I have consulted with the prosecution five or six times and testified once. But the rest of the testimony in criminal cases has been on behalf of the defense.

Q. And you've testified about how many times total?

A. I've testified about 250 times since June of 1975.

Q. And one of those was for the prosecution.

A. Well, those include civil cases as well as criminal cases.

1 Q. And there's no prosecutor in a civil case.

2 A. Right. So in the civil cases --

3 Q. How many criminal cases have you testified in?

4 A. Oh, maybe half of them are criminal cases. Possibly

5 a hundred and -- something over a hundred.

6 Q. You don't remember?

7 A. No. It's over 30 years.

8 Q. But in any event, they were all criminal cases we're

9 talking about. And you'd say half of 250?

10 A. Roughly, yes.

11 Q. Okay. And one of those cases you testified for the

12 prosecution.

13 A. Correct.

14 Q. The rest of the time you testified for the defense.

15 A. Yes.

16 Q. Do you remember how many times you testified in

17 2001?

18 A. In 2001? It would just be an estimate. It might be

19 six times.

20 Q. You've probably got that data somewhere.

21 A. Probably, yes.

22 Q. And if you referred to it, you would remember how

23 many times you testified.

24 A. I'd be able to tell you exactly how many times I

25 testified.

1 Q. And then that thing that you forgot would be
2 accurately recalled.

3 A. Right.

4 Q. But you know, right now, you've always testified for
5 the defense, except for one case.

6 A. Yes.

7 Q. What is your -- well, let me -- I should ask you,
8 you're billing for your services here today; isn't that
9 correct?

10 A. Well, I do expect to be compensated for my time,
11 yes.

12 Q. You don't work for free. That's fair. Right?

13 A. Well, sometimes I do take pro bono cases, yes.

14 Q. Are you working for --

15 A. But not in this case.

16 Q. Not in this case.

17 A. Right.

18 Q. Okay. And what is your rate? How do you bill?

19 A. Well, I -- when Mr. Rogers first contacted me, I
20 gave him an estimate. And I try to stick fairly close to
21 what the estimate is. And so I estimated to him, and would
22 hope to be compensated for the last three months of work,
23 about \$11,000.

24 Q. So what is that an hour?

25 A. Well, it -- I actually do charge \$450 an hour for my

1 time now, but I don't know what it will work out -- there
2 will be more hours involved. But I won't be charging for all
3 those hours, because I don't like to exceed my estimate.

4 Q. You didn't go a full three months working on this
5 case, did you?

6 A. No, no, no. No. But that's how long I've been --

7 Q. Retained?

8 A. Yes. And reviewing materials and consulting and
9 trying to digest the case.

10 Q. And you generated, after all that, about two weeks
11 ago, you generated a two-page report?

12 A. Well, I don't usually write reports, but I --

13 Q. How come?

14 A. I'm not usually asked to.

15 Q. Okay. They just ask you to testify.

16 A. Yes. In this case they asked me if I would write
17 something up so the prosecution would be aware of the gist of
18 the testimony.

19 Q. You used to just bill -- I was thinking -- my
20 understanding was, last year, maybe I'm wrong, you were just
21 billing 400 an hour. When did you go up? Or did you?

22 A. I believe that I raised my rates to 450 a few -- a
23 couple of years ago.

24 Q. A couple years ago?

25 A. Yes.

1 Q. Okay. How much do you make in a given year on your
2 testimony work? Or your defense consultation and testimony.

3 A. It's -- well, it's hard to -- maybe a hundred
4 thousand.

5 Q. A hundred thousand a year?

6 A. Possibly.

7 Q. And that's on top of what you get for working at --
8 where do you -- where's your position?

9 A. I am a professor at the University of
10 California-Irvine, where I make quit a bit more money than
11 that.

12 Q. Okay. What do you make there?

13 A. I think probably this year I may end up with a total
14 salary of about 200,000.

15 Q. Okay. And so if you got a gross of 300,000 a year,
16 a third of that is for your work that you do in the criminal
17 defense area; correct?

18 A. No, that's not true.

19 Q. Okay.

20 A. I mean, that -- that would be -- because I don't do
21 that many criminal cases now. Mostly I work on civil cases.

22 Q. Okay. Well, I was just -- you get a hundred
23 thousand dollars a year, you just said was your estimate.

24 A. I know, but that's -- that's all kinds of consulting
25 in all kinds of cases.

1 Q. Okay.

2 A. Well -- and then there -- well, I did win a prize, a
3 big prize in psychology. That was 200,000. And that's
4 distributed over five years, so...

5 Q. Well, I'm not talking about -- I mean,
6 congratulations. But I'm talking about your work in the area
7 of criminal defense; the preparation, the testimony; like
8 you're doing -- the work you're doing here.

9 A. I don't -- I only work on a few criminal cases,
10 because I'm working on primarily civil cases.

11 Q. Well, suffice it to say, though, your work in this
12 area, in the criminal defense realm, is very lucrative; isn't
13 that correct?

14 A. Well, I don't work on that many criminal cases now.
15 I would say that in the civil cases, yes, things are --

16 Q. Well, how about this, Doctor. I'm not talking about
17 civil cases. I'm talking about criminal cases.

18 MR. ROGERS: Your Honor, I'd ask that the witness be
19 allowed to complete her answer before she gets shut down.

20 MR. CRANE: Oh I'm sorry, Judge, Mr. Rogers. I
21 thought she completed her answer.

22 Q. I apologize, ma'am.

23 A. Well, most of the work I do now, in terms of
24 consulting and litigation, is on civil cases. Occasionally I
25 have criminal cases that I'm working on.

1 Q. I'm talking about criminal cases. Okay? Criminal
2 cases where you testify for the defense. You make \$450 an
3 hour; correct?

4 A. That is my current billing rate.

5 Q. Right.

6 A. Yes.

7 Q. A couple years ago you were just charging 400.

8 A. Right.

9 Q. And before that you might have been charging 350.

10 A. Exactly.

11 Q. And before that, 300. Inflation; right?

12 A. Yes.

13 Q. Okay. Do you remember how much you made when you
14 testified on behalf of the defense in the Hillside Strangler
15 case?

16 A. I don't know. That would have been a long time ago.

17 Q. What about when you testified on behalf of the
18 defense in the Ted Bundy prosecution?

19 A. Well, that would have been 1976, when I might have
20 been charging \$50 an hour. I don't even remember.

21 Q. Okay. But you have those records somewhere, and you
22 could refer to them, and your memory would be accurate of
23 what you were charging when you testified on behalf of Ted
24 Bundy. Is that correct?

25 A. I -- I'm not sure I have records from 30 years ago,

1 but I -- it's possible.

2 Q. What was the Hillside Strangler's real name?

3 MR. ROGERS: I'm going object to this as irrelevant,
4 Your Honor. I think he's done what he's entitled to do, and
5 I think this is just irrelevant and badgering the witness.

6 MR. CRANE: Well, Judge, I certainly don't intend to
7 badger Dr. Loftus. At all. And I apologize if I'm leaving
8 her with that impression. The question that I asked there
9 goes to the memory of this witness. Obviously she said she's
10 testified in the case of the Hillside Strangler. And I was
11 going to ask her if she remembered that particular
12 defendant's name.

13 THE COURT: The objection's overruled.

14 A. I believe it was for Angelo -- in the case of Angelo
15 Buono. I -- there were two individuals who were accused of
16 being the Hillside Stranglers in Los Angeles. And I believe
17 this was for one -- on behalf of one of the defendants in
18 that case.

19 Q. You don't remember his name.

20 A. Angelo Buono.

21 Q. Okay. And did you testify in the O.J. Simpson
22 prosecution?

23 A. I was con -- I consulted on the O.J. Simpson case.
24 I did not testify.

25 Q. Okay. Was that consulting with the prosecutor?

1 A. It was the defense that consulted me.

2 Q. Okay. Ma'am, what is a clinician in your
3 profession?

4 A. The -- the field of psychology is -- one division in
5 the field of psychology is between the individuals who treat
6 patients, and those would be called clinical psychologists or
7 clinicians, and the other group are those who teach and do
8 research. Of course sometimes clinicians also teach and do
9 research. But the nonclinicians are individuals who do not
10 see patients.

11 Q. You're not a clinician, are you?

12 A. Correct.

13 Q. Have you ever seen patients, you know, in the role
14 of: You're a psychologist there to help a patient?

15 A. No. I've studied patients, but I haven't treated
16 them.

17 Q. That's the other category, though; right?

18 A. Right.

19 Q. You've never had a patient that had come in to your
20 office, for instance, with a problem, and you dealt with it
21 as a professional doctor-patient relationship. That's just
22 not what you do.

23 A. Correct.

24 Q. Okay. Have you ever seen a patient?

25 A. No. I've never --

1 Q. Never have.

2 A. -- never been a clinician.

3 Q. So the only sphere that you operate in is one in
4 which you are studying, teaching, that type of thing; right?

5 A. Right.

6 Q. Okay.

7 A. Doing research.

8 Q. And as a part of -- I'm sorry. Did I cut you off?

9 A. Well, doing research, sometimes on patients, or
10 teaching.

11 Q. Right. But you're not -- you're -- with -- they're
12 on patients, but, I mean, generally they're more like, and
13 I'm not trying to denigrate those people, but they're more
14 like a guinea pig type situation; right? I mean, your
15 testimony on direct was your description of various studies
16 you've done with, like, lost in the mall. That -- you
17 wouldn't call those patients, would you?

18 A. No.

19 Q. Okay. And as a part of your work, you've also
20 written a number of books; isn't that correct?

21 A. I see books.

22 Q. I've got some of them here. Do you remember the
23 names of them?

24 A. Yes. But I don't know which particular ones you --
25 that one on top looks like Eyewitness Testimony.

1 Q. You've written one on Eyewitness Testimony, Affect
2 and Accuracy in Recall, The Myth of Repressed -- what was it
3 -- what is that? The Myth of Repressed what?

4 A. Memory.

5 Q. Witness for the Defense. You wrote that book;
6 correct?

7 A. Coauthored, yes.

8 Q. And that was about some of the more notable cases
9 wherein you testified as a defense witness? Your
10 experiences?

11 A. Yes.

12 Q. Like the Bundy case. And there was another homicide
13 out there in California. Was it Franklin?

14 A. Well, George Franklin, who was accused based on a
15 repressed memory, but that's in The Myth of Repressed
16 Memory --

17 Q. Okay.

18 A. -- not in Witness for the Defense.

19 Q. And then you've got another one called Memory. Is
20 the last one I've got. You've got a lot of books and
21 articles; right?

22 A. Yes.

23 Q. These are just some of them that were at the
24 library. Okay. But you've -- you've written --

25 A. That's good to see.

1 Q. -- all those; correct?

2 A. (Nodding head up and down.)

3 Q. Okay. You never met Charles Erickson, did you?

4 A. Correct.

5 Q. Okay. And what did you say you had been given by

6 the defense in this case, to look at and review?

7 A. Lots and lots of documents.

8 Q. Okay. Police reports?

9 A. Yes.

10 Q. Did you get all of them?

11 A. I'm sure I didn't get all of them.

12 Q. Okay.

13 A. But I got many of them.

14 Q. Do you think you got all of the ones generated after

15 the arrest?

16 A. I think I got at least many of the ones that

17 pertained to Mr. Erickson and the development of his report.

18 Q. Okay. Did you look at any records or police reports

19 with respect to the crime scene?

20 A. Well, there -- not in particular, no.

21 Q. Did you look at any photographs of the crime scene?

22 A. Well, only what I've seen around the courtroom here.

23 Q. You did look at the photographs of the crime scene.

24 A. Well, just what I've seen around here.

25 Q. Oh, you mean in here.

1 A. Right.

2 Q. I'm sorry. All right.

3 A. No, I --

4 Q. So they didn't give you any of the photographs in
5 the case at all?

6 A. No.

7 Q. So the only time you've seen them is glancing at
8 them as you're going back and forth to the stand?

9 A. Right.

10 Q. Okay. Did you read any reports about witnesses at
11 the scene?

12 A. Well, yes. There were mentions of people at the
13 scene.

14 Q. Right. And you weren't here for any of the
15 testimony of the people that were at the scene of this crime
16 when it occurred.

17 A. No.

18 Q. You weren't in here. You just got in town, what,
19 last night?

20 A. Yes.

21 Q. Okay.

22 A. Correct. Yesterday afternoon.

23 Q. So you don't know what those individuals recalled,
24 what they remember seeing, et cetera? For instance, these
25 janitors. Does that ring a bell with you at all?

1 A. Yes.

2 Q. Okay. So you read reports on that?

3 A. Well, I read the newspaper.

4 Q. You did.

5 A. Yes.

6 Q. And what impact did that have --

7 THE COURT: Just a second. Before you get into
8 this, I do not want this witness to repeat --

9 MR. CRANE: Right.

10 THE COURT: -- what she's read in the paper, since
11 we've been instructing the jury not to read the newspaper.

12 MR. CRANE: Right.

13 Q. Don't tell us what you read in the paper. Let me
14 ask you this. Did that have -- did what you read in the
15 newspaper have any bearing on what you're testifying here
16 today to?

17 A. No.

18 Q. Okay. In many of the cases where you have testified
19 as a defense witness, isn't it true, ma'am, that in many of
20 those cases the person on trial, or the defendant, is someone
21 who has been charged with abuse of a child?

22 A. Well, in some cases that's true. I worked on
23 Michael Jackson's case, and that was the case. And other --
24 with other defendants, it's not the case. I worked on the
25 Martha Stewart case, and that had nothing to do with abuse.

1 Q. And the Bundy case and the Strangler case, those
2 were obviously not, but -- recognizing that you certainly
3 testified in murder cases and serial murder cases, have you
4 also testified on several occasions, let me put it that way,
5 in cases wherein the defendant is someone accused of child
6 abuse?

7 A. Yes.

8 Q. Okay. And, in fact, isn't it true that your book,
9 The Myth of Repressed Memory, is, in part at least, dedicated
10 to two convicted child abusers?

11 A. No, that's not true.

12 Q. It's not.

13 A. No.

14 Q. You don't know names Raymond and Shirley Souza?

15 A. I do know -- I do know who they are, yes.

16 Q. Okay. And how is it you know who they are?

17 A. Because they were accused based on claims of --
18 involving repressed memory in Massachusetts early in the
19 '90s.

20 Q. Okay. Well, I'm looking here at the acknowledgement
21 section, and -- and maybe it's a matter of semantics that the
22 problem is. But this is your book, The Myth of Repressed
23 Memory?

24 A. Yes.

25 Q. And under the acknowledgement section -- it doesn't

1 have a page number, but that is the acknowledgements;
2 correct?

3 A. Well, you'll have to show that to me.

4 Q. Okay. Acknowledgements?

5 A. Yes.

6 Q. Okay. And I'll give it to you, but I don't think I
7 could read it at the same time. It says, "We would like to
8 express our deep gratitude to the many people who offered
9 their help and support during the three years we worked on
10 this book. We were especially grateful to," and then if you
11 look at the second paragraph here --

12 A. Yes.

13 Q. -- who are those people?

14 A. Well, to put it in context, "We are especially
15 grateful to the families and individuals who told us their
16 stories. Many of the people we interviewed asked to remain
17 anonymous, in order to spare their families further pain.
18 Thus, while we cannot mention them by name, we honor their
19 contribution." And then in the next section, "Raymond and
20 Shirley Souza, Lynn Price Gondolf" --

21 Q. Okay. Let me --

22 A. -- "Laura Pasley" --

23 MR. CRANE: Judge, that's nonresponsive. I was
24 asking her if she -- and they can talk to her about it on
25 direct.

1 MR. ROGERS: He asked: What were those names? And
2 she's reading the names.

3 MR. CRANE: First two names, first paragraph, Judge.
4 I mean, I guess if she wants to read off all the other
5 names -- you want to sit here and have her do it?

6 MR. ROGERS: It's necessary for the context, Your
7 Honor --

8 Q. All right. You want to read them, go ahead.

9 A. "Laura Pasley, Melody Gavigan, Phil and Susan
10 Hoxter, Chuck and June Noah, Jennifer and Pamela Freyd, and
11 Paul Ingram, who taught us so much about the anguish of both
12 the accuser and accused."

13 Q. Now, Raymond and Shirley were the accused; isn't
14 that correct?

15 A. They happened to be a couple, an elderly couple, who
16 were convicted in Massachusetts, yes.

17 Q. Thank you. Did you read Dr. Delaney Dean's report?

18 A. Yes.

19 Q. You would agree that she found -- do you know -- do
20 you know Dr. Dean?

21 A. Not personally, no.

22 Q. Okay. She indicated that when she --

23 MR. ROGERS: Objection. That's hearsay. There's no
24 foundation. There's no indication that this witness relied
25 in any way on Dr. Dean's report in formulating any of the

1 opinions she's expressed. And for him just to have her read
2 it into the record is hearsay and deprives Mr. Ferguson of
3 his right to confront and cross-examine witnesses against
4 him.

5 MR. CRANE: I wasn't just going to read the report
6 into the record. She's an expert witness. She took -- she
7 said she reviewed Dr. Dean's report. I was going to ask her
8 if anything about her report was taken into account, of
9 interest, et cetera.

10 THE COURT: You may ask her that question.

11 Q. Dr. Dean actually did meet with Charles Erickson;
12 isn't that true?

13 A. Yes.

14 Q. And it's your understanding --

15 MR. ROGERS: I'll object to that, Your Honor. That
16 does call for hearsay. She doesn't know that unless she read
17 it in the report. I think the question he is asking is not
18 the question he told the Court he was going to ask.

19 MR. CRANE: Well, Judge, I get to explore -- I can
20 ask her if the report indicates that Dr. Dean actually saw
21 Charles Erickson.

22 MR. ROGERS: Your Honor, before he can ask this
23 witness about something which is clearly hearsay, about the
24 contents of a writing that she reviewed, it has to be a
25 writing that is relevant to the opinions she has expressed in

1 this case. It's not. He knows it's not. And that's the
2 question he said he was going to ask to lay a foundation.
3 And instead, he's trying to skip that so that he can get in
4 the hearsay.

5 MR. CRANE: Well, after -- can I respond to that
6 mischaracterization objection, Judge?

7 THE COURT: You may respond to the objection.

8 MR. CRANE: This expert said she read another
9 expert's reports. Now Mr. Rogers' objection is essentially
10 trying to tell her that it didn't make any difference. I
11 have a right to ask her if she read that and if any of that
12 had anything importance, et cetera. And that's all I'm
13 trying to do.

14 THE COURT: Well, you may ask that question.

15 Q. You read her report; is that correct?

16 A. I did.

17 Q. Okay. And she indicates that she --

18 MR. ROGERS: Objection to the "she indicates" part,
19 Judge. He's halfway there, but he's still trying to do the
20 hearsay first.

21 MR. CRANE: He asked -- Judge, here's my response to
22 that. This witness, on direct, was asked numerous questions
23 reference hearsay. That, in some appropriate circumstances,
24 is the purview of an expert. Now he's -- no? Now, he's
25 suggesting that I can't do the same.

1 MR. ROGERS: All I'm suggesting, Your Honor, is
2 that, as a foundational matter, as the Court has indicated at
3 least twice, he needs to establish that this is one of those
4 appropriate circumstances.

5 MR. CRANE: No, I don't.

6 MR. ROGERS: Therein lies the dispute.

7 MR. CRANE: That's my response.

8 THE COURT: You may ask her if she relied on that
9 report in reaching any of her conclusions. That was what you
10 asked me to inquire. You are entitled to do that. And you
11 may ask that question.

12 Q. You read the report?

13 A. I did.

14 Q. Why?

15 A. It was in the stack of materials that was sent to
16 me.

17 Q. The findings of Dr. Dean, who actually -- another
18 psychologist, who actually met with Charles Erickson, were
19 relevant to your overall understanding of this case, weren't
20 they?

21 MR. ROGERS: Objection, Your Honor. First of all,
22 it assumes facts not in evidence. Second -- that's my
23 objection. I object to the part of the question which
24 assumes facts not in evidence, and, once again, just
25 attempting to get the hearsay in.

1 THE COURT: He's not asked her about what the
2 findings are. And I will allow him to ask if those findings
3 were in any way relevant, which -- I'm going to overrule your
4 objection.

5 Q. Do you want me to ask it again?

6 A. I think I -- I think I understand it. The portion
7 of the report that I found of particular interest was where
8 she described Mr. Erickson as being -- having consumed nine
9 to ten drinks and cocaine on the night of November 1st,
10 October 31st, 2001.

11 Q. Okay. You thought that was of particular interest?

12 A. It -- it certainly confirmed a -- the large amount
13 of alcohol involved.

14 Q. She indicated that she had actually met with Charles
15 Erickson; correct?

16 A. Yes.

17 Q. And you never did, did you?

18 A. That's correct.

19 Q. And you've never seen him testify before this jury,
20 have you?

21 A. No.

22 Q. Okay. And Dr. Dean indicated that he had no
23 indication of delusional thought. Isn't that true? Isn't
24 that -- wasn't that Dr. Dean's finding?

25 A. I believe that was in the report.

1 Q. And she indicated that there was no evidence of
2 brain damage. Isn't that true?

3 A. I don't recall that, but I --

4 Q. You won't dispute it.

5 A. I won't dispute it, no.

6 Q. Okay. No evidence of mania; correct?

7 A. I don't remember that explicitly.

8 Q. If it's in the report, you won't disagree with it?

9 A. Right. I won't disagree with --

10 Q. That she found no --

11 A. -- that that's her opinion, yes.

12 Q. -- evidence of mania? No evidence, in her opinion,
13 when she met with Charles Erickson, of hypomania. Correct?

14 A. If it's in the report.

15 Q. Okay. So you don't remember those sections. You
16 just went right to the drinking part?

17 A. Well, that's what I happened to take a note about.

18 Q. Did you read these other things I'm talking about?

19 A. I read the whole report. It wasn't very long.

20 Q. No. But it doesn't sound like you remember anything
21 but the drinking part.

22 A. I happened to write that down.

23 Q. Okay. And that helps you remember that one portion
24 of the report by Dr. Delaney Dean?

25 A. It does. Yes. It reminds me.

1 Q. And the other parts are out of your mind?

2 A. Well, I don't -- I believe she might -- her bottom
3 line was that she thought he was competent to testify.

4 Q. Okay. No evidence that he was suffering from any
5 mental disease or defect. Isn't that correct?

6 A. I can't remember if she exactly put it that way,
7 but.

8 Q. Okay. So the only thing you jotted down was the
9 drinking?

10 A. And competent to testify.

11 Q. Okay. Do you remember or did you also jot down her
12 finding that Charles Erickson's long- and short-term memory
13 appeared to be intact?

14 A. I don't -- I don't remember --

15 Q. If that was her finding, you wouldn't disagree with
16 that.

17 A. Correct.

18 Q. The cases or studies, some of these things you
19 talked about with Mr. Rogers, the case studies you've
20 conducted deal with inserting a false memory into a person.
21 Or some of your studies. Not all of them. But some of them
22 do; right?

23 MR. ROGERS: I'm going object to that as a
24 misleading question in view of the term "case studies." I
25 don't -- I think that has a specific meaning, which is not

1 what she's talked about.

2 MR. CRANE: Well, we can find that out, if --

3 MR. ROGERS: Please.

4 THE COURT: The objection is overruled. You may ask
5 the question.

6 Q. Isn't that right? I mean, you started -- you said
7 yes.

8 A. Well, in my experimental studies, that's what we
9 examined. Planting entirely false memory or distorting
10 somebody's memory for detail.

11 Q. Right. So you take 12, 50 people, and you lie to
12 them about something that happened -- or strike that, that
13 didn't happen, and see whether or not they adopted it as a
14 memory.

15 A. That's a simple way to put it, but basically
16 accurate.

17 Q. Kind of a redneck way to put it, but, I mean, isn't
18 that basically it?

19 A. That's very close to it.

20 Q. You try to insert a lie, or something that's not
21 true, into somebody's head.

22 A. Correct.

23 Q. It takes a lot of work to get that done, doesn't it?

24 A. Well, it depends. With the stop sign/yield sign, we
25 can do it with a leading question. A single leading

1 question. With the -- getting people to believe they were
2 lost in a shopping mall, we do it with three suggestive
3 interviews.

4 Q. And a relative. Their mom or their dad going, "Now,
5 you remember, Billy. Remember that time you got lost at the
6 store?"

7 A. Well, the relative doesn't actually make contact
8 with the subject. The relative feeds the information to us,
9 and then we do the suggestive interviewing.

10 Q. Okay. So you talk to the relative and find out some
11 information that might be true from the relative, and then
12 you mix in the falsehood.

13 A. Exactly.

14 Q. And when you do that to a hundred people, only 25 of
15 them fall for it. Correct? You said 25 percent?

16 A. Well, that happened to be the figure in -- that we
17 got in our lost-in-the-mall study.

18 Q. Yeah, I'm just talking about lost in the mall right
19 now.

20 A. Right. Because different investigators get
21 different figures.

22 Q. Right. I'm just talking about lost in the mall.
23 Your study.

24 A. Right.

25 Q. So, you got four people, let's say, and you go

1 through three suggestive interviews, going, "Hey, Billy Bob,
2 your mom says you got lost in the mall. Do you remember
3 that? Don't you remember that?" And you go through three of
4 those interviews, and then you go back and you check, and
5 three of them say, "I wasn't ever lost in no mall."

6 A. No, they usually say: "I just don't remember."
7 They --

8 Q. Well, yeah. The --

9 A. They say --

10 Q. -- false memory didn't stick. Right?

11 A. Right. It -- in our study, it happened in just a
12 quarter of the sample. So three-quarters said they just
13 didn't remember.

14 Q. And one of them goes, "You know, I think I was." Is
15 that basically -- I mean -- again, I'm simplifying it with
16 four people, but one of them would say, "You know, I do
17 remember. One time I got lost."

18 A. Well, but sometimes what they'll do is elaborate.
19 They'll tell you what the person looked like who came to
20 rescue them.

21 Q. Been trying to get a pop machine to marry them and
22 all that stuff. I got that. But three of them go, "Huh-uh.
23 That didn't happen."

24 A. No, they don't say it didn't happen. They say, "I
25 don't remember."

1 Q. You've got it documented? All the responses?

2 A. We did, yes.

3 Q. Okay. Now, the memory could be something that
4 happened to them when they were a kid. Before you even start
5 talking to them. Right? I mean, anybody, when they're a
6 kid, could be lost in a shopping center; right?

7 A. But --

8 Q. That's almost a rite of passage for kids, isn't it?

9 A. But in this -- in that particular study, we plant a
10 very specific memory. You were lost in this place, at this
11 age, with this people -- these people present, you
12 disappeared by the pet store. You know, so it's a very
13 specific recollection. We're not -- we're not trying to say
14 you were lost sometime, somewhere, but you were lost in
15 exactly this way.

16 Q. And how old are the people that you're trying to get
17 this memory insert -- this false memory inserted on? How old
18 are they?

19 A. In that particular study, they were ages 18 to 53.

20 Q. And when you're telling them that they were lost in
21 the mall -- in a store, what have you, when were you trying
22 to tell them it happened? The false -- the lie. When were
23 you trying to tell them it happened?

24 A. That it happened when they were about six years old.

25 Q. Really. When they were just a kid.

1 A. Yes.

2 Q. So if you got the guy that was 43 years old, you're
3 talking to him: "Now, when you were five, back when you were
4 five, you got lost at the store." I mean, you couldn't use a
5 mall with me. I don't think we had any malls here by then.
6 But a store. Right?

7 A. Well, for you, we would say a Sears or a K-Mart or
8 some --

9 Q. Yeah. You'd probably need to go K-Mart or Wal-Mart
10 with me, yeah.

11 A. Okay.

12 Q. The issue, though, is: You're trying to get him to
13 remember -- trying to get him to adopt a false memory that
14 may have happened 20, 30 years ago. Or actually didn't
15 happen. Right?

16 A. In that study, yes.

17 (Cell phone ringing.)

18 THE COURT: Excuse me. You will leave -- I want the
19 phone taken. We do not have telephones in this courtroom
20 that go off. If they do, they will be confiscated for the
21 day.

22 Q. Yeah, you better put that up.

23 THE COURT: We're not going to keep your phone,
24 Doctor. Just check and make sure it's off.

25 Q. You got that off?

1 A. It was off.

2 Q. Okay. Let's see. Oh. Did you ever do any studies
3 in the area of suggestion of a false memory wherein no one
4 suggested anything to a -- to a guinea pig. Or what do you
5 want to call them?

6 A. We call them experimental subjects.

7 Q. Experimental subject. Okay. Where you did testing
8 on false memories where no person ever suggested anything to
9 the experimental subject?

10 A. Yes.

11 Q. Okay. What's an example of that?

12 A. Well, for example, I've done studies -- there is
13 literature on people -- spontaneous distortions in memory.
14 When no one has specifically suggested anything. These
15 studies show that people will remember that their kids walked
16 and talked at an earlier age than they really did. In my own
17 studies in this area, we have shown that people will remember
18 that they voted in elections that they didn't vote in.

19 Q. Pretty benign memories, though; right? I mean, even
20 really the -- the lost-in-the-mall thing is really kind of
21 benign, not a traumatic event, wouldn't you agree?

22 A. We chose it because it would have been at least
23 mildly traumatic if it had happened. But you're right, it's
24 not -- certainly not as traumatic as --

25 Q. Combat.

1 A. Well, or being a victim of a vicious animal attack,
2 which is the false memory that was planted by Dr. Stephen
3 Porter in his research.

4 Q. And while we're at it, I mean, some of the other
5 studies you've done, you did one where you tried to get
6 people to think that they saw Bugs Bunny at Disney Land;
7 right?

8 A. Several of our recent studies have looked at that,
9 so that we could be sure we were planting, you know, an
10 impossible experience.

11 Q. Right. Because Bugs Bunny, they wouldn't let him
12 through the gates at Disney Land, would they?

13 A. No.

14 Q. Because he's --

15 A. He's Warner Brothers.

16 Q. Warner Brothers. So you tried -- and that would be,
17 though, a benign memory; right?

18 A. Well, that one. But "You met and shook hands with
19 Bugs Bunny at Disney," which we have succeeded in planting in
20 people, is a -- somewhat of a friendly memory, but it
21 couldn't have happened.

22 Q. Right. And how many -- what was your percentage of
23 success on that one?

24 A. In the very first study that we did, 16 percent fell
25 for the suggestion. In the doc -- the thesis work of my

1 graduate student, with repeated suggestions, she raised it to
2 25 percent in one study and 36 percent in her second study.

3 Q. So if you really get on them, it goes from 16 to 25
4 percent.

5 A. Or -- well, in one of her studies it was slightly
6 over a third.

7 Q. Okay. They thought they saw Bugs Bunny there at
8 Disney Land.

9 A. Correct.

10 Q. The first round you said was 16 percent. Said,
11 "Okay. Yeah, I remember seeing old Bugs at Disney Land."

12 A. Yep -- yes.

13 Q. And another one was having to do with hard-boiled
14 eggs. I remember reading in one of your articles about
15 hard-boiled eggs, trying to insert the memory that they had
16 gotten sick on them before?

17 A. Yes.

18 Q. And you actually did that with Alan Alda, was one of
19 your experimental subjects in that study; isn't that right?

20 A. Well, he wasn't an official subject. He came to
21 film our research for Scientific American Frontiers, his
22 television program that he hosts on science. And we
23 demonstrated our latest research, where we have made people
24 believe that they got sick eating particular foods, and later
25 on they don't want to eat those foods as much.

1 Q. And Alan Alda didn't fall for it, did he? He --

2 A. He was suspicious.

3 Q. He just didn't like hard-boiled eggs; right? Isn't
4 that true, ma'am?

5 A. That's what he said.

6 Q. You couldn't insert a false memory on Alan Alda,
7 could you?

8 A. He did not -- he did not fall for the suggestion and
9 come to develop a false memory, no. He was very suspicious
10 when he came to the lab, because he knew that our research
11 was on planting false memories.

12 Q. Okay. Is there any indication, based on all the
13 materials that you've read, that -- that was provided to you
14 by the defense about this case, that the memory of who
15 committed this crime upon Mr. Heitholt was suggested to
16 Charles Erickson?

17 A. Not that I saw specifically about who, but the
18 suggestions were about other details.

19 Q. Yeah. Other -- right. And you talked about some of
20 those on direct. But who committed this crime was never
21 suggested to Mr. Erickson, based on what you've understood in
22 the three months that you've looked at this case. Isn't that
23 correct, ma'am?

24 A. In one sense, yes. But in another sense, certainly
25 when Mr. Erickson expressed any, you know, uncertainty in

1 some of his earlier interviews, he was punished in some sense
2 for --

3 Q. Wait a minute. Okay. I'm sorry.

4 A. When he expressed uncertainty about whether he
5 actually committed it or whether he dreamed it or was
6 fabricating it --

7 Q. Right.

8 A. -- he --

9 Q. I'm talking about -- I'm sorry. I keep thinking
10 you're done.

11 A. I know. But I'm not quite done.

12 But as he was expressing his uncertainty about who
13 did it and whether he did it or just was imagining doing it,
14 there was suggestion or coercion imposed upon him at that
15 point. So in that sense, there was suggestion about who did
16 it.

17 Q. At that point. That's your opinion. Correct?

18 A. Yes.

19 Q. Okay. Now, I'm talking about before he went to the
20 police.

21 A. Uh --

22 Q. What -- let me ask the question again, if you would,
23 please, ma'am. What suggestion was ever given to Charles
24 Erickson that he and Ryan Ferguson committed this homicide
25 upon Mr. Heitholt?

1 A. Well, I actually don't know that there was any
2 suggestion, other than newspaper and media coverage --

3 Q. Okay.

4 A. -- that placed the two of them --

5 Q. Well, I don't think the Court is going to want you
6 to testify as to the contents of newspaper accounts.

7 A. That's right.

8 Q. But I can ask you a question, understanding that
9 limitation.

10 A. Yes.

11 Q. Okay. Prior to the arrest of Charles Erickson and
12 Ryan Ferguson, what indication did you ever see in a
13 newspaper article or from someone else that there was a
14 suggestion to Charles Erickson that he and Ryan Ferguson had
15 committed this murder?

16 A. Nothing direct that I saw.

17 Q. Nothing indirect either; isn't that true, ma'am?

18 A. Well, no, it's not quite true, because it's my
19 understanding that Mr. Erickson was at the By George club,
20 which was not far from where the Tribune parking lot was,
21 and --

22 Q. And what -- I'm sorry. Go ahead.

23 A. -- was mulling over that fact.

24 Q. What was in any suggestion -- strike that. What
25 suggestion was there in any media or police re -- well, he

1 wouldn't have read the police reports. -- from any person
2 that you reviewed in this case that suggested that the
3 perpetrators of this homicide were at By George's bar before
4 the crime occurred? And I'm talking about prearrest, ma'am.

5 A. No, there was nothing that I saw at all.

6 Q. All right. So that wasn't it.

7 A. No. It was not external suggestion.

8 Q. Until Mr. Erickson talked to the police, that fact
9 wasn't known.

10 A. It -- it was in the mind of Mr. Erickson.

11 Q. Right. Right. And in the mind of Mr. Ferguson. He
12 says they were there as well.

13 A. Yes, but it was --

14 Q. Okay. Thank you. Now, are we in agreement that --
15 and I'm going, first of all, with this core fact that there
16 was no suggestion by anyone or anything -- and we'll take
17 before March 10, '04. You'll agree with me that was the date
18 of the arrest?

19 A. Yes.

20 Q. Are we in agreement that there was no suggestion by
21 anyone or anything to Mr. Erickson that he or Mr. Ferguson
22 committed this crime? Are we in agreement on that?

23 A. The only suggestion was in the mind of Mr. Erickson.

24 Q. That's not a suggestion.

25 A. Yes, it -- it can be auto suggestion.

1 Q. Suggesting it to himself?

2 A. Exactly. It's called auto suggestion.

3 Q. Well, how about this then. There was no external
4 suggestion.

5 A. None that I saw. Correct.

6 Q. And external suggestions are the way that you insert
7 false memories on people, isn't it?

8 A. That's how we do it in our experimental work, yes.

9 Q. Okay. You read that, or maybe you'd been told, that
10 prior to talking to the police, after his retrieval cue, as
11 you call it, or trigger, of looking at a newspaper article,
12 thinking about this more, he talked to two friends, Art
13 Figueroa and Nick Gilpin. Did you read those reports?

14 A. I read about those two individuals --

15 Q. Okay.

16 A. -- and those conversations, yes.

17 Q. And is -- you didn't see any indication that Art
18 Figueroa or Nick Gilpin suggested to Mr. Erickson, before
19 Mr. Erickson told them about his memories, that he'd done it.

20 A. I didn't, no.

21 Q. Okay. Do you recall that, when you read those
22 reports, that Mr. Erickson, when he was talking to Nick
23 Gilpin and Art Figueroa, recalled attacking the victim,
24 recalled Ryan Ferguson strangling the victim. This is prior
25 to talking to the police. Isn't that correct, ma'am?

1 MR. ROGERS: I'm going to object, Your Honor, to
2 details of what reports say Erickson -- reports say Gilpin
3 and/or Figueroa say Erickson told them. That's hearsay.
4 They haven't been called by the state to testify. And I
5 think it's improper to get into the details of what was told.
6 She's already said that there's no claiming there was undue
7 suggestion there.

8 MR. CRANE: Your Honor, this witness has testified
9 that Mr. Erickson had the recollection of this crime
10 suggested to him. They played tapes. They asked various
11 questions about that. The state has confirmed via the
12 witness that she has, in fact, read those reports. The state
13 is entitled to inquire with respect to those reports the same
14 as defense counsel.

15 THE COURT: The objection's overruled.

16 Q. Isn't it true, ma'am, that the reports indicate
17 that, prior to talking to the police, Chuck Erickson told
18 Nick Gilpin and Art Figueroa that he and Ryan Ferguson had
19 been at George's. Do you remember that? That's the bar.

20 A. No, I know. I -- I -- I believe that -- it's my
21 impression from what I remember reading that, at least when
22 he talked to Mr. Figueroa, he wasn't sure whether it was real
23 or a dream.

24 Q. That's correct. But what did he tell him he
25 remembered?

1 A. Well, that -- some of the details that --

2 Q. So you forgot the details of what you read about his
3 discussion with Art Figueroa, but you've retained the
4 uncertainty and dream part.

5 A. Well, that he -- that he believed that -- or he was
6 starting to either have real memories or have dreams that he
7 was involved.

8 Q. Right. And that he was at By George's Halloween of
9 2001 with Ryan Ferguson. Correct?

10 A. Well, I don't remember exactly which details he told
11 which friend, but --

12 Q. If your records that you reviewed for three months
13 prior to today reflect that Chuck Erickson told Art Figueroa
14 that, "Yeah, I'm not sure, but Ryan Ferguson and I were at By
15 George's, and we killed that guy on the Tribune parking lot,
16 and that I beat him and Ferguson strangled him," would you
17 have any argument with that?

18 A. No. If -- I would accept that he -- that may have
19 been part of that discussion, if I -- if you showed it to me.

20 Q. And that he told essentially the same thing to Nick
21 Gilpin. You wouldn't have any argument with that, would you?

22 A. Yeah. If you refreshed my memory with documents
23 that he discussed those facts, I wouldn't disagree.

24 Q. Okay. You'd accept that as occurring.

25 A. Yes.

1 Q. Okay. And you would also accept, if it's in those
2 statements, that he said he remembered a cleaning lady and
3 telling her to go get help. If it's in there. Correct?

4 A. If it's in there, yes.

5 Q. Okay. Before he talked to the police.

6 A. If it's in there, yes.

7 Q. And Nick and Art never suggested anything before he
8 confided in them, did they?

9 A. I don't -- didn't see any evidence that they did at
10 all.

11 Q. And ma'am, most of your cases that you have dealt
12 with in defense cases of people who have recalled a child
13 abuse incident from their childhood, once they've reached
14 adulthood, you have been critical of memories being brought
15 out, if you will, via therapy; isn't that correct?

16 A. Suggestive psychotherapy, yes.

17 Q. In other words, you've given caution to other
18 therapists against even accidentally bringing forth a memory
19 that isn't accurate. Or isn't true. Right?

20 A. Well, I've tried to caution people to be careful
21 about using techniques that are prone to lead to false
22 memories.

23 Q. There's no indication that any psychologist or
24 psychiatrist or any mental health professional or any human
25 being prior to the time that he was talking to Nick Gilpin --

1 strike that, prior to the time he talked to the police,
2 there's no evidence that he was ever suggested by a therapist
3 to have been involved in this crime; isn't that correct?

4 A. I didn't see any evidence of that, no.

5 Q. Okay. He was never given dream therapy.

6 A. No, I didn't see any evidence --

7 Q. Never given sodium pentathol.

8 A. Not that I know of.

9 Q. Okay. Nothing was done by any therapist or any
10 human being to suggest that he committed this murder. Isn't
11 that true?

12 A. When he initially started pondering the idea, it
13 came from him. Apparently.

14 Q. Not suggestion. Correct?

15 A. Right.

16 Q. Now, in terms of detail versus the core of an event,
17 you use those terms, don't you?

18 A. Yes.

19 Q. Somebody could witness a shooting, could witness one
20 person shooting another one, and they may remember the core
21 details, will tend to remember the core detail, that somebody
22 was shot, but sometimes the peripheral details they're not as
23 able to recall. Correct?

24 A. Yes.

25 Q. So in the car crash, for instance, the two cars

1 crash together, and they may remember that impact and
2 describe the vehicles, but they might not remember what the
3 car looked like that was not involved in the accident parked
4 across the street. Correct?

5 A. Correct.

6 Q. So people tend to remember the core or the essence
7 of the traumatic event. Isn't that correct?

8 A. Yes.

9 Q. And isn't it true that people who are actually
10 involved in the event tend to remember the core, or the
11 essence, better than those who are nonparticipants?

12 A. Well, there's one study that does show -- at least
13 one that shows somewhat better memory if you're a participant
14 than just an observer. All other things being equal.

15 Q. Well, I mean, you've testified and written before
16 that people who are a participant in the event remember the
17 core details better than observers, haven't you?

18 A. I -- well, that's what I just said. There is a
19 couple of studies that show that you're somewhat better.

20 Q. Well, you agree with that too --

21 A. Yes.

22 Q. -- don't you? You agree with that. Correct?

23 A. All other things being equal. I mean...

24 Q. Do you agree, ma'am, that people can have awful
25 things happen to them, and not think about them for a long

1 time, and be reminded of them later?

2 A. Yes.

3 Q. In fact, those are your words, aren't they?

4 A. Sounds very familiar.

5 Q. They can have an awful thing happen to them, not
6 think about it for a long time, and then remember it again.

7 A. That can happen.

8 Q. What is a retrieval cue?

9 A. It's just some sort of stimulus in the environment
10 that causes you to be reminded of something.

11 Q. Maybe the anniversary of an event?

12 A. Well, usually, in the research on retrieval cues,
13 that hasn't exactly been looked at, but --

14 Q. Well, that's in the DSM-IV, isn't it? That -- under
15 -- at least -- take post-traumatic stress syndrome.

16 A. Well, one -- I suppose one way that an anniversary
17 could be a retrieval cue is: When we have a -- the
18 anniversary of the assassination of President Kennedy, it
19 does sometimes remind people about what they were doing on
20 that day when they learned the news about the Kennedy
21 assassination. Assuming they were over the age of eight at
22 the time.

23 Q. Right. They would remember what they were doing
24 maybe when they heard about President Kennedy being
25 assassinated; right?

1 A. Right.

2 Q. But you wouldn't expect them to remember where they
3 were when President Kennedy was assassinated, would you? You
4 see the difference?

5 A. Yes, I do.

6 Q. In other words, we can remember where we were when
7 we heard about 9/11.

8 A. Yes.

9 Q. When we heard about it. Or read about it. But
10 not -- you don't think of where you were when the first
11 terrorist jet hit the building; correct? That's not what
12 happens, is it?

13 A. Well, that's the -- that is not exact -- that's not
14 the best example, because that went on for more than an hour,
15 and people became aware of it while it was -- some people
16 became of aware of it while they --

17 Q. Well, I mean --

18 A. -- in the middle of it.

19 Q. Let's say you were on a trip and you didn't hear
20 about it for -- you were on a camping trip and you hear about
21 it two days later. You would remember when you got the news.
22 Right?

23 A. Right.

24 Q. Not where you were when it was happening.

25 A. That would -- that would -- that would make sense.

1 Q. Thank you, ma'am. Would you agree, Doctor, that
2 retrieval cues sometimes trigger unpleasant or traumatic
3 memories?

4 A. Yes.

5 Q. And you said, "Hey, go to your high school reunion."
6 Right?

7 A. Yes.

8 Q. May have a retrieval cue happen. Okay? Would you
9 agree that people can push information out of their conscious
10 mind and not think about it?

11 A. Yes.

12 Q. You would agree with that.

13 A. Yeah -- that people cannot think about things, yes.

14 Q. Okay. They can push information out of their
15 conscious minds and not think about it. That thing. That
16 event. Isn't that -- do you agree with that?

17 A. Right. I think people do that primarily by
18 distracting themselves.

19 Q. Okay. They're consciously putting something out of
20 their memory because they don't want to think about it.

21 Right?

22 A. Well, they are trying not to dwell on it constantly.

23 Q. Right. People don't -- it's a bad thing. They
24 don't want to think about it. Right?

25 A. Right.

1 Q. And you agree that people -- I think we've already
2 established this. People can forget something and remember
3 it later.

4 A. That can happen.

5 Q. Everybody knows that can happen.

6 A. Correct.

7 Q. And people -- would you agree, ma'am, people can
8 experience something so painful, so terrible, that they avoid
9 thinking about it. Isn't that true?

10 A. Yes.

11 Q. In fact, it happens, that people experience a
12 terrible event, and if you ask that person if they remember
13 whether it happened or not, they might not remember. Doesn't
14 that happen?

15 A. That -- that can happen, yes.

16 Q. In fact, you've testified to that before; correct?

17 A. Well, it can happen. And I -- if I've been asked
18 about it, I might have testified about it.

19 Q. So you agree that people can experience a terrible
20 event and tell you they don't remember it.

21 A. Well, that's correct. There's even one government
22 study: A year after being in an auto accident, people are
23 asked, "Were you in an accident?" And they tell the
24 interviewer, "No."

25 Q. Most certainly people can forget horrible things

1 that happen to them. Correct?

2 A. That can happen.

3 Q. In fact, those are your words, in an article,
4 "Memory Distortion and False Memory Creation"; correct?

5 A. Well, you'll have to -- I'll take your word for it,
6 but.

7 Q. You forgot writing that?

8 A. That could have been a hundred articles ago. And I
9 don't remember the exact wording I used in every article.

10 Q. You don't disagree that those are your words, do
11 you, ma'am?

12 A. Well, if you'd like to show me the article, I can
13 confirm it.

14 Q. Do you disagree?

15 A. I don't really disagree with it, no.

16 Q. All right. In fact, in that same article, "Memory
17 Distortion and False Memory Creation," you said, quote, "We
18 should be able to concede that it is possible for people to
19 forget traumatic experiences and later remember them." Your
20 words, ma'am?

21 A. Well, that sounds -- it sounds familiar, and I would
22 agree with that.

23 Q. You'd also agree that traumatic memory can come back
24 with a retrieval cue. Isn't that correct?

25 A. Yes.

1 Q. Ma'am, did you also -- well, strike that.
2 "Traumatic memories take many forms. Sometimes they are
3 repressed, and sometimes they are repressed and return." Do
4 you recall who wrote that?

5 A. That sounds like something I might have been
6 speculating about in 1990 or 1991. Some --

7 Q. Speculating?

8 A. -- 15 years ago. Yeah.

9 Q. Okay. Your words.

10 A. I believe that, before really investigating this
11 whole repressed memory controversy, I thought maybe there was
12 such a thing as repression.

13 Q. Okay. Well, you do agree that people forget.

14 A. Yes. That's not the same thing as repression.

15 Q. Okay. That's cool. They forget a traumatic memory,
16 and they remember it again.

17 A. That -- that can happen, yes.

18 Q. Okay. And you agree -- I think you started to say
19 that if you don't like something, you don't want to think
20 about it, it's painful, you can distract yourself when
21 thoughts of it start to come to your conscious mind? You
22 agree with that?

23 A. Sure. People can do that.

24 Q. Because you've said that too. Do you remember
25 saying that?

1 A. I would agree with that.

2 Q. Okay. You agree that if someone can distract
3 themselves and not think about something, they can forget
4 about the event. You agree with that?

5 A. Well, they can certainly not think about it, yes.

6 Q. I mean, if you're -- that's a direct quote out of
7 another case you testified in under oath. You do agree with
8 that? That, quote, "Eventually, if you can distract yourself
9 and not think about something, you can forget about it"?

10 A. You'll have to show me that.

11 MR. ROGERS: Your Honor, for the record, could we
12 have the case and the date?

13 THE COURT: If you want to -- yes.

14 MR. CRANE: Actually, Judge, all the -- all of the
15 questions that I've been drawing from are from -- not --
16 strike that. The last series of questions, three of them,
17 Commonwealth of Massachusetts versus Paul Shanley. February
18 3rd, 2005. Testimony of Dr. Loftus.

19 Q. And Doctor, there's -- well, do you agree you
20 testified in that case?

21 A. I did, yes.

22 Q. Okay. Do you agree you've said the things, going
23 back through the last series of questions -- let's just take
24 the last three. Do you agree with those propositions?

25 A. They sounded familiar, but you just read me

1 something that didn't sound quite right, so I'm asking you to
2 show it to me.

3 Q. Page 37, line --

4 MR. CRANE: Do you want it see it?

5 Q. 37, line 8. I think I got it highlighted.

6 A. Well, it says -- I'm being asked the question:
7 "Eventually, if you can distract yourself and not think about
8 something and not rehearse it, then maybe you can forget
9 about it at that way. Do you remember saying that at this
10 deposition as well?" And my answer was: "I don't remember
11 exactly that, but you can show it to me. I mean, I would
12 agree with that."

13 Q. Okay. That's what you said in that case? Do you
14 agree with that?

15 A. That, if you can distract yourself and not think
16 about something and not rehearse it, then maybe you can
17 forget about it at that -- I think I probably was saying "in
18 that way." That might be a typo.

19 Q. And then you later said you agree with that.

20 A. Yeah. I would -- I would agree. You can just not
21 rehearse something and --

22 Q. And they were --

23 A. -- may be one way that you can kind of forget about
24 something.

25 Q. And on that question, the prosecutor in that case on

1 cross-examination was referring you to a deposition; is that
2 right?

3 A. It appears that way, yes.

4 Q. Yeah. Now that brings me to another question. What
5 is the DSM-IV?

6 A. Well, that is a document used -- developed by the
7 American Psychiatric Association to aid mental health
8 professionals in terms of being able to diagnose patients.

9 Q. Right.

10 A. And their conditions.

11 Q. Okay. And you rely on the DSM-IV and other -- I
12 realize not the only thing, but you do consult and are
13 familiar with the DSM-IV?

14 A. I'm not that familiar with the DSM-IV. It's used
15 for diagnosis and classifying patients. Being able to
16 communicate about the conditions of patients.

17 Q. You're not that familiar with the DSM-IV?

18 A. Well, I know what it is, but I don't use it in my
19 day-to-day research, no.

20 Q. Well, do you agree that the DSM-IV accepts the
21 diagnosis -- or the idea that people can lose a memory of a
22 traumatic event and then later recover it?

23 A. Well, there's something in there about -- about
24 amnesia and so on. Although there is a caution about not
25 using it for forensic purposes.

1 Q. Right. This -- but you're not really that familiar
2 with this?

3 A. No. I -- that is a document prepared by the
4 American Psychiatric Association. I'm not a psychiatrist,
5 and I --

6 Q. Yeah, but this isn't just for psychiatrists, is it?

7 A. Well, people who deal with patients, who treat
8 patients, use that for communication and classification.

9 Q. Okay. I mean, the DSM-IV says in the beginning,
10 "The purpose of DSM-IV is to provide clear descriptions of
11 diagnostic categories in order to enable clinicians and
12 investigators to diagnose, communicate about, study, and
13 treat people with various mental disorders." Right?

14 A. Right.

15 Q. And you communicate about -- you may not treat
16 people, but you communicate and study people; right?

17 A. I study the memories of people, yes.

18 Q. Are you familiar with dissociative amnesia?

19 A. I've probably read the section, yes.

20 Q. Do you remember reading out of the DSM-IV that
21 "dissociative amnesia most commonly presents as a
22 retrospectively reported gap or series of gaps in recall for
23 aspects of an individual's life history"? Does that sound
24 right?

25 A. It sounds right.

1 Q. "These gaps are usually related to traumatic or
2 extremely stressful events." Sound right?

3 A. Well, you'll have to show it to me.

4 Q. Okay. And defense attorney can ask you about the
5 rest of this section. I'm looking at page 520 and the
6 highlighted portion I have here.

7 (Mr. Crane showing the manual to the witness.)

8 A. Well --

9 Q. You've had an opportunity to read the highlighted
10 portion, ma'am?

11 A. Yes.

12 Q. Okay. And that is the DSM-IV; correct? Can I see
13 it? Because I can't -- I don't have it memorized.

14 A. Yes. DSM-IV. Yes.

15 Q. And you agree that in its discussion of dissociative
16 amnesia, these gaps are usually related to traumatic or
17 extremely stressful events. Some individuals may have
18 amnesia for various episodes, and it includes violent
19 outbursts.

20 Now, it also indicates that "The main manifestation
21 in most individuals is a retrospective gap in memory. The
22 reported duration of the events for which there is amnesia
23 may be minutes to years."

24 A. You'll have to show me that.

25 Q. Okay. Right there. Highlighted right there.

1 (Mr. Crane showing the manual to the witness.)

2 Q. Doesn't it say that, Doctor?

3 A. It does, yes.

4 Q. Okay. Thank you. You don't disagree with that, do
5 you?

6 A. I don't disagree with the sentences in there. I
7 just don't know what evidence they're really using for it.

8 Q. Well, you accept the idea that a person could lose a
9 memory of a traumatic event and recover it later. Correct?

10 A. I accept that someone cannot think about something
11 for a long time or can distract themselves by thinking other
12 things and then be reminded of it. That is ordinary
13 forgetting and remembering. There's -- there's nothing fancy
14 about it.

15 Q. All right. That's fine. Ordinary remembering or
16 forgetting.

17 A. Right.

18 Q. I'm going to ask if you recall your deposition in
19 Jane Doe versus Schultz Lewis (phonetic), back in October of
20 2000. And I'll just tell you, ma'am, this is the deposition
21 that they were talking about in the 2005 trial transcript.

22 A. Okay.

23 Q. You don't disagree with that?

24 A. I don't know. I don't remember that.

25 Q. Okay. And do you remember being asked in that

1 deposition, which we've referred to in the Shanley trial --
2 which, by the way, was a case in which you were testifying
3 for the defense on behalf of somebody accused of child abuse;
4 right?

5 A. That was -- I don't remember the details of that.

6 Q. That was just back here in February of this year.

7 A. Oh, Shanley.

8 Q. Yeah.

9 A. Oh. I thought you were talking about this Schultz
10 case.

11 Q. Yeah.

12 A. Yes.

13 Q. Okay.

14 A. Yes. Repressed memory.

15 Q. And you were asked the question: "The organization
16 that created the DSM," that's the DSM we've been talking
17 about, "basically accepted the idea that the person could
18 lose a memory of a traumatic event and then later recover
19 it." You were asked that question. Do you remember
20 answering: "Well, I think lots of people would agree with
21 that. You can not remember and then remember." Then you
22 were asked the question: "Do you agree with that?" And your
23 answer was: "Of course."

24 Do you need to look at this?

25 A. Well, I -- it sounds very familiar, and I agree with

1 it.

2 Q. Okay. That people can not remember, and then
3 remember.

4 A. Yes.

5 Q. Is it your opinion that false memories are more
6 prone to be adopted by someone who will receive favorable
7 consequences if they adopt the false memory?

8 A. I think that's probably correct.

9 Q. Okay. You would agree then that someone who may
10 perceive their remembering this falsehood and getting some
11 benefit from it, like, "Now I can justify why I'm, you know,
12 in this position," maybe in a mental institution, or
13 whatever, and somebody, maybe a therapist, starts suggesting,
14 "Hey, maybe you got -- had this bad thing happen to you when
15 you were a kid."

16 A. Right.

17 Q. That might be something that the patient, if you
18 will, would view as a favorable consequence for them. "Hey,
19 this will answer the questions about why I was -- you know,
20 why I'm in a mental" -- whatever. You understand what I'm
21 saying?

22 A. I do, yes.

23 Q. Okay. Would you agree that it is more unlikely for
24 someone who would have negative consequences to adopt a false
25 memory? Would you agree with that?

1 what it is. I mean, I don't know either, but --

2 THE COURT: If he wants to ask a question, he may.

3 Q. Well, you understand that that's kind of an
4 intermediate revision of the book, since the original DSM-IV
5 came out.

6 A. Well, I -- the DSM I understand is -- goes through
7 all kinds of evolutions, as diagnoses come in and drop out.

8 Q. All right.

9 A. And so this is just maybe the latest version.

10 Q. I always thought the DSM was the DSM-III, and then
11 we had the DSM-III-R during the '80s, and then the DSM-IV
12 came out sometime?

13 A. Yes.

14 Q. That's your memory?

15 A. Yes.

16 Q. And now we have the DSM-IV-R -- TR. Excuse me. And
17 according to the Library of Congress
18 Cataloging-in-Publication Data here on the inside, this is
19 officially known as the DSM-IV, 4th Edition, Text Revision.

20 A. Okay.

21 Q. Correct? But we don't know what revisions were made
22 when.

23 A. I don't, no.

24 Q. And the part that Mr. Crane read to you and showed
25 to you and had you read and stuff, you don't know whether

1 that was in the original DSM-IV or not.

2 A. I don't really know.

3 Q. And you were read some excerpts from an article that
4 you wrote called -- I lose things.

5 A. You could ask me.

6 Q. I'm sorry. What was the article that he was reading
7 you quotes from?

8 A. It -- he mentioned one article by name, which I
9 could find on the vitae, but I -- it appears as if he was
10 reading different sentences from different articles at
11 different times.

12 Q. What's the one he mentioned by name?

13 A. If you hand me the vitae, sir, then --

14 Q. That would be easier, because you lived these
15 events.

16 MR. CRANE: I can try to speed it up by finding out
17 which one of them you're talking about. What was the
18 question? Do you remember?

19 MR. ROGERS: No. I don't take that detailed of
20 notes.

21 A. In answer to your question, I believe that he was
22 reading some sentences from my article "Memory Distortion and
23 False Memory Creation," published --

24 Q. That's the one.

25 A. -- in the bulletin of the American Academy of

1 Psychiatry and Law.

2 MR. CRANE: 1996.

3 A. 1996. But I also believe he read some quotes from
4 something that I may have written back in 1990 or --

5 MR. CRANE: '93. "Why Do Traumatic Experiences
6 Sometimes Produce Good Memories and Sometimes No Memory."
7 Page 222. 1993 article.

8 MR. ROGERS: Anything else?

9 A. Well, I see, "Why" -- in 1992, "Why Do Traumatic
10 Experiences Sometimes Produce Good and Sometimes Poor." That
11 was published in 1992. So I would have probably written that
12 in 1990. And that's why I said that, you know, that's a view
13 from 15 years ago that has evolved in light of the last 15
14 years' worth of scientific evidence.

15 Q. Okay. And that's what I was going to ask you. What
16 have you done since writing the quote that he read to you to
17 investigate the propositions expressed in that quote?

18 A. Well, back in the early 1990s, when people were
19 claiming that they had, for example, been molested in Satanic
20 cults for years and repressed these experiences into their
21 unconscious, and some clinicians were believing and
22 discussing this whole issue of repression and people were
23 being accused based on it, I thought there was -- was
24 repression. I had heard the word used. I possibly even used
25 it in some of my own writings. But I had never really

1 investigated the evidence for it. And once I did, in the
2 very early 1990s, I was actually quite shocked that there was
3 no good, credible support for the idea that we take this
4 horrible brutalization and banish it into the unconscious,
5 and that we are, by some process, beyond ordinary forgetting
6 and remembering.

7 And so I have -- I have examined the lack of
8 evidence, the subsequent attempts to produce evidence, the
9 flaws in those attempts, and have come to an opinion, that is
10 shared by many other clinicians and memory scientists, that
11 there's a real problem here.

12 Q. Okay. And that, therefore, is the genesis of the
13 title of your book, *The Myth of Repressed Memory, False*
14 *Memories and Allegations of Sexual Abuse.*

15 A. Yes.

16 Q. And that book was published in 1994.

17 A. Correct.

18 Q. So it would have been written after you wrote the
19 article that he questioned you about and as a result of the
20 research you did in response to the issues discussed in the
21 earlier article.

22 A. Correct.

23 Q. And have you, since writing the 1994 book, continued
24 an interest in that field?

25 A. Yes.

1 Q. And you've been doing your own studies and looking
2 at everybody else's.

3 A. That's correct.

4 Q. Anybody come up with any evidence supporting the
5 theory of repressed memories?

6 A. Well, they keep trying, but they haven't produced
7 any -- any really credible scientific support for this idea
8 of massive repression, no.

9 Q. Okay. Now, you were asked by Mr. Crane at the very
10 end about the notion of a positive consequence being --
11 making it more likely to, what do I want to say, adopt a
12 false memory?

13 A. Yes. That's my -- that's the impression that I
14 have. That it would be easier to plant a false memory if it
15 would lead it to positive consequence. That it would be
16 easier for me to convince somebody that they were owed money,
17 for example, rather than that they owed someone else money.

18 Q. Okay. And, of course, what is a positive
19 consequence and a -- what's a negative consequence might
20 differ, might it not?

21 A. Well, that's true. I mean, even in the -- some of
22 the sex abuse cases where people have developed these
23 memories of Satanic ritual abuse, I have been asked many
24 times, "Why would anybody want to make up something so
25 awful?" And the answer, of course, is: If there's a cost to

1 it, because they now are estranged from their family and so
2 on, there must be a very big benefit. And the benefit in
3 those cases can sometimes be obscure, but it's a desire for
4 attention or a desire to have some of your problems explained
5 or some -- a sympathy or empathy you get from other people
6 who are making the same claims. So there's your -- there's
7 your benefit, even if there is a cost.

8 Q. And if there might be a negative consequence, if
9 that negative consequence is not as negative as some other
10 consequence, then it might be positive in relation to the
11 other one. See what I'm talking about?

12 A. Well, I --

13 MR. CRANE: Judge, I'm going to object. Leading and
14 compound.

15 THE COURT: You may rephrase your question.

16 Q. Can the individual's assessment of consequences be
17 viewed in relative terms?

18 MR. CRANE: Object to the form of the question.

19 THE COURT: Sustained.

20 MR. ROGERS: I thought the last one was the bad
21 question.

22 Q. Could you tell us whether or not, in assessing the
23 ease with which a false memory can be induced, the relative,
24 positive versus negative, consequences might be a factor.

25 A. Well, of course -- now this is kind of an extreme

1 case, but it will make the point that I want to make to
2 answer this question. If -- if planting one false memory
3 means that you're going to have a bad consequence and go to
4 jail for life, and planting -- or a jail for ten years, and
5 another memory will put you in jail for -- or give you the
6 death penalty, then maybe the lesser negative is the better
7 of those two. And that's why somebody might be susceptible
8 to having a memory be planted that has a negative
9 consequence.

10 MR. ROGERS: Mr. Weis, would you play the clip,
11 please?

12 THE COURT: Tell me what you're going to be playing.
13 I assume --

14 MR. ROGERS: I'm going to ask her: Is that an
15 example of consequences of possibly planted memories.

16 THE COURT: And this is something that's been
17 admitted?

18 MR. ROGERS: Something that's been admitted. It's
19 Defendant's Exhibit D.

20 THE COURT: All right. D has been admitted.

21 (Excerpt played.)

22 MR. ROGERS: That's enough. Thank you. Thanks.

23 Q. Is that an example of a relatively positive
24 consequence being offered for the memory, as opposed to the
25 relatively negative consequence of being the one on the

1 chopping block hanging out here?

2 MR. CRANE: I'm going to object as to her
3 interpretation of that in that context, Judge.

4 THE COURT: What is your specific objection,
5 Mr. Crane?

6 MR. CRANE: Relative to what? There's no evidence
7 that he -- are you talking about -- the range of punishment
8 issue was what this witness just brought up a minute ago. I
9 mean, relative to what?

10 THE COURT: Please rephrase your question.

11 Q. Let me do it -- did that clip give an example of
12 what we're talking about? Something which might be a
13 false -- or a negative consequence independently might be
14 positive in relation to something else?

15 A. Well, I -- I -- it's hard to know. But what is
16 clear is that there is reinforcements and punishments being
17 offered in the course of that -- you know, being communicated
18 to Mr. Erickson. That he'd be better off if he responds in
19 certain ways than in other ways.

20 Q. Now let's go back to some earlier things that
21 Mr. Crane asked you about. First of all, about what -- these
22 days, within the last couple three years, about what
23 proportion of your income is derived from testifying in
24 criminal cases?

25 A. Maybe a seventh or a sixth or --

1 Q. And I realize Southern California is not a cheap
2 place to live, but if you didn't do cases like this, would
3 you starve?

4 A. No, I wouldn't.

5 Q. Okay. And if you did cases which put your
6 professional reputa on the line, and your testimony was not
7 accurate or reliable, would that cost you a whole lot more?

8 MR. CRANE: Judge, I'll object to form of the
9 question. Leading.

10 THE COURT: Sustained.

11 Q. What would be the economic impact of you being a
12 witness for hire who will say whatever somebody wants to pay
13 her wants to hear?

14 A. Well, I -- I don't really need economically to work
15 on criminal cases at all, since I have so many other happily
16 professional opportunities in my life right now.

17 Q. Are you proud of your professional reputation?

18 A. Yes, I am.

19 Q. Are you going to sell it for whatever you're getting
20 paid in this case?

21 A. No.

22 Q. You understand, of course, that every time you
23 testify, somebody down the road is going to have a
24 transcript.

25 A. Well, I'm sure there are many, many transcripts of

1 my prior testimony floating around and available to people.

2 Q. Now, after I quit objecting to Dr. Dean's report,
3 Mr. Crane asked you several things about it; is that correct?

4 A. Yes.

5 Q. And those are not things that were really germane to
6 your determination in this case, were they? I mean, whether
7 he was delusional or dissociated or all that stuff?

8 A. Well, it might have made a difference if he had a --
9 if he were retarded, for example. Because we know that
10 levels of retardation are associated with even greater
11 suggestibility. It might have -- but, of course, we get
12 suggestible -- suggestibility effects with normal IQ people,
13 so.

14 Q. Even high IQ people.

15 A. Even high IQ people, yes.

16 Q. Possible exception of Alan Alda.

17 A. Yes.

18 Q. I haven't tested his IQ. He looks smart on TV.

19 I believe Dr. Dean's report indicated that long-term
20 and short-term memory were intact? Is that what you remember
21 him saying?

22 A. That was the suggestion, yes.

23 Q. And -- first of all, was there anything in the
24 report that you saw that said how that was evaluated?

25 Through any type of --

1 A. I don't --

2 Q. -- testing instrument?

3 A. I don't remember, no. I don't.

4 Q. Secondly, does that have anything to do with the
5 veracity or nonveracity of his claimed memories?

6 MR. CRANE: Judge, that invades the province of the
7 jury.

8 THE COURT: That objection is sustained.

9 Q. Let me ask you this. The presenting problem to
10 Dr. Dean, from her report, which you reviewed, which
11 Mr. Crane questioned you extensively about, was what? Why
12 was Mr. Crane having Dr. Dean evaluate Erickson?

13 MR. CRANE: Well, hold it. Judge, the questions
14 that I asked her about dealt with Dr. Dean's evaluation of
15 Mr. Erickson at the request of Erickson's defense attorney,
16 Mark Kempton. And then thereafter he was seen by Dr. Dean
17 again, at my request. He's suggesting that the only time
18 Dr. Dean saw Chuck Erickson was with respect to my request.
19 That's not the case.

20 MR. ROGERS: All right. Well, let's do both.

21 Q. Did you have more than one report from Dr. Dean?

22 A. Well, I have information that she saw Mr. Erickson
23 on two occasions, before writing her report.

24 Q. And you have one report that you got basically --
25 and when did you get that? When was that report written?

1 Can you tell me?

2 A. The report was dated September 14th, 2005.

3 Q. Okay.

4 A. It indicated that she had seen him on two separate
5 occasions.

6 Q. Right. And with regard to that, when she wrote the
7 report, did it say what she was evaluating him for?

8 A. I thought it was to see if he was competent to
9 testify.

10 Q. Okay. And did it say that that was at the request
11 of Mr. Crane, the prosecutor?

12 A. Yes.

13 Q. Okay. So she was asked by the prosecutor to
14 evaluate him, to see if he's competent to testify. Right?

15 MR. CRANE: Well, Judge, for the record, that
16 request to see Mr. Erickson and evaluate his competency and
17 whether or not he suffered from mental disease or defect was
18 also made by Mr. Kempton, Mr. Erickson's defense attorney.

19 MR. ROGERS: I'm asking about the report that she
20 reviewed that you questioned her about.

21 MR. CRANE: Right. And you're couching it in terms
22 of my request. I'm only, for the record, stating --
23 accurate -- it is request of defense attorney first, and then
24 later me.

25 Q. In any event, there's nothing there to evaluate --

1 well, let me ask it: Is there any testing that can determine
2 whether a memory is, after the fact -- obviously if you film
3 the event, then you can see what really happened. But after
4 the fact, is there psychological testing that can determine
5 whether a memory, a claimed memory or a reported memory, is
6 false or accurate?

7 A. No. You need independent corroboration to tell the
8 difference between a memory that is real, genuine, authentic,
9 or one that's a product of some other process.

10 Q. So when you read in that report, "long-term and
11 short-term memory were intact," that did not go anywhere to
12 answering the question that you were looking at.

13 A. Correct. No.

14 Q. Okay. And there were many -- various mental
15 conditions that Mr. Crane asked you that apparently were not
16 diagnosed by Dr. Dean? Do you remember that?

17 A. Yes.

18 Q. Okay. And were any of those conditions that would
19 relate to a person's susceptibility for the implantation or
20 suggestion of false memories?

21 A. Well, I -- I don't know. I see false memories in
22 normal, healthy, you know, intact people. I can't tell you
23 whether, if somebody's diagnosed as being delusional, that
24 they would be more susceptible. I could imagine that might
25 be true, but I don't know for sure.

1 Q. Because a delusion is kind of already an accepted
2 auto suggestion?

3 A. Yes.

4 Q. Okay. So that brings us to -- we'll get to that in
5 a minute. You were also asked a question -- I made an
6 objection about case studies. And just to explain that, what
7 is a case study? In your profession.

8 A. Well, usually a case study is just one individual or
9 one patient. And so -- you can see examples in the
10 literature where a mental health professional, for example,
11 will say, "I had a patient. Here were the patient's
12 symptoms. Here was my diagnosis. Here's the treatment I
13 did." And usually they -- the article ends with: "And the
14 patient got better," or they wouldn't be writing the article.
15 But that would be a case history or a case example.

16 Q. Do you do that?

17 A. I -- I use occasional anecdotes, but I don't really
18 use case histories, because I've written about them, and they
19 are subject to misrepresentation by the person who is the
20 only one who possesses the information.

21 Q. The patient? Or the --

22 A. Or the therapist.

23 Q. -- the clinician?

24 A. Yes.

25 Q. And so what kind of studies do you use?

1 A. I do experimental studies where we run, for example,
2 groups of people, groups of individuals, some of them are
3 given one treatment or one manipulation, and the others are
4 given a different manipulation, and then you compare their
5 behavior.

6 Q. And are these studies carefully constructed?

7 A. Yes.

8 Q. Is that part of what you do to be one of the most
9 eminent psychologists of the past century?

10 A. That shows you I'm a has-been already, but yes, we
11 use the experimental scientific method.

12 Q. Okay. And you do a study that will be controlled
13 with regard to the relevant variables; right?

14 A. Yes.

15 Q. And that can be replicated by somebody else who
16 wants to check your results.

17 A. Yes.

18 Q. You can't do that kind of thing with a case study,
19 by definition.

20 A. That's the problem with case studies. One problem.

21 Q. Okay. And the problem with experimental studies is
22 creating test conditions which will replicate traumatic
23 events, subject to some kind of ethical constrains; right?

24 MR. CRANE: Form of the question.

25 THE COURT: Sustained. As to the form of the

1 question.

2 Q. What is the challenge with constructing a case study
3 like the kind you've described -- excuse me, an experimental
4 study, not a case study, like the kind you've described?

5 A. Well, you try to design an experimental situation
6 that kind of captures the essence of something that happens
7 in the real world. And sometimes that's the challenge.
8 Because you don't want to do anything in your experimental
9 study that's going to create permanent harm for a subject.
10 Or even temporary harm.

11 Q. Or somebody who's not really a subject, just a
12 bystander. For example, you can't have a hundred people,
13 half of them go out and kill somebody, half of them just go
14 get drunk; right?

15 A. Right.

16 Q. That would be unethical.

17 A. Yes.

18 Q. Okay. Now I noted, when somebody's cell phone went
19 off in the courtroom, you checked your cell phone to make
20 sure you turned it off.

21 A. Yes.

22 Q. Is that -- what would you call that, in the context
23 of memory?

24 A. I forgot whether I turned it off.

25 Q. Okay. And did you retrieve a memory after the cue?

1 Or did you just take action to make sure?

2 A. I just took action. And then I saw that it really
3 was off.

4 Q. Okay. Did you now remember having turned it off?

5 A. No, not exactly.

6 Q. All right.

7 A. But I -- you know, I -- not exactly.

8 Q. All right. Now, you talked a little bit about what
9 you called auto suggestions? Tell me about those.

10 A. This is where people suggest things to themselves.
11 So you can -- you can draw inferences about what might have
12 happened in the past situation. And those inferences and
13 thoughts can act like post-event information. And you can
14 then come to believe that you actually experienced what you
15 were really merely speculating about. And that's an example
16 of auto suggestion. There's no external suggestion coming
17 in. Nobody's telling you it was a yield sign instead of a
18 stop sign, but you're inferring it or assuming it or
19 speculating about it.

20 Q. And how do you study that scientifically?

21 A. Well, there are a number of different ways. I mean,
22 one is to look at the spontaneous distortions that occur,
23 some of which I mentioned, where people remember voting in
24 elections they didn't vote in and try to analyze why that
25 happened. The other is to do studies where you know that

1 people are likely to draw inferences, and see whether they
2 later on misremember the inferences actually having been
3 presented.

4 So, for example, in one study, when subjects heard,
5 "John -- John hammered the nail into the wall" -- or wait,
6 "John pounded the nail into the wall," later on, what people
7 remember hearing is "John hammered" -- I even messed up the
8 example. They hear "John pounded," but they later remember
9 hearing "John hammered the nail." Well, no one ever said
10 "hammered." No one ever said anything about a hammer. He
11 could have pounded the nail into the wall with his shoe. But
12 it's a natural inference for people to draw, that when they
13 hear "pounded the nail," that he was using a hammer. And
14 later on people will indeed misremember and think they heard
15 "hammer."

16 Q. Now, you were asked about police reports concerning
17 conversations Chuck says he had with Nick Gilpin and Art
18 Figueroa? Do you remember those?

19 A. Yes.

20 Q. Okay. First of all, you've looked at a lot of
21 police reports in your life, I assume?

22 A. Yes.

23 Q. Are they always accurate?

24 A. No.

25 Q. Secondly, you don't know whether those reports were

1 generated before or after Mr. Erickson had the conversations
2 with the police on March 10th that you viewed, do you?

3 A. I don't know.

4 Q. Thirdly, was it after the -- you I think agreed with
5 Mr. Crane that those -- the conversations with Nick and Art
6 happened before Erickson's arrest. Correct?

7 A. Yes.

8 Q. But it was after Erickson's arrest that the
9 interview with Mr. Short concerning the cleaning lady, where
10 Short told Erickson what the cleaning lady told the police
11 happened. Right? The one we saw earlier?

12 A. Yes.

13 Q. And you also have reviewed a police report of
14 Mr. Short's initial interview with Erickson. The one that
15 was not tape-recorded or videotaped. Correct?

16 A. Yes.

17 Q. Tell us whether or not in that report -- tell us who
18 in that -- according to that report, first introduced the
19 notion that one these suspects told the cleaning lady to get
20 help?

21 A. Well, I'd have to just refresh my memory, but in
22 that interview, it was Detective Short doing the interview,
23 and the report does say, "He stated he saw a female standing
24 between the two doors near the loading dock or on a loading
25 dock at the back of the business. He stated he yelled at her

1 and he got mad at her because she just stood there."

2 MR. CRANE: Well, Judge, she -- we don't have any
3 argument with that. She can read from the report. I mean,
4 that's all well and good, what she's reading there. Would it
5 be okay, though, on recross if I were allowed to -- I may not
6 object, if I were allowed to have her read from Art and
7 Nick's statements?

8 MR. ROGERS: I believe what you did was ask her
9 leading questions about what was in them over my objection.

10 MR. CRANE: And on cross-examination I can lead.

11 MR. ROGERS: Right.

12 MR. CRANE: My objection then, if there's no
13 agreement to that effect, is that this witness should not
14 read from the police reports, although I realize she already
15 did that, and that much is fine.

16 MR. ROGERS: Well, so far we're trying to give some
17 context to the answer to the question.

18 A. Yes. But it -- it is --

19 THE COURT: Well --

20 MR. CRANE: Judge, can I get a ruling on my
21 objection?

22 THE COURT: Yes. The question was: Did she
23 remember in the report a certain matter.

24 MR. ROGERS: Right.

25 THE COURT: And she said she'd have to refresh her

1 memory by looking at the report.

2 MR. ROGERS: Right.

3 THE COURT: And so she's looking at the report. And
4 she's beginning to read into the record what the report says.
5 And if the objection is that she should not continue to read
6 the report into the record, that objection would be
7 sustained.

8 MR. ROGERS: Okay.

9 THE COURT: But she certainly may answer the
10 question that you've asked her.

11 Q. And reading to yourself the report to refresh your
12 recollection, have you got there yet?

13 A. Yes, I do. This refreshes my recollection, that it
14 was the detective explicitly telling Erickson that the
15 cleaning lady told the police that someone asked for help.
16 And that Erickson then said that was him.

17 Q. Okay. And does that occur before there is any
18 attribution in the report to Erickson of that statement?

19 MR. CRANE: Judge, I'm going to object. What part
20 of that statement? Because what the witness has previously
21 read, in the report that she had very handy right beside her,
22 was that Erickson told Short that he had yelled at the
23 cleaning lady. Now, if the question is -- and I believe
24 that's what's on the table right now. Mr. Rogers has asked:
25 "If all together yelled at the cleaning lady to go get help,"

1 may be another question, but there should be a distinction,
2 based on the information that's in the report.

3 MR. ROGERS: Let me rephrase the question, and maybe
4 that will make it clear.

5 Q. When that -- in the context of that report, and this
6 is the report by somebody who the state chose not to call, so
7 we don't know --

8 MR. CRANE: Equal opportunity, Your Honor.

9 MR. ROGERS: Excuse me.

10 Q. In the context of that report, when the words or the
11 gist of the statement made to the cleaning lady first
12 appeared, who is credited with speaking those words?

13 A. Well, it is my impression from this report that
14 Erickson himself may have first reported that he said
15 something to the cleaning lady, but it was Detective Short
16 who informed him that the cleaning lady had told the police
17 that the person had asked for help. So --

18 Q. That's fine. Now, you were asked a bunch of
19 questions about somebody trying to forget an unpleasant
20 event, and you talked about how that could happen when
21 somebody tries to distract themselves from thinking about it;
22 is that correct?

23 A. Yes.

24 Q. If, based upon your knowledge and research and
25 expertise in the field of psychology with -- specifically in

1 the realm of human memory, if an individual had successfully
2 distracted themselves from thinking about an event, a very
3 serious and traumatic event which had occurred on November
4 1st, would reading a newspaper account of that event on
5 November 2nd tend to maintain that distraction?

6 MR. CRANE: Judge, that is -- if that's a
7 hypothetical, it -- I mean, there is no way that this witness
8 can answer that question, under any realm of scientific
9 authority. How in -- can that question be answered? I mean,
10 she may be, Judge -- it's a foundational question.
11 Dr. Loftus has been qualified as an expert by the defense,
12 but she is not a mind reader. And that question is exactly
13 what she's being asked to do. And, you know, I don't -- I
14 don't think she'll disappoint, but there's no -- no
15 foundation for that in science, that she can in any way
16 answer that.

17 THE COURT: You may respond if you care.

18 MR. ROGERS: Oh. Seems so obvious to me that that
19 is what we're talking about. He asked her question after
20 question, with quotations out of context from other cases or
21 other articles or whatever, about distraction and forgetting
22 and self distraction, and eventually if you self-distract
23 long enough, you can forget. Now the question is: If you're
24 self-distracting that so you'll forget, what would be the
25 impact of reading a newspaper two days ago?

1 MR. CRANE: Judge, I never used the term
2 self-distraction.

3 THE COURT: I will permit her to answer generally.
4 She may not answer with respect to the individual in this
5 case, because I don't know that she could know, in his mind,
6 what happened. But she may generally testify to her
7 expertise in that area.

8 Q. Let me see if I can formulate a question that works.

9 In the context of the things Mr. Crane was asking
10 you and the quotations he was reading to you from various
11 times over the last 15 years about self-distraction and -- or
12 distracting yourself, your mind from things, so that you
13 won't be confronting the memories, do you remember those
14 questions?

15 A. (Nodding head up and down.)

16 Q. Is that a fair way of stating it?

17 A. Well, the -- given that -- given everything we know
18 about people who have been through horrific experiences, I
19 have seen no evidence that you could remind a person of the
20 experience one day later and they'd be completely unaware
21 that it happened.

22 Q. And if somebody were consciously trying to ignore an
23 experience, would they seek out such a stimulus? A news
24 report?

25 A. Well, you -- if they're trying to avoid thinking

1 about something, you would think they would avoid reminders
2 of it.

3 Q. It seemed that way to me, but...

4 THE COURT: Mr. Rogers, I don't know how much longer
5 you have in redirect. The jury's lunch is here. And if it
6 were very brief, I would permit you. And I'm sure there may
7 be some recross also. I don't know how much longer you care
8 to go.

9 MR. ROGERS: I -- it may be brief, but I can't
10 guarantee it.

11 THE COURT: All right.

12 MR. ROGERS: It seems to be laborious at this point.

13 THE COURT: All right. If -- I don't know where our
14 marshal went, but Harold, can you -- will you get them out of
15 here? Ah, here he is. Les.

16 Ladies and gentlemen, we will take our noon break.
17 A little bit late, but we will.

18 The Court again reminds you of what you were told at
19 the first recess of the Court. Until you retire to consider
20 your verdict, you must not discuss this case among yourselves
21 or with others, or remain in the presence of anyone who is
22 discussing the case when the Court is not in session. Do not
23 read, view, or listen to any newspaper, radio, or television
24 report of the trial.

25 Take about an hour break for lunch.

1 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

2 THE COURT: If you'll let me know when the jury's
3 finished.

4 DEPUTY COURT MARSHAL WERNER: Yes.

5 THE COURT: And the witness may be excused for lunch
6 also. Just come back within an hour.

7 - - -

8 The following proceedings were held out of the presence
9 of the jury:

10 THE COURT: Mr. Rogers, do you intend to rest with
11 this witness, when her testimony is --

12 MR. ROGERS: Yes. We have a couple of exhibits to
13 offer, but that's it.

14 THE COURT: All right. And will there -- Mr. Crane,
15 will there be rebuttal evidence?

16 MR. CRANE: I don't think so.

17 THE COURT: All right. We did have an instruction
18 conference last evening. And counsel was going to be busy --
19 or staff was going to be busy getting together some drafts of
20 instructions. Do you have those here in the courtroom?

21 MR. CRANE: I'll get them. I don't think we got
22 them here. Yeah, we do.

23 THE COURT: You want to give me just a marked copy?
24 I guess I need an original -- I will need an original of all
25 of them.

1 That's murder one. And murder second.

2 MS. GOROVSKY: Your Honor, I made complete new sets
3 for everybody.

4 THE COURT: Okay. And did -- you didn't include the
5 ones defense was going to do.

6 MS. GOROVSKY: I did not.

7 THE COURT: Okay.

8 MR. ROGERS: The other murder second, the only
9 distinction is the number the Court writes in.

10 THE COURT: I will write numbers in the
11 instructions. I did not intend to write them in the forms of
12 verdict.

13 MR. ROGERS: That makes a certain amount of sense.

14 MS. GOROVSKY: And Your Honor, he -- I'll wait a
15 minute.

16 THE COURT: Just a minute.

17 DEPUTY COURT MARSHAL WERNER: They asked that that
18 be placed in the file.

19 THE COURT: Who did?

20 DEPUTY COURT MARSHAL WERNER: Eileen from the
21 clerk's office brought it up.

22 THE COURT: Okay.

23 The little old lady that let her phone go off and
24 didn't even turn it off, but continued to walk out with it,
25 was here on several occasions when I made the announcement.

1 She is the only person in that audience that has stood every
2 time the jury has come in. I've noticed that as well. I
3 take it she's probably not real pleased that you've checked
4 her telephone.

5 DEPUTY COURT MARSHAL WERNER: She didn't really
6 indicate that she was upset. She just didn't understand who
7 would be calling her, because not very many people had that
8 phone number. Her name is Carston or something.

9 THE COURT: Carston?

10 DEPUTY COURT MARSHAL WERNER: Carston.

11 THE COURT: I assume you'll get her name so you can
12 return the phone?

13 DEPUTY COURT MARSHAL WERNER: Jack took care of that
14 for me --

15 THE COURT: Okay.

16 DEPUTY COURT MARSHAL WERNER: -- because he was out
17 -- back there. We'll get that taken care of.

18 THE COURT: All right.

19 I have the robbery. If you have a reasonable doubt,
20 with the purpose, together with Charles Erickson, and -- this
21 is robbery in the first degree. I have -- so you have
22 conversed murder one, conventional murder two, and felony
23 murder two. Yes?

24 MR. ROGERS: That's correct. Although they are
25 identical for the two second degree murders.

1 THE COURT: No.

2 MR. ROGERS: The converses. The language is
3 identical.

4 THE COURT: I don't think it is.

5 MS. GOROVSKY: No.

6 MR. ROGERS: No, you're right. I'm sorry. I'm
7 sorry. I misspoke. What I mean is the first degree murder
8 and the second degree conviction are --

9 THE COURT: Are the same.

10 MR. ROGERS: That's what I meant to say.

11 THE COURT: Okay. Were there any others, other than
12 those converses, that you were going to prepare for me?

13 MR. ROGERS: I think the other ones -- one is
14 Instruction A, rejected.

15 THE COURT: Yes.

16 MR. ROGERS: And the other one we intend to give as
17 submitted last night.

18 THE COURT: And you have the state's instructions?
19 And you have a complete set for me, and also for the -- one
20 for the jury? All right. I'll take a look at them during my
21 lunch hour. Hopefully I won't get stains on them. We'll
22 come back to it.

23 Did you see anything in the defense --

24 MS. GOROVSKY: I did not.

25 THE COURT: You didn't see them, or you didn't see

1 anything that you --

2 MS. GOROVSKY: I did not see anything that I want to
3 object upon.

4 MS. BENSON: Your Honor, the jail is wondering if
5 they can take Ryan down.

6 THE COURT: Sure. This is just an instruction
7 conference.

8 MS. BENSON: Okay.

9 THE COURT: I'm just looking at these right now to
10 see if I have a question.

11 (The defendant left the courtroom.)

12 THE COURT: Are you looking through the state's?

13 MR. ROGERS: I just have, Your Honor.

14 THE COURT: And were any -- anything that you --
15 other than the one you've already -- other objections that
16 you've made on the record, did you have any additional
17 objections?

18 MR. ROGERS: Objections? I -- I don't know whether
19 I made this on the record or not, Your Honor, but I did make
20 on the record last night my objections to the wording of
21 their -- their second degree murder instructions, and I think
22 if the Court views the record made last night as sufficient
23 on that issue, I don't think we need to repeat it.

24 THE COURT: All right. And my recollection is that
25 also last night you had objected to the definition of cool

1 reflection in the murder first degree instruction, 314.02.

2 MR. ROGERS: And I renew that objection as well,
3 Your Honor.

4 THE COURT: Okay.

5 MR. ROGERS: And with regard to 310.50, I would
6 object to submission of 310.50. Not to the language of it,
7 but to giving it at all.

8 THE COURT: And the reason that the state is
9 offering this is because there's evidence that at least
10 Erickson was intoxicated.

11 MS. GOROVSKY: That's correct.

12 THE COURT: And they're acting in concert.

13 MS. GOROVSKY: I think there is even evidence that
14 the defendant was intoxicated as well, considering he was at
15 a bar.

16 THE COURT: Well, not everyone at a bar is
17 intoxicated.

18 MS. GOROVSKY: True. But I think there is some
19 circumstantial evidence there.

20 THE COURT: All right. Your objection's are
21 overruled, if those are all your objections.

22 MR. ROGERS: With regard to the earlier one, Your
23 Honor, I just want to comment that I do not believe that
24 Erickson's intoxication is relevant to Ferguson's mental
25 state. I think -- I don't think it would be a defense that,

1 "I had the intent to further the commission of a robbery;
2 that the guy who I was having help do it was too drunk to
3 know what was going on." So I don't think that Erickson's
4 intoxication warrants the submission of this instruction.
5 And I don't think that the evidence of Ferguson's
6 intoxication, such as it is, is sufficient to warrant the
7 giving of this instruction. So I'm objecting.

8 MS. GOROVSKY: Your Honor, we have tons of testimony
9 from the codefendant that the defendant was drinking. That's
10 not to be ignored evidence.

11 THE COURT: Well, I think it's up to the jury to
12 decide whether or not he was intoxicated and whether someone
13 of his size and age, consuming the amount of alcohol there
14 was testimony about, whether he was intoxicated or not. So,
15 I think it's a jury issue on that, in that regard.

16 With that understanding, I guess we need to talk
17 about the time that you would be allowed for closing, but
18 Mr. -- Mr. Crane is not here. And you're not doing the
19 closing argument on the case.

20 MS. GOROVSKY: No, I am not.

21 Bill. We need Kevin.

22 THE COURT: I will give -- assuming that you rest,
23 and that the state rests and doesn't call any kind of
24 witnesses, I will take a break to allow you to collect your
25 thoughts, and if you need to use the rest room or whatever

1 you need to do.

2 MR. ROGERS: Actually what I'm hoping -- well, I'll
3 go get something to eat between now and then, because the
4 jury is eating now.

5 THE COURT: They are eating now. Yes. But I'm just
6 telling you that --

7 MR. ROGERS: I was thinking of waiting to get
8 something then, because Dr. Loftus needs to be at the airport
9 at 3:18. I don't think I will have any problems. It's not
10 that far to the airport and it's not that big of place. But
11 she's got the world's worst flight schedule. Three different
12 flights.

13 (Mr. Crane present in the courtroom.)

14 THE COURT: My inclination is, since punishment is
15 not to be discussed in the first part of this case, and I
16 trust you have other instructions in the event --

17 MS. GOROVSKY: We do.

18 THE COURT: -- that there are guilty verdicts
19 returned on one or more --

20 MS. GOROVSKY: We do.

21 THE COURT: -- of the counts, that it seems to me
22 that 45 minutes on each side should be sufficient, on the
23 guilt phase of this trial. If you don't think you need 45
24 minutes, that's fine.

25 MR. CRANE: I might not use 45 minutes, but I -- I

1 mean, what do you think, Charlie?

2 MR. ROGERS: 45 minutes is sort of what I was
3 ball-parking anyway, so I think I can do it in 45 minutes. I
4 have never yet not consumed all of the time. That's just me.
5 That's --

6 THE COURT: So if I gave you an hour and a half, you
7 would consume that as well.

8 MR. ROGERS: Right. Or three days or whatever.
9 I've never had three days.

10 THE COURT: Well, no, I don't -- we're not in
11 California.

12 How do you want to split your time?

13 MR. CRANE: Let me do the math here. 23 minutes --
14 and the back end's got to be less; right?

15 THE COURT: That would be 22 or less. And 22 and 23
16 is 45.

17 MR. CRANE: Yeah. That's --

18 THE COURT: The last time I counted.

19 MR. CRANE: -- the only way I can get the most at
20 the back end; right?

21 THE COURT: Yes. 22 is the long --

22 MR. CRANE: 23 and 22. Yeah.

23 THE COURT: Do you need any kind of reminder?

24 MR. CRANE: Can you give me a two-minute bell, Fred?

25 DEPUTY COURT MARSHAL BAER: Uh-huh.

1 MR. ROGERS: You actually ring a bell?

2 DEPUTY COURT MARSHAL BAER: Uh-huh. A little school
3 bell.

4 THE COURT: It sounds like when you go into an old
5 shop and you go ding ding ding.

6 MR. ROGERS: Cool.

7 DEPUTY COURT MARSHAL BAER: Does he want two minutes
8 on both sides, Judge?

9 THE COURT: Two minutes on both sides, Kevin?

10 MR. CRANE: Pardon me?

11 THE COURT: Two minutes on both sides?

12 MR. CRANE: Yeah. At the front and the back, yeah.

13 THE COURT: Do you need a warning before you -- you
14 can't split yours, unfortunately.

15 MR. ROGERS: Come on, Judge. How about if he has
16 leftover? I want probably five-minutes warning and then a
17 two-minute warning.

18 DEPUTY COURT MARSHAL BAER: Okay.

19 THE COURT: I think we can figure that one out. We
20 do have a stop watch. We do not count time if there is a --
21 if there should there be an objection, we don't count that in
22 your time.

23 MR. ROGERS: Okay.

24 THE COURT: We stop the watch.

25 MR. ROGERS: That's fair.

1 THE COURT: All right? With that understanding,
2 well, maybe you can get a bite to eat.

3 MR. ROGERS: Thank you, Judge.

4 THE COURT: Uh-huh.

5 (Recess taken.)

6 - - -

7 The following proceedings were held out of the presence
8 of the jury:

9 THE COURT: State ready to proceed?

10 MR. CRANE: Ready, Judge.

11 THE COURT: And the defendant ready to proceed?

12 MR. ROGERS: Ready, Your Honor.

13 THE COURT: And the witness is here and ready to
14 proceed as well.

15 The jury is ready? Yes?

16 DEPUTY COURT MARSHAL: Yes.

17 THE COURT: I see a little crack in the door there.

18 - - -

19 The following proceedings were held in the presence of
20 the jury:

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ELIZABETH LOFTUS,

resumed the stand and testified further:

THE COURT: Mr. Rogers, you may continue your
redirect examination.

MR. ROGERS: Thank you, Your Honor.

- - -

RESUMED REDIRECT EXAMINATION

BY MR. ROGERS:

Q. Dr. Loftus, before lunch we had some conversation
about favorable consequences or positive consequences and
negative consequences of adopting a memory. Correct?

A. Yes.

Q. If someone had a feeling of guilt about an incident,
would resolving that guilt -- could resolving that guilt be a
favorable consequence?

A. Well, given that guilt's often an unpleasant
feeling, any -- something that might reduce it could be
considered some positive benefit, yes.

Q. Okay. And you were asked on cross-examination about
some criminal cases in which you had testified. Turning all
the criminal and civil cases together, since you received
your doctorate -- back in 1970?

A. Yes.

Q. -- about how many court cases have you been involved
in?

1 A. Well, I've actually testified in approximately 250
2 or 260 trials in the last 30 years, but I have consulted on
3 additional cases, even though I haven't actually testified in
4 those cases.

5 Q. Some civil, some criminal; just --

6 A. Right.

7 Q. -- a variety of things. And with regard to criminal
8 cases, you mentioned that you had testified on behalf of
9 Michael Jackson, who was found not guilty.

10 A. Well, I consulted in that case.

11 Q. Consulted.

12 A. I didn't actually testify.

13 Q. Okay. And Martha Stewart?

14 A. I consulted in that case.

15 Q. Consulted? What other high profile, non murder,
16 serial killer, sexual abuse kind of cases have you testified
17 in? Just give a couple.

18 A. Oh, I -- well, I consulted in Oliver North's case in
19 the late 1980s. I've consulted in numerous -- well, other
20 kinds of cases.

21 Q. Okay. Thank you. You were also asked about the
22 dedication of your book, *The Myths of Repressed Memory*. And
23 as I recall, you were asked about two peoples whose names do
24 not appear in the dedication, but who appear along with many
25 others in the acknowledgement.

1 A. Correct.

2 Q. And you read that one paragraph of the
3 acknowledgement, which goes on for another page and a half or
4 so?

5 A. Well, we acknowledged the help of quite a few
6 people, yes.

7 Q. Some are persons who had been accused; some were
8 persons who were accusers; some were psychotherapists; some
9 were researchers such as yourself; and just a bunch of
10 people.

11 A. Yes.

12 Q. Editors, publishers, family members.

13 A. Yes.

14 Q. Your own family members.

15 A. Yes.

16 Q. Okay. But did you also have a dedication of that
17 book?

18 A. I did, yes.

19 Q. Would you tell us to whom that book was dedicated.
20 Or to what.

21 A. We dedicated the book to the, to quote, principles
22 of science, which demand that any claim to truth be
23 accompanied by proof.

24 Q. Okay. Now, in that regard, Doctor, in the study you
25 have done over the past many years and the techniques you

1 have developed for investigating memories in the
2 nonexperimental situation, the noncontrolled situation, what
3 techniques are there for distinguishing a true memory from a
4 false memory?

5 A. Basically, since both kinds of subjective
6 experiences can be felt with a lot of confidence or delivered
7 with a lot of detail and emotion, it really is virtually
8 impossible to tell the difference, without some independent
9 corroboration.

10 Q. And what -- what do you mean by independent
11 corroboration?

12 A. Well, some -- some piece of ind -- you know, it
13 could be some DNA evidence or some photographs or some --
14 some truly independent eyewitness testimony that's credible.
15 Some piece of independent corroboration.

16 MR. ROGERS: Thank you.

17 THE COURT: Are you through?

18 MR. ROGERS: Yes, Your Honor.

19 THE COURT: Recross?

20 - - -

21 RE-CROSS-EXAMINATION

22 BY MR. CRANE:

23 Q. You testified on re -- or excuse me. I can't
24 remember. You testified when he was talking to you, how
25 about that, that you wouldn't expect somebody to have been

1 engaged in a traumatic event and then not remember it the
2 next day? Did you say that to him?

3 A. Well, I believe that before lunch we were talking
4 about whether somebody could -- that it would be within the
5 usual workings of memory to have a horrific experience, and
6 then a day or two later have no idea it even happened to you.

7 Q. That could happen.

8 A. I think it --

9 Q. Is that what you're saying?

10 A. -- would be very unlikely.

11 Q. Really? Well, see, when I was talking to you,
12 though, on cross, you said that you agreed that people can
13 have awful things happen to them, and not think about them
14 for a long time, and be reminded of them later. And you also
15 said, it happens that people experience a terrible event, and
16 if you ask that person whether or not it happened to them,
17 they might not remember. You said, yeah, that happens.

18 A. That happens, yes. That wasn't one or two days
19 later.

20 Q. Well, you also said, when I showed you the DSM-IV,
21 under dissociative amnesia, you said that you agreed with the
22 idea that the main manifestation of dissociative amnesia in
23 most individuals is a retrospective gap in memory; the
24 reported duration of the event for which there is amnesia may
25 be minutes to years. You agreed with that idea, didn't you?

1 A. I agreed that the sentence is in there, but I -- I
2 don't know of any -- any evidence for dissociative amnesia
3 after minutes.

4 Q. Well, that's in this book compiled by other
5 psychiatrists and psychologists and mental health
6 professionals in your very field, and you haven't followed up
7 on why that's in there?

8 A. That is a book for clinicians, to be able to discuss
9 diagnoses.

10 Q. And so if you don't see patients, you just ignore
11 this book?

12 A. Well, I don't -- I don't deal with it in my daily
13 teaching and research, no.

14 Q. And it says that it's not just for treatment of
15 patients; it's also a book compiled by agreement, between
16 numerous mental health professionals, for the discussion of
17 and the study of mental health issues in people, isn't it?

18 A. Well, it's certainly used to communicate, but it's
19 primarily for classification and diagnosis. And there's a
20 caution in there that's its dangerous to use it in forensic
21 situations.

22 Q. Well, isn't it also dangerous not to refer to and
23 consider a book like this? You don't even know what's in
24 here?

25 A. Well, I know -- I happen to know some of it. But I

1 don't use it in my daily teaching and research, no.

2 Q. Well, you don't disagree with that phenomenon, do
3 you? That somebody can have a traumatic, terrible event and
4 consciously put it out of their memory or not think about it
5 and have it remembered again. You don't disagree with that,
6 do you?

7 A. People can not think about something for a long time
8 and then be reminded of it. I agree with that.

9 Q. Okay. The example that's in here is: A soldier,
10 with localized amnesia, may go through several days of
11 intense combat, not remember it, and then regain it later.
12 After he's off the battlefield. This book indicates that
13 that's an example of how a traumatic event can be forgotten,
14 and then it may be remembered again. Is that correct? You
15 don't disagree that that can happen with a -- somebody that's
16 been in combat.

17 A. Well, I have -- in fact, I'm teaching a course on
18 this right now. We are reviewing some of the work on memory
19 of war veterans and people who've been through wars. I
20 don't -- I don't see a single situation where they totally
21 forgot they were in a war.

22 Q. I never suggested that they forgot they were in a
23 war. And you know that, Doctor. I'm talking --

24 MR. ROGERS: I'm going to object to the form of this
25 question, Your Honor. That's totally improper.

1 THE COURT: The objection is sustained as to the
2 form of the question. You may rephrase your question.

3 Q. Do you understand I'm not talking about somebody
4 that was in Vietnam, and when they were put on the plane and
5 brought back to the United States, they forgot they were even
6 overseas. Now, you understand that's not what I'm talking
7 about, don't you?

8 A. I don't know what you're talking about. It's --

9 Q. I'm talking about a situation where somebody in
10 combat, for instance, goes through a traumatic event, and
11 they suffer from dissociative amnesia, that may last for
12 minutes or years. You don't refute that that can occur, do
13 you?

14 A. Well, there certainly are -- there are a few cases.
15 There are cases where people, for example, claim that they
16 have absolutely no memory of who they are or where they grew
17 up --

18 Q. That's not --

19 A. -- or anything about --

20 Q. -- dissociative amnesia, is it?

21 A. Yes, it is. It's -- it's an example of a supposed
22 dissociative amnesia called a fugue state. And it's in the
23 DSM.

24 Q. And you think that's disassociative.

25 A. Dissociative, yes.

1 Q. Dissociative.

2 A. Yes. It's an example of dissociative amnesia.

3 Q. All right. Let me ask you this. Are there other
4 cases, do you agree, where a person can experience a
5 traumatic event, not remember it, and remember it later?

6 A. Well, there -- there are certainly cases where
7 people can not think about something awful that happened to
8 them and be reminded of it later.

9 Q. And be asked at some point if they remembered it and
10 say no. You've already testified to that. That you agree
11 with that idea.

12 A. Well, I have seen situations where people were asked
13 if they were sexually abused, and they say no. And then you
14 give them a few examples of what you might mean, and they'll
15 say, "Oh, yeah. Now that I think of it, that particular
16 thing did happen to me."

17 Q. And it did. Correct?

18 A. Well, it presumably did.

19 Q. You know, the term "repressed memory" is one thing.
20 And I'm not even asking you whether or not repressed memory
21 is relevant in this case. I want to ask you about what we'll
22 call deliberate forgetting of a traumatic event and simple
23 forgetting. You've already agreed that people can experience
24 a traumatic event, and deliberately forget it, and then
25 remember it again. On a retrieval cue. Correct?

1 A. Yes. They can not think about -- try not to think
2 about it and not think about it for a long time and be
3 reminded of it, yes.

4 Q. All right. And then there's also what we can refer
5 to as simple forgetting, where you just forget something like
6 how many times you testified in a criminal case in 2001.
7 Right? That would be an example of simple forgetting.

8 A. Well, you could call that simple forgetting.

9 Q. Okay.

10 A. Yes.

11 Q. And you've testified that the core or the essence of
12 a memory, a traumatic memory, is what is -- usually the part
13 that's retained. And that was your car crash example.

14 A. Right. That -- well, people will remember, you
15 know, that it was an accident, and not a fire, for example.

16 Q. And they might forget some of the details.

17 A. That happens.

18 Q. Like what color the light was.

19 A. Sure. That happens.

20 Q. Whether it was red or flashing. A detail.

21 A. Yes.

22 MR. CRANE: I think that's all the questions I have.

23 THE COURT: Redirect?

24 - - -

25

1 FURTHER REDIRECT EXAMINATION

2 BY MR. ROGERS:

3 Q. I'm a little bit confused, because this book here,
4 the DSM-IV-TR, is called the Diagnostic and Statistical
5 Manual of Mental Disorders, isn't it?

6 A. Yes.

7 Q. And actually, what it does is it gives code numbers
8 for various diagnoses so that psychiatrists can bill
9 insurance companies; right?

10 MR. CRANE: Well, Judge, I'm going to object. Form
11 of the question. Leading. If he wants to look in the --
12 some of the descriptive portions of the book at the front, he
13 can do that. And further, it's form of the question.

14 THE COURT: The objection is sustained. You may
15 rephrase your question.

16 MR. ROGERS: I'm not going to bother, Judge.

17 Q. What is the purpose -- well, I will bother. What is
18 the purpose of the numerical formulation in the DSM-IV?

19 A. Well, it's my understanding that it can allow people
20 to communicate with each other about which mental disorder
21 they are referring to.

22 Q. And when you say "people," is that also people in
23 organizations and stuff like that?

24 A. Certainly you see it on medical records, where
25 people will actually put down a number and say, "This is my

1 diagnosis of the mental disorder that this patient has."

2 Q. And you've never been in clinical practice where you
3 saw patients and diagnosed them and tried to get paid for
4 doing your work.

5 A. That's correct.

6 Q. And you do still try to get paid for doing your
7 work.

8 A. Well, I try.

9 Q. We already went through that.

10 A. Yes. I try.

11 Q. Okay. And in all of the information you saw
12 concerning Mr. Erickson, which was I guess Dr. Dean's
13 reports, report or reports, one report, two interviews, or
14 something, was he ever diagnosed with a mental disorder by
15 Dr. Dean?

16 A. Not that I saw, no.

17 Q. Did you ever see that he had been diagnosed --

18 MR. CRANE: Judge, I'm going to object. Leading
19 question. Suggests the answer. We can approach.

20 THE COURT: The witness has answered the last
21 question.

22 MR. CRANE: Right. I'm talking about this question
23 is objectionable. Leading. I think I know where he's going.
24 It's improper.

25 THE COURT: Well, you may approach, if you wish to,

1 or if --

2 - - -

3 Counsel approached the bench and the following
4 proceedings were held:

5 THE COURT: I don't know where he's going.

6 MR. CRANE: He said, "Do you remember him being
7 diagnosed by Dr. Dean for a mental disorder?"

8 THE COURT: And she said --

9 MR. CRANE: She goes, "No." Now he is going to go,
10 "Do you remember him being diagnosed for OCD?"

11 MR. ROGERS: No, I'm not. That's not where I'm
12 going.

13 MR. CRANE: Okay.

14 THE COURT: Okay. Just try not to ask a leading
15 question, so we can move along, please.

16 MR. ROGERS: Asking leading questions is how we move
17 along.

18 THE COURT: They do help you move, but not in this
19 case.

20 - - -

21 The following proceedings were held in open court:

22 THE COURT: You may inquire.

23 Q. In any of the materials which you have reviewed in
24 connection with Charles Erickson, could you tell us whether
25 or not there has been any indication that he was ever

1 diagnosed with dissociative amnesia?

2 A. To my knowledge, he wasn't, no.

3 Q. So whether or not you agree or disagree or don't
4 know if there's any evidence for or know that there's
5 evidence for the lines in this part of the book, what does
6 that have to do with Mr. Erickson?

7 A. Well, maybe you could ask the prosecutor. I'm -- I
8 don't know.

9 Q. I don't get to ask him.

10 A. I don't think it has much to do with it, but...

11 MR. ROGERS: Thank you.

12 - - -

13 FURTHER RE-CROSS-EXAMINATION

14 BY MR. CRANE:

15 Q. Doctor, you testified that people can forget a
16 traumatic event and remember it again, years later, upon a
17 retrieval cue. Is that correct?

18 A. That happens, yes.

19 Q. And would you agree that that phenomenon is also
20 recognized in the DSM-IV?

21 A. That's normal forgetting. I'm not sure -- I mean,
22 I'm sure most people would accept that.

23 MR. CRANE: No further questions.

24 MR. ROGERS: Nothing further. Thank you, Your
25 Honor.

1 THE COURT: May the witness be finally excused?

2 MR. ROGERS: From the defense, Your Honor.

3 THE COURT: For the state?

4 MR. CRANE: Yes.

5 THE COURT: Thank you, Dr. Loftus. You're excused.

6 Would ask you not to discuss your testimony with any other

7 witnesses. But you're free to go.

8 THE WITNESS: Thank you.

9 THE COURT: Hopefully you'll make your plane.

10 THE WITNESS: Thank you.

11 THE COURT: Does the defendant wish to present

12 further evidence?

13 MR. ROGERS: Briefly, Your Honor.

14 Your Honor, at this time the defense would offer

15 Exhibit AA, which is a business record supported by affidavit

16 of the Missouri Department of Transportation, showing the

17 signal phasing and timing for the traffic signals at

18 Route 163/Providence Road and Locust Street, and Route 163

19 and Ash Street in Columbia, Missouri, as it existed on

20 October 31st, November 1st, 2001.

21 THE COURT: Do you have an objection to Defendant's

22 Exhibit AA?

23 MR. CRANE: No.

24 THE COURT: Defendant's Exhibit AA is admitted.

25 - - -

1 Defendant's Exhibit AA admitted into evidence.

2 - - -

3 THE COURT: And when I don't have a list, I usually
4 write on it. Are you going to read this to the jury or --

5 MR. ROGERS: I will read a very small part of it to
6 the jury and explain to them, Your Honor, if I might, kind of
7 what it is.

8 THE COURT: You may explain. It's admitted into
9 evidence.

10 MR. ROGERS: Ladies and gentlemen, as the affidavit
11 reflects, this is a business record of the Missouri
12 Department of Transportation. It has to do with the timing
13 of traffic signals at two intersections in Columbia. One is
14 Route 163 at Locust. That's a two-page exhibit that shows
15 the timing on different times of day for the signal at 163
16 and Locust. The other is for the signal at 163 and Ash. And
17 it shows the -- it's only one page, but it shows the same
18 information.

19 Both of these reflect, in the lower right-hand part,
20 that from 12 a.m. to 6 a.m., the light is yellow on 163,
21 which is Providence, and it is red on Locust. And that's
22 under the category "flash time." In other words, from
23 12 a.m. to 6 a.m., midnight to 6 in the morning, there's a
24 flashing yellow light for traffic on 163 and a flashing red
25 light for traffic on Locust.

1 Defendant's Exhibits B-1, B-2, and B-3 admitted into
2 evidence.

3 - - -

4 MR. ROGERS: At this time, Your Honor, defendant
5 rests.

6 - - -

7 DEFENDANT RESTS

8 - - -

9 THE COURT: Does the state intend to call rebuttal
10 evidence?

11 MR. CRANE: No rebuttal, Judge.

12 THE COURT: Ladies and gentlemen, the evidence in
13 this case is closed. Last night, after you left, the
14 attorneys and I spent a couple of hours talking about
15 instructions, so that you wouldn't have to sit here today for
16 that discussion. I do want to give them a brief recess, as I
17 indicated before to them, before we take up instructions and
18 closing arguments. And it should be no more than ten
19 minutes.

20 The Court again reminds you of what you were told at
21 the first recess of the Court. Until you retire to consider
22 your verdict, you must not discuss this case among yourselves
23 or with others, or permit anyone to discuss it in your
24 hearing. You should not form or express any opinion about
25 the case until it is finally given to you to decide. Do not

1 read, view, or listen to any newspaper, radio, or television
2 report of the trial.

3 If the jury would be in recess.

4 And counsel may remain just briefly. I need to ask
5 you a question that relates to this matter.

6 - - -

7 The following proceedings were held out of the presence
8 of the jury:

9 THE COURT: The question that I have is: What to do
10 with the alternates when we send the 12 out to deliberate.
11 And I'm going to ask them how they're feeling or if there are
12 family problems. Some courts in the past have -- I mean,
13 we're not going to take them back to Troy. The question is
14 whether we keep them in a private place and instruct those
15 jurors not to talk about the case, in the event someone were
16 to have a heart attack or do something like that and we might
17 want to use one.

18 MR. CRANE: Yeah.

19 THE COURT: And it may be that you wouldn't agree to
20 that at all, in which case -- we're not going to take them
21 back, but we will not keep them as segregated as we might
22 otherwise.

23 MR. ROGERS: I haven't actually given it any
24 thought, Judge, and certainly --

25 THE COURT: I've never had the occasion where I had

1 to use a juror like that, but there have been judges that
2 have in this state.

3 MR. CRANE: Yeah, I think that's a good idea.

4 THE COURT: I know it's been approved by the
5 appellate courts, depending on how you keep them apart and
6 tell them not to discover it -- discuss it, and to begin anew
7 their discussions about the case. I mean --

8 MR. ROGERS: Hopefully we won't need that.

9 THE COURT: I've never had that happen. But we do
10 have two alternates.

11 MR. ROGERS: You're not -- you're not seeking my
12 assent or consent to substituting an alternate, so without
13 waiving any possible objection I might have to that, I think
14 keeping them separate --

15 THE COURT: And apart.

16 MR. ROGERS: -- and apart --

17 THE COURT: And telling those jurors not to discuss
18 the case among themselves or with others.

19 MR. ROGERS: Right. Is probably the best move. But
20 I --

21 THE COURT: Okay. Well, I --

22 MR. ROGERS: Like I say, I don't want to, without
23 having talked about it --

24 THE COURT: I'm not asking you --

25 MR. ROGERS: God knows I don't want to have retry

1 this case.

2 THE COURT: You may certainly reserve any objection
3 that you would have, if we were to have a situation where
4 someone would become ill and be unable to continue in
5 deliberations. I just don't want to let them out -- let them
6 talk to the press. If you don't care.

7 MR. CRANE: Hey, Judge. I tell you what. I'm -- I
8 understand we want to move the case along. I'm asking you
9 for 20 minutes, to get -- to get -- to look over some closing
10 items. I mean, hey, I think that's fair.

11 THE COURT: Are you saying you want a 20-minute
12 recess as opposed to a 10-minute recess?

13 MR. CRANE: Yeah. Can we get a little bit more than
14 10 minutes before we kick off a closing on this thing?

15 THE COURT: How about a compromise. How about 15?
16 Does that sound all right?

17 MR. CRANE: Well, if that's -- if --

18 MR. ROGERS: And then compromise with me and get up
19 to 17 and a half.

20 MR. CRANE: Yeah, I mean --

21 THE COURT: I have never had a jury that wanted to
22 work as hard as this jury.

23 MR. CRANE: Yeah. And we've been working --

24 THE COURT: I mean, they've been pushing us -- I'm
25 willing to work as hard as they are, but I realize I'm not

1 trying the case and preparing it like you are. And I know
2 it's difficult for attorneys.

3 MR. CRANE: And I'm only asking for 10 more minutes.

4 THE COURT: Well, why don't we see you at a quarter
5 after 2. How about that? We'll see you at 2:15.

6 MR. CRANE: Very good.

7 THE COURT: We will be in recess until 2:15.

8 (Recess taken.)

9 - - -

10 The following proceedings were held out of the presence
11 of the jury:

12 THE COURT: Mr. Crane, are you ready to proceed?

13 MR. CRANE: Yeah. I'm still kind of screwing around
14 here with these exhibits, but I'll be ready real quick.

15 THE COURT: Well, I have some instructions to give
16 the jury. Hopefully you'll --

17 MR. CRANE: That's fine, Judge. Go ahead.

18 THE COURT: Is the defendant ready?

19 MR. WEIS: We have one motion we need to take up.

20 THE COURT: All right. You may file your motion.
21 Are you wanting to argue it?

22 MR. WEIS: No, Your Honor.

23 (Motion for Judgment of Acquittal at the Close of
24 All the Evidence filed.)

25 THE COURT: Okay. Have you provided a copy to the

1 state?

2 MR. WEIS: We're going to provide them a
3 file-stamped copy, Your Honor.

4 THE COURT: All right.

5 MR. WEIS: Thank you.

6 THE COURT: The motion then is submitted without
7 argument? Yes?

8 MR. WEIS: Yes, Your Honor.

9 THE COURT: Mr. Crane, do you wish to be heard?

10 MR. CRANE: No.

11 THE COURT: The motion is overruled.

12 You may return the jury to the courtroom.

13 - - -

14 The following proceedings were held in the presence of
15 the jury:

16 THE COURT: Thank you for your patience, ladies and
17 gentlemen. I have some instructions for you, and then the
18 attorneys may argue the case to you.

19 (Instructions 3 through 17 read to the jury.)

20 THE COURT: Mr. Crane, you may address the jury.

21 MR. CRANE: Please the Court. Counsel.

22 THE COURT: If you need to use the Court's
23 instructions, on either side, I'll put them on the bench
24 here.

25 MR. CRANE: Thank you, Judge. I've got a copy.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - -

OPENING ARGUMENT

BY MR. CRANE:

Well, ladies and gentlemen, after all you've heard about Columbia in this trial, I bet you are ready to get back to Troy.

The instructions that the Court gave you are all very important. Some of them, though, are going to be where ultimately you're going to focus your attention. And those are what's called the verdict directors. Those -- remember in jury selection, when I talked about the elements that you got to find beyond a reasonable doubt of given crimes? Those verdict directors set out the elements. Okay?

Now, I'm going to start with one of the last verdict directors the Court read you. And that's the robbery charge. That's robbery in the first degree. And you remember we talked about the concept of acting in concert, where two people act together to commit a crime? That robbery is that way in the verdict director. It's both the defendant and Charles Erickson, acting together, committed this crime of robbery.

Now, the elements are going to be set out for you. There's a lot of things in all these instructions that aren't in dispute. The date. November 1, 2001. That's not in dispute here. The location, being in Boone County, that's

1 not in dispute. The victim was Kent Heitholt. There's no
2 dispute as to that. Obviously this case is about a whodunit.

3 Now, the elements of robbery in the first degree
4 require that there be some type of physical force used to
5 steal from the victim. And also that serious physical injury
6 was inflicted on the victim during the course of the
7 stealing. Okay? Well, you've seen the photographs probably
8 too many times of what happened to Mr. Heitholt. Obviously
9 serious physical injury was inflicted upon him during the
10 course of this robbery.

11 Now, what was stolen? The evidence has been, ladies
12 and gentlemen, that when they worked the crime scene, the
13 victim's watch was not on his person, not at the crime scene,
14 and never found. We've got evidence that the victim was at
15 home before he went to work. His wife Deborah testified that
16 she saw that watch. Remember, she said she gave it to him.
17 We've got a photograph in State's Exhibit 1B of the victim
18 with his watch on that day, October 31st, '01. And he went
19 back to work later and then left early morning November 1,
20 2001. There's the watch.

21 The belt is, I might add, not a charged item, but it
22 is also in this top picture, 1A, and identified by his wife.

23 Car keys were missing. Ladies and gentlemen, you've
24 heard the evidence. He was at his car. The door was open.
25 He was getting ready to leave. The keys are not at the

1 scene. The evidence is clearly, at its most basic, that his
2 watch and his keys were taken in this robbery. Those items
3 were taken by the use of force, and serious physical injury
4 was inflicted on the victim.

5 You've heard the testimony of Chuck Erickson, ladies
6 and gentlemen. He said he was there with Ryan Ferguson, and
7 they, acting together, engaged in those elements and
8 completed that robbery in the first degree.

9 Now, that's going to be one of the last ones you're
10 going to see. I'm going to start back with the murder
11 charges.

12 The first verdict director for murder is murder in
13 the first degree. And remember, I told you in jury selection
14 that murder in the first degree has an element of
15 deliberation. Not only do you kill somebody, but you do it
16 after deliberation. Cool reflection on the matter, for any
17 period of time, no matter how brief. Okay?

18 Now, how was he killed? You heard the evidence.
19 The medical examiner testified what caused Mr. Heitholt's
20 death was that belt around his neck. You've seen the
21 photographs. You've seen the imprint. You've seen the
22 buckle.

23 That belt was removed from Mr. Heitholt's pants.
24 During the course of this murder, Mr. Heitholt, down, his
25 belt is ripped off. That's an act done in contemplation of

1 putting it around his neck. Rip it off of him. The belt
2 loop's ripped. Then affix the belt around the neck. And
3 then yank up on it hard enough, not only to kill him,
4 strangle him to death, which remember, it took some time
5 before that could completely be accomplished, but it's so
6 hard that it broke his neck.

7 Ladies and gentlemen, that was intent to kill, after
8 deliberation. And you've heard the evidence, ladies and
9 gentlemen. That was done by Ryan Ferguson. The defendant in
10 this case. Murder in the first degree is the appropriate
11 charge for you to come back with on a guilty verdict. As is
12 the robbery.

13 Now, there are other instructions. In the event you
14 should decide -- and by no means talking about this do I mean
15 you should. Should you, though, decide that for some reason
16 there is no deliberation after all that conduct with the
17 belt, then you have two other options.

18 One option is what's called conventional murder in
19 the second degree. That doesn't have deliberation as an
20 element. That's just that the defendant knowingly caused the
21 death of the victim in this case by strangling him. Okay.
22 So there isn't a deliberation element in there. All right.

23 Now, the second form of murder, as you go on through
24 these instructions, that you may consider, is that felony
25 murder. And remember, I talked about that, where you got the

1 wheelman in the robbery, and his buddy goes inside and shoots
2 somebody? And the wheelman can be charged with the robbery,
3 because he was helping his buddy on the murder -- on the
4 robbery, but also charged with murder if his buddy shoots
5 somebody. Do you remember all that, when I was talking to
6 you about that in jury selection? Okay. That also is an
7 option in here for you to consider.

8 But the state submits to you that this case does
9 have deliberation, and the appropriate thing to convict the
10 defendant of in this case is something that he did do. And
11 he did commit murder in the first degree and robbery in the
12 first degree.

13 Ladies and gentlemen, another instruction talks
14 about the burden of proof. Beyond a reasonable doubt. And
15 there's a part of that instruction that says, A reasonable
16 doubt is a doubt based upon reason and common sense, after a
17 careful and impartial consideration of all of the evidence in
18 this case.

19 And you all have been very attentive. You've heard
20 it. You've listened to it. You've carefully considered the
21 evidence in this case. And you're also equipped with reason
22 and common sense.

23 Ladies and gentlemen, if you look at this case,
24 let's talk about what Chuck Erickson says and for a moment
25 compare it to what the defendant testified to yesterday.

1 If you noticed, ladies and gentlemen, the events of
2 the night that Chuck Erickson described for you were
3 virtually, without any exception, agreed to by the defendant.
4 He picked him up at Swilling's. He was driving his Mercedes.
5 He took him over to Erickson's house. Remember, he agreed
6 with that. They left Erickson's. They went to George's.
7 They met his sister. They met Christine Lo, the Asian
8 friend. They got into the bar, with the assistance of the
9 older girls. They drank in the bar. Even what they drank.
10 Amaretto Sours. Chuck Erickson says that they ran out of
11 money. The defendant testified that he spent \$12 total on
12 drinks. He gave Chuck Erickson \$10. And they paid for the
13 cover charge. And we added that up. He said he had 30 bucks
14 on him. That was 30 bucks. They're in agreement. They're
15 in agreement that they were together at George's.

16 You know, ladies and gentlemen, there is no evidence
17 at all that Chuck Erickson did this crime on his own, by
18 himself. That couldn't have happened. Do you remember the
19 map? Both of them agree that at some point Ferguson took
20 Erickson home. There's no way that Erickson can make it back
21 down to the Tribune, commit this crime by himself. Further,
22 do you remember what the janitor said? In their most basic
23 interpretation, two young white males. Two.

24 Now, their -- their conduct inside the bar. They
25 say they pretty much hung together. Saw each other off and

1 on. They left the bar. Together. No dispute, was there?

2 They left the bar together.

3 The location of the car. First and Ash. They're in
4 agreement. Right?

5 And right there, what happens? Charles Erickson
6 tells the truth. And that was what led to this offense.
7 That they left the car, with that weapon, and they went down
8 to the Tribune and committed the crime.

9 The description of the scene by Chuck Erickson,
10 consistent with the scene. Again, in its most basic sense,
11 ladies and gentlemen, the homicide, the beating, and the
12 strangulation of the victim occurred on the driver's side of
13 the victim's car. It appears, it was not disputed by the
14 defense, through their expert, that the victim was standing
15 by his car, with the car door open. And there was blood
16 inside the car. Consistent with Chuck Erickson standing
17 beside the car when he delivered that first blow.

18 Now, the defense expert -- there was maybe some back
19 and forth a little bit about whether something was mud, what
20 have you, but he agreed the victim went to: Standing, down,
21 knees, finally on the pavement. Same as Jeff Nichols, the
22 detective that worked the crime scene. And consistent with
23 Chuck Erickson.

24 Chuck Erickson said, after he was down -- remember,
25 he heard that moan? By the way, there wasn't any police

1 reports for him to read about that moan of the victim.
2 That's burned into his memory.

3 The victim's down. He feels sick. He drops the
4 tire tool. He goes and sits down at the front end of the
5 vehicle. During that period, Charles Erickson's, "Hey, I
6 didn't -- wasn't looking at that point." Whether or not the
7 defendant struck him additional blows, he had the weapon over
8 there. It's possible. Charles Erickson can't account for
9 that period of time. But when he looked up, what was going
10 on? What did he say before he talked to the police? That he
11 saw Ryan Ferguson over the victim, strangling him.

12 MR. ROGERS: I'm going to object to that. There's
13 no evidence whatsoever that Mr. Erickson ever said that
14 before he talked to the police.

15 MR. CRANE: Judge, there's -- our -- we've talked --
16 the witness, Charles Erickson, testified as to saying that to
17 Art Figueroa and to Nick Gilpin, and he told that to the
18 Columbia police.

19 THE COURT: The jury will recall what the evidence
20 is.

21 MR. CRANE: I've only touched on a few of the
22 things, backing up, that defendant and Chuck Erickson agree
23 on. I mean, they weren't wearing costumes when they were at
24 George's. It goes on and on and on. The agreement. Until
25 we get to that one period of time.

1 Defense is arguing that he didn't have a gap at all.
2 That he just imagined this occurrence. Why would anybody do
3 that? It wasn't suggested to him.

4 You know, ladies and gentlemen, they can't tell
5 Chuck Erickson what he thinks. What's in his mind is his.
6 And he remembers. No matter how hard they try to convince
7 him otherwise, he knows. And it was eating at him. And just
8 like the defense expert testified, he put it out of his mind,
9 because it was painful to think about. And he couldn't do
10 it. And he remembered. And he told people about it.

11 And then the police got onto it. And he talked to
12 them. And no, he couldn't remember every detail. And yes,
13 some things came back to him. Some things didn't. You
14 remember all the witnesses that testified in this case? That
15 said they had forgotten things about that night? Or about
16 the past? And they remembered it again when something
17 refreshed their memory? I mean, that goes from anybody from
18 the gal, the 16-year-old that was in the bar; Kelly Ferguson;
19 the defendant; even Dr. Loftus, remembered a fact they'd
20 forgotten when they looked at something. A record or a
21 photograph. But that's nothing. No big shock to you.
22 That's just the way it is when you're a human being.

23 The defense wants you to think that if there is
24 something that he forgot, and then remembered again, that the
25 whole essence of this event can't be believed.

1 The defense expert today testified that the core of
2 that traumatic event, once recalled, due to a -- she called
3 them retrieval cue. I was calling it a trigger before that.
4 The core thing. The two cars hitting each other. Somebody
5 being shot. That's what you remember. You may not remember
6 whether the light was flashing or solid red, but, by golly,
7 you remember that event. And you remember it more when
8 you're a participant. Even though you've tried to forget it.

9 The janitors. Again, at its most basic level, two,
10 not one, two people on the driver's side of the car. Okay?

11 There's no dispute that the time was after Kent
12 Heitholt had gone out and before 2:26. Remember now.
13 Remember that time thing. Kent logs off his computer at 2:08
14 and obviously leaves a few minutes after that. The
15 defendant's last phone call of the night, even though he
16 couldn't remember who he called, couldn't remember that when
17 he talked to the police, was at 2:09. Do you remember how
18 long it takes to get from First and Ash down to the Tribune?
19 3 minutes 20 seconds. 3 minutes 20 seconds. Walking at a
20 regular pace. 2:09 cell phone call. 3 minutes 20 seconds;
21 you got to 2:26 to do this and get out of there.

22 Two; not one. Males. Not women; males. Two. And
23 not Hispanic, not African-American, not Asian, not Indian.
24 White males. Two white males. What else? Two young white
25 males. Late teens, early twenties. And then -- that's the

1 basics. That's the basics.

2 You all get back there in deliberation, holler for
3 these exhibits. Take a look at this second composite. You
4 can take a look at the first one too. Done by Shawna. She
5 said, "This is the guy that yelled." You all take a look at
6 that when you get back there, will you?

7 And Jerry Trump. Jerry Trump, in front of you all,
8 in court, said, "I saw those photos, and they were the ones."
9 And in court, he pointed him out.

10 Ladies and gentlemen, you know, if Chuck Erickson
11 was wanting to get back at Ryan Ferguson for something, we
12 sure haven't heard anything about it. Neither one of them
13 said they had any problems with each other. Neither one of
14 them. Now, Ferguson tried to distance himself from Erickson
15 yesterday, but then he admitted, "Well, yeah, earlier that
16 night I called him. And yeah, we hung out together. No
17 problem."

18 And further, ladies and gentlemen, if Chuck Erickson
19 was going to make this up to get back at Ryan for some
20 unknown indiscretion, he sure didn't do himself any favors,
21 did he? 25 years in the penitentiary. Talk about cutting
22 off your nose to spite your face. Nobody would do that,
23 ladies and gentlemen. He remembers.

24 You'll remember the route.

25 One thing I want to ask you to do, ladies and

1 gentlemen. I'll have a chance to visit with you a little bit
2 longer in a minute. One thing I'm going to ask you. You
3 know, I was talking about the exhibits going back. You're
4 going to have the memory of Erickson's testimony in front of
5 you in your memories, but you won't have a videotape of that.
6 If you've got the videotapes of what Erickson talked to the
7 police, will you also remember his testimony to you,
8 collectively? Will you remember what he said and how he
9 appeared before you? And will you also remember the
10 defendant's testimony when you go back there? Because
11 remember, I asked you during jury selection, said, "You know,
12 if anybody's got a problem, anything from a backache to
13 worrying about something, tell me now," because we're going
14 to have to have everybody's memories, listening, retaining,
15 because when you go back there in the deliberation room,
16 yeah, you're going to have exhibits potentially, but it's
17 just going to be what you remember, in some cases, on that
18 testimony. Will you take back those memories of his
19 testimony? He was up there for, what? Eight hours?

20 MR. ROGERS: May it please the Court.

21 THE COURT: You may proceed.

22 MR. ROGERS: Counsel.

23 - - -

24

25

1 CLOSING ARGUMENT

2 BY MR. ROGERS:

3 Ladies and gentlemen of the jury, on behalf of Ryan
4 Ferguson, his defense team, his friends and his family, I
5 want to express our appreciation for the sacrifice you have
6 made coming far from your homes to hear a case about a tragic
7 situation that didn't happen in your community, but happened
8 here.

9 To the friends and family of Kent Heitholt,
10 co-workers, I want to express, on behalf of Mr. Ferguson, the
11 defense team, his friends and family, our condolences for
12 your loss. We feel your pain. Ryan Ferguson did not cause
13 that loss, but he feels it. And from everything that we have
14 heard, it is a great loss indeed for this community.

15 If I say anything that you resent or disagree with,
16 please, it is not my intention to cast any aspersions on Kent
17 Heitholt. I have none to cast.

18 You have heard a lot about memory in this last week.
19 And so let's look at our memories of a week ago, when we met
20 for the first time in the courthouse in your community, in
21 Troy.

22 Each one of you assured us then that you would
23 follow the Court's instruction. And especially we talked
24 about the principles of law in Instruction Number 4. And the
25 reason we spent such a long time on that is because that's

1 the cornerstone of our legal system. It's what makes America
2 different than Afghanistan or Iran or Korea or someplace. It
3 says -- I'm going to read just parts of it, because my time
4 is limited. "The defendant is presumed to be innocent,
5 unless and until, during your deliberations upon your
6 verdict, you find him guilty. This presumption of innocence
7 places upon the state the burden of proving beyond a
8 reasonable doubt that the defendant is guilty." That is what
9 you all promised you would do before we left Troy. That is
10 what we ask you to do today.

11 And if you do that, this is not a difficult case.
12 This is not a close case. This is not a troubling case, from
13 the point of view of your decision. Of course it's troubling
14 when we know what happened to Kent Heitholt. But this case
15 is open and shut in terms of: Has the state met its burden
16 of proof?

17 You know, what do you do if you have somebody who
18 claims to have a memory of an event? How do you tell if that
19 is a true, accurate memory or a false memory? You can look
20 at outside indicia of how things may have been placed there.
21 You've seen a whole lot of things like that. But underneath
22 it all, what did Dr. Loftus say? And I don't think the state
23 disagrees with it. You look to the external evidence. And
24 so let's look to the external evidence.

25 Let's look, first of all, to the physical evidence.

1 Because the physical evidence, that's what the state spent
2 half of their time on. Physical evidence. And you heard a
3 lot of evidence that details in some -- to some extent what
4 happened there at that scene. You heard evidence about the
5 relationship of places together. You saw physical evidence
6 that had been tested by the Columbia Police Department, with
7 their luminol tracking; by the Missouri State Highway Patrol
8 laboratory; by the FBI laboratory. Not one iota of physical
9 evidence in this case indicates that either Chuck Erickson or
10 Ryan Ferguson was ever present at that scene or ever had any
11 contact with Kent Heitholt or ever had any contact with Kent
12 Heitholt's car.

13 The scientists at the laboratories selected hairs to
14 be examined. And they selected those which were the most
15 dissimilar to the ones that they had that they knew were from
16 Mr. Heitholt. Of those hairs that they examined further,
17 they found one which they could definitely say did not come
18 from Kent Heitholt. That was a hair which was recovered from
19 the evidence bag placed around his I believe right hand.

20 That hair -- and by the way, they put the evidence
21 bags around the hand for the purpose of recovering trace
22 evidence. That's what the bags are for. That's what they're
23 used for. And the whole idea is: Before we move this body,
24 let's make sure that anything that falls off the hand is
25 caught. It is ludicrous to suggest that that hair was

1 somehow already in the bag. It is even more ludicrous to
2 suggest that of all of the hairs and hair fragments that
3 ended up in that bag, all the rest came from Kent Heitholt
4 just by coincidence, and this one came from someplace else
5 unrelated to the crime scene. That hair was in Kent
6 Heitholt's hand when he died. Now, I don't know. I went to
7 the rest room after lunch. I washed my hands. I don't have
8 any hairs. I didn't have any hairs on them when I washed my
9 hands. Except the ones that are growing there on the back of
10 my fingers.

11 Yes, we do live in a -- you cannot show to a
12 certainty, by excluding everyone else that Mr. Heitholt had
13 ever come into contact with or that has ever been anywhere
14 where he's ever been, that that hair came directly from the
15 crime scene, but why did they test it? They tested it
16 because it was a hair in his bloody hand at the time of his
17 death that wasn't his.

18 And sure, there are a lot of cases, maybe nine out
19 of ten, when they don't have any hairs from the suspect that
20 are found on the victim. But here we have a hair that is
21 found on the victim. A hair that is not his. Is it just a
22 coincidence that that hair happens to be found there at the
23 time of his death? That every other hair that has been
24 tested that was found on him, on his clothes, near him, is
25 his?

1 Let's talk about what else does the physical
2 evidence show? Because, in fact, the way they handled the
3 scene that night, the prosecutor made it look as if they were
4 doing some sort of Keystone Cop routine and everybody was
5 bent over, trying to contaminate the evidence by shedding
6 hair and stuff. That's not the way they did it. They did it
7 professionally. The first officer there securing the scene.
8 Aside the from the paramedics, they kept everybody else away.
9 The paramedics are trained. They're professional. There's
10 no indication that they would be depositing hairs. Besides,
11 who has the burden of proof? If, in fact, it's a paramedic's
12 hair, "Okay, state, you've got the burden. Prove it."

13 MR. CRANE: Judge, I'd argue equal opportunity with
14 respect to the hair.

15 MR. ROGERS: We don't have a crime lab.

16 THE COURT: The objection is overruled.

17 MR. ROGERS: Thank you.

18 We don't have a crime lab. And we don't have a
19 burden. What they're attempting to do is create a smoke
20 screen and argue away a powerful piece of exculpatory
21 evidence.

22 Fingerprints are a little less obviously connected
23 to the murder. But there are fingerprints which are found.
24 Useable fingerprints. Fingerprints of value. Whatever you
25 want to call it. And unknown. Not the fingerprints of Kent

1 Heitholt; not the fingerprints of his family; not the
2 fingerprints of any police officer whose fingerprints are on
3 file; not the fingerprints of anybody whose fingerprints are
4 in their computer system; and certainly not the fingerprints
5 of Erickson; and absolutely not the fingerprints of Ryan
6 Ferguson.

7 What else do we see? Well, we see the blood stain
8 spatter, whatever you want to call it, evidence. And that is
9 significant. And I will partially agree with Mr. Crane, that
10 there's not a whole lot of dispute on many issues between
11 Mr. Nichols, their witness, and Mr. Singer, our expert.
12 Nichols was there. Singer had only the photographs and
13 reports. But one thing that Singer says -- and it's not
14 disputed by Nichols; he just doesn't say it as forcefully --
15 at least one and probably more of the blows that were struck
16 on Kent Heitholt were struck while his head was at or near
17 the ground.

18 And remember what we went through with this
19 photograph of the hubcap and tire and the upwards angle of
20 the spatter on some of those stains; the fact that the --
21 there's kind of a vertical angle on some, and this obviously
22 large transfer stain?

23 So what does Chuck Erickson say here in court when
24 he claims now that he remembers everything, because he's
25 accepting responsibility? What does he say? He says, this

1 time, "I hit him. I don't know how many times I hit him. I
2 remember I hit him, and he went to his knees. And he made
3 this moan. This noise that I'll never forget. And it made
4 me sick. And I hit him one more time, and he went to the
5 ground. I dropped the implement and went over and sat on the
6 curb of the retaining wall" or the parking lot block,
7 depending on which time he said it, "and threw up."

8 Where's the other blow while the guy's on the
9 ground? Or the other two blows or three? The assault as
10 described by Charles Erickson is not borne out by the
11 physical evidence, the blood stain pattern analysis,
12 whichever account you give.

13 And when the state says, "Oh, it's consistent with
14 the scene," that's just not so. It is not consistent. None
15 of his accounts are consistent. And certainly the account
16 that he gave initially, where he said, "I only hit him once,"
17 the account that he gave later, where he says, "I went into a
18 rage and hit him," none of these are consistent with the
19 scene.

20 Let's talk about other aspects of the physical
21 evidence. Because you remember, when Erickson first was
22 questioned by the police and he is driven around by Jeff
23 Nichols and they're videotaping the drive-around, talking
24 particularly with his exit from the scene, he says: They
25 leave the parking lot; they come in this direction, past this

1 service station, the Break Time, across Providence, cutting
2 through here. And you see -- saw where he was pointing out a
3 big wooden fence. He said, "No, I don't think that's what I
4 climbed over. I thought it was this retaining wall, with the
5 railroad ties." That's what he said when he was driving
6 around with Jeff Nichols.

7 But then what do we know? We know that he got
8 police reports. And the police reports had two different
9 things in them. They had not only the account of Jeff
10 Nichols, of how he, on two separate nights, followed the
11 luminol trail from the alley south to Walnut, and then from
12 Walnut south to Broadway; they also had the report that Jeff
13 Nichols was ordered by Sergeant Monticelli to verify with the
14 luminol the report of Officer Albers and the dog. And you
15 recall that Erickson had access to that report as well.

16 That -- you recall Officer Nichols testifying that
17 he was sent to the area behind this Flat Branch Brewery
18 place, to process that for luminol, because he was verifying
19 where the dog had gone. And you recall he went to this area
20 that's kind of off the map here, by McDavid Hall, which is a
21 part of the University of Missouri, where he testified that
22 the trail that he was supposed to be verifying had ended.
23 The scent trail followed by the dog. And he said that he
24 processed with luminol, not only the steps leading up to that
25 building, but also the interior of that building where the

1 scent trail had ended. Those were with negative results.

2 Then he came back the next night with more luminol.
3 Did from Walnut to Broadway. And he said that by the time he
4 got to Broadway, the luminol trail was exhausted. This was
5 three days later, after the dog initially followed, not a
6 trail of droplets which chemiluminesced, but a scent trail
7 with the nose of a trained canine.

8 So that information is given to Erickson. And what
9 does he do? Well, he accommodates part of it. He follows
10 the luminol trail now in his October 1st account. The
11 account where.

12 He says, "Okay, government. I'm going to take my
13 lumps. Give me my 25 years. I'm going to tell you the truth
14 finally." He says, "Okay. I went over here. I went behind
15 the Broadway Diner." But then he comes, not where the dog
16 went, and we don't know, because there's no luminol here,
17 comes down across the creek, places where Nichols had driven
18 him the day before -- or not the day before. The day of his
19 arrest. Places where Nichols had driven him. Instead of the
20 Break Time, now he says, "It's the Phillips 66," even though
21 he specifically excluded the Phillips 66. And then he says,
22 "We went back to By George's this way."

23 Well, let's wait a minute. What is there, other
24 than the say-so of Charles Erickson, to give any credence to
25 that account at all? First of all, why does he have to get

1 from up here where the dog went down here to the Phillips 66
2 station? Because he's told the police, "Oh, yeah. I saw
3 this guy, Dallas Mallory. Dallas Mallory was there. He was
4 wearing the same police officer uniform he wore at the
5 Halloween party. And he's sitting there at the red light."
6 Remember that?

7 And what does he tell Short? He says, "It was the
8 light by the Break Time." And what does he tell Nichols? He
9 says, "I think it was this light right here. But it might
10 have been this one here at Walnut." And what does he say on
11 October? "Oh, I'm sure it's here. Providence and Locust.
12 Dallas Mallory stopped at the red light." That's what he
13 said under oath at the deposition. Do you remember when I
14 read him the questions and the answers? And he said, "Yep,
15 that's what I said"? Stopped at the red light. Comes up to
16 him. "Oh, me and Ryan, we just beat a guy down back there.
17 Can I have a hit of your marijuana zeppelin?"

18 Well, wait a minute. What corroborates that? Where
19 is Dallas Mallory.

20 MR. CRANE: Judge, I'll object. Equal opportunity
21 to call Mr. Mallory.

22 MR. ROGERS: We don't have any burden of proof.

23 MR. CRANE: I didn't say that. I said they have an
24 equal opportunity to call him as a witness, Judge. They
25 can't comment on our --

1 MR. ROGERS: We can certainly comment on their lack
2 of corroboration of their main witness.

3 THE COURT: That is a fair argument, and in that
4 limited area, the objection's overruled.

5 MR. ROGERS: For that matter, where's John Short?
6 The lead detective in the case.

7 MR. CRANE: Judge, I'm going to have to object
8 again. Equal opportunity. The defense could call John
9 Short.

10 THE COURT: The objection's overruled.

11 MR. ROGERS: If there's anything at all that makes
12 you wonder whether it corroborates Charles Erickson, it's not
13 our burden to corroborate Charles. It's their burden. He's
14 their witness. They're supposed to prove that he's telling
15 the truth.

16 Where is anybody in the whole round world, other
17 than Chuck Erickson, who claims that By George's stayed open
18 past closing time Halloween 2001? Where is there anybody,
19 under 21, over 21, bouncer, bartender, patron, police officer
20 outside, anybody in the whole round world to say, "Oh, yeah,
21 just on this particular night, this place stayed open till
22 4:00 in the morning," when it's supposed to close at 1. And
23 that at 4:00 in the morning, there's a police officer outside
24 making sure that, two and a half hours late, they're having a
25 peaceful exit.

1 You know, we did bring you some witnesses. We
2 brought you witnesses like Melissa Griggs, who was in a bar
3 under age. Still is. Probably is even as we speak. She's
4 getting closer, though.

5 She was there. She saw Chuck. She saw Ryan. She
6 knows them both. She's not a particularly close friend of
7 either of them, but she talked to them. She had been at the
8 same party earlier, at Ryan Swilling's house. Ryan Swilling
9 is her former boyfriend.

10 She stayed a little later, because, by the time she
11 got to the bar, she knew that Ryan had been -- Ryan Swilling
12 had been arrested for having the underage drinking at the
13 party. She says they closed at 1:30.

14 We had Kris Canada, a convicted trespasser, who said
15 that the bar always closed at 1:30. They never stayed open
16 late, even for Halloween. He never worked a Halloween where
17 they had a private party after hours. That what they did --
18 he did, as the back bartender, was close up his bar. The
19 lights come on around 1:15. The bouncers start moving
20 through to get everybody out by 1:30. He cleans up his bar.
21 He takes his liquor up to the front bar, where it's kept. He
22 wipes out the ashtrays.

23 By the way, obviously Chuck had not spent too much
24 time in bars, because he claims they went outside to smoke.
25 I don't spend much time in bars either these days, but I have

1 never been in a nonsmoking bar in the State of Missouri. Let
2 me put it that way. And we have Mr. Canada cleaning out the
3 ashtrays.

4 We called the witness. We called Kelly Ferguson.
5 We called Holly Admire.

6 And let's look at the time line the way things
7 really happened. 1:15 the lights come on. By -- before
8 1:30, customers are out. There's no dispute that Chuck and
9 Ryan left with the crowd. The crowd is leaving between 1:15
10 and 1:30. They go to Ryan's car. They drive to Chuck's. He
11 drops Chuck off in front of his house. He goes to his house.
12 Now it is 1:37, 1:41, something like that. We know it's
13 almost 1:42, because that's when he calls Holly Admire. For
14 the second time. Or third or something. Not the first time
15 that night, but the first time after By George's. And we
16 know that because it's on Ryan's cell phone record and it's
17 on Holly's cell phone record. That that's when it happened.
18 They don't remember when it happened, but the records show
19 when it happened. And the records are evidence. What the
20 records don't show was where Ryan was when he made it.

21 But let me ask you this: Is it reasonable to think
22 that if you are told to leave the bar, and you do, you then
23 make a bunch of cell phone calls for some 20, 30 minutes, 40,
24 and then you decide, "Okay, even though the bar closed 40
25 minutes ago, let's go get some money to go back to the bar"?

1 It doesn't make a whole lot of sense.

2 But it makes perfect sense that Charles Erickson is
3 left at his house sometime before 1:40; that Ryan Ferguson
4 gets to his house, not that far away, sometime around 1:40;
5 that Ryan Ferguson then makes the phone calls that are shown
6 on his cell phone records, ending with a call to a male
7 friend that he doesn't remember who, and doesn't remember the
8 number on the records. A male friend at 2:09. And I think
9 -- and I'm a little confused on this. You remember the
10 evidence. He may have said, "I called, but I don't know. I
11 don't think I actually talked to anybody." Whatever.
12 Anyway, that call is at 2:09.

13 Now, yes, if that call is made while they're at By
14 George's, then there's no time to drop Chuck off and get
15 home, et cetera, before the murder. But if Chuck was dropped
16 off at By George -- at his house half an hour before, before
17 the phone call to Holly Admire, Ryan has no idea what Chuck
18 did after he was dropped off at his house. And neither do
19 we, except based on what Chuck tells us. So it's not
20 undisputed that Chuck had opportunity to get back downtown.
21 He's got half an hour. It takes 14 minutes, or whatever
22 Mr. Hawes said.

23 Compare the manner while -- look at the instructions
24 on how you're supposed to judge the credibility of witnesses.
25 And that's Instruction Number 1, the first instruction that

1 was read to you by the Court before the case, so you'd have
2 some rules to play by when the -- when you heard the
3 testimony. And it says, in the third paragraph, "In
4 determining the believability of a witness and the weight to
5 be given to testimony of the witness, you may take into
6 consideration the witness's manner while testifying; the
7 ability and opportunity of the witness to observe and
8 remember any matter about which testimony is given; any
9 interest, bias, or prejudice the witness may have; the
10 reasonableness of the witness's testimony considered in the
11 light of all of the evidence in the case; and any other
12 matter that has a tendency in reason to prove or disprove the
13 truthfulness of the testimony of the witness."

14 Now, you saw Ryan Ferguson testify. And he does
15 have an interest in this case. Depending on your decision,
16 he will go home to his family, a little late to go take the
17 test, but he'll get back in school and get on with his life.
18 Or he will be incarcerated, imprisoned, for the rest of his
19 life. So he has an interest.

20 But you saw his testimony. You saw his manner. You
21 saw what he said. He didn't try to guess what Mr. Crane was
22 trying to get at. He wasn't evasive. He wasn't combative.
23 He was telling things as best he could.

24 And you saw his testimony. And based on that alone,
25 you should know that he is not guilty. His testimony has

1 been corroborated, to the extent it can be, after all these
2 years, with the cell phone records, by his sister Kelly, by
3 Melissa Griggs, Kris Canada.

4 Think of the other things. The same day they were
5 questioning Ryan Ferguson -- excuse me, Chuck Erickson. And
6 you saw those videotapes. And we'll talk about them in some
7 length in just a minute. They also went and arrested Ryan,
8 in Kansas City, where he's going to school. They questioned
9 him in Kansas City; they questioned him all the way in
10 between Kansas City and Columbia; they questioned him again
11 in Columbia.

12 There is absolutely no evidence whatsoever that Ryan
13 Ferguson has ever in this world told anybody, any place, any
14 time, that he was involved in the murder of Kent Heitholt.
15 None. He's never said it, 'cause he never did it. And you
16 saw the way that Nichols went after Erickson when Erickson
17 was trying to express his uncertainty. Look at it again.

18 (Excerpt played.)

19 MR. ROGERS: If he goes that hard after Charles
20 Erickson, who he views as somebody who just walks in off the
21 street to confess to a murder, what do you think they're
22 doing to Ryan Ferguson? Ryan is one of the 75 percent who
23 has a strong enough memory that he's not going to accept the
24 false memory. But you saw how they treated Chuck. You
25 haven't seen the videotapes of how they treated Ryan.

1 The officers who interrogated Ryan Ferguson have not
2 been called. By either side. And they have not been called
3 by the side that has the burden of proving beyond a
4 reasonable doubt that Ryan Ferguson committed this murder.

5 What else? Well, let's look at Chuck Erickson.
6 You've seen his story change. That very day it changed to
7 fit detail that he was fed by the police. And you can look
8 at these videotapes on the DVD player in your deliberations
9 if you want to. Those videotapes are in evidence. You can,
10 again, see how it changed. But it was pointed out pretty
11 much for several hours during the examination of Erickson and
12 other witnesses.

13 What else has changed, after he gets the police
14 reports? Well, he finally figured out -- oh, by the way,
15 when you look at those videotapes, never once does any police
16 officer interrogating Erickson ever let him know what time
17 the murder took place. If he had said, "We left during the
18 evening and came back and left By George's at closing time,"
19 and they had said, "Wait a minute, closing time's 1:30, the
20 guy's still alive and well," we might not be here. And they
21 never, ever mentioned the time the bar closed or the time of
22 the murder to Erickson, until later on when he gets the
23 police reports.

24 Then he goes back in October. And again here in
25 court. He's got a problem. Because now he understands,

1 unlike the videotapes, where he's thinking, "Ryan must have
2 taken the wallet. After all, it was a robbery. You do a
3 robbery to get money. Money is in a wallet. He took the
4 wallet." But then he has been told, by October: "No wallet
5 missing. Wallet's in the car." The guy didn't keep his
6 wallet on his person; he kept it in the car. "Oh. Wait a
7 minute. I already said we went back and drank. Didn't have
8 any money; went back and drank. Got to come up with
9 something." Then for the first time we have the notion:
10 "Oh, Ryan gets back there, gets into the bar, which we go
11 back into, knowing we don't have any money, because there's
12 no wallet involved, we're going in the bar anyway to drink
13 some more, knowing we don't have any money, but inside the
14 bar, opens up Ryan's wallet, "Oh, lo and behold, here's
15 another \$20 bill I forgot I had." Give me a break. Give us
16 a break. Give the criminal justice system and the search for
17 the truth a break.

18 What else does he do to change his story? Well,
19 like Mr. Crane pointed out when he examined Ryan Ferguson.
20 The day Ryan's arrested, Ryan didn't sit down and stop in the
21 middle of the interrogation and being questioned by police
22 about this and that and say, "Oh, wait a minute. I'm sure I
23 made some cell phone calls. I'll have cell phone records.
24 Those cell phone records will show that I was talking on the
25 phone after we left By George's," and et cetera. He didn't

1 say that. But by the time -- and you'll notice also, nothing
2 on any of the March 10th interrogations of Chuck Erickson in
3 any way mentions Ryan making cell phone calls after leaving
4 By George's. Either time. Nothing.

5 So what happens? Show up in October. Lo and
6 behold, "He stopped. We went out there. He was talking on
7 the phone as we walked to the car. He was talking on the
8 phone in the car. Well, he hung up the phone and we went and
9 did the crime." That is false. I don't think it's a false
10 memory, but it's false. And that is something which has a
11 tendency in reason to disprove the truthfulness of Chuck
12 Erickson.

13 Think of the most significant disproof of Chuck
14 Erickson. He didn't stop in October. He came right in here,
15 and on the witness stand, having reviewed police reports,
16 having met with prosecutors, having found out that Michael
17 Boyd left in the red car, he improved his story. For the
18 first time now he said, "Oh, we got there. We saw Heitholt.
19 We were going to go do it, but then some other guy came out,
20 walking around the parking lot, doing stuff, and so we hid
21 behind the Dumpsters until the other guy got in his red car
22 and left." Do you remember? "Can you describe that
23 individual?" "Oh, he was just a regular, you know, a regular
24 white guy. Regular height. Regular build. Regular dark
25 hair. Middle-aged." A regular, white, middle-aged

1 30-year-old black man. That was the evidence.

2 That's not confabulation. That's not false memory.
3 That's not suggestion. That is a damned lie. And what does
4 he say? "But I wouldn't lie. I wouldn't lie. Oh, I'm
5 taking responsibility. I wouldn't lie." He would rather go
6 to prison for 25 years, assuming that he at all believed
7 Mr. Crane's offer to dismiss it if he said it wasn't right,
8 than to admit that he talked himself into this case; that he
9 was confronted by Jeff Nichols with the choice of: You're in
10 it now, and you're going to either stay in it worse, or put
11 it on Ryan Ferguson.

12 You heard me ask him about his conversations with
13 his father, where his father -- before they ever saw the
14 evidence, before they ever know what the videotapes are like,
15 before he's had the ability to discuss them with his lawyer
16 and point out, "Hey, I was trying to tell them I didn't do
17 it," his father is telling him, "Look, you're going to get
18 twice as much time if you don't cooperate. If you don't come
19 up with some details. You got to increase your value. We're
20 not going to pay for Mr. Kempton if all you're going to do is
21 plead guilty. We'll get you the public defender."

22 This is the man that Shawna Ornt says looks like the
23 person she saw that night. The best she could do. 8.5 on a
24 scale of 10. It doesn't look like Ryan Ferguson. It doesn't
25 look like Chuck Erickson.

1 CLOSING ARGUMENT

2 BY MR. CRANE:

3 Not one time during that argument did you ever hear
4 why would Charles Erickson tell his friends on two separate
5 occasions that he was the one that beat the victim and Ryan
6 Ferguson was the one that strangled him on the Tribune
7 parking lot and that he yelled at a cleaning lady to go get
8 help on Halloween 2001 after they had left George's. Why
9 would he do that?

10 MR. ROGERS: Objection, Your Honor. That misstates
11 the evidence. There's no evidence from Mr. Erickson or
12 anybody else that those lies were told to anybody.

13 THE COURT: The jury will remember that evidence.

14 MR. CRANE: Why? The state can answer that.
15 Because he did it. With Ryan Ferguson. They never answered
16 that. They want you to think that this kid just walks in and
17 says, "I did it, and gosh, now I'm going to continue to talk
18 about it, I'm going to get an attorney, eight months later
19 I'm going to talk about it some more, and then I'm going to
20 plead guilty and go for 25 years." You know, ladies and
21 gentlemen, when Charles Erickson testified before you, this
22 jury, and after pleading guilty he testified before you all,
23 he was certain. He was under a grueling cross-examination.
24 He was certain. Why? Why? Because he did it, ladies and
25 gentlemen.

1 A little bit response to some of the arguments by
2 the defense. You remember all that hair stuff? I counted in
3 opening statement -- and, you know, I don't mean to denigrate
4 Mr. Rogers at all. He's a smart guy, doing his job. But he
5 told you five times, I counted them, five times in opening
6 statement that the evidence would be that there would be a
7 bloody hair in the bloody hand of the victim that wasn't
8 Ferguson's or Erickson's or the victim's. Okay?

9 Number one, ladies and gentlemen, and we went
10 through excruciating detail on this, there's no evidence that
11 that hair was ever in his hand. And there was no evidence
12 that it was bloody. Think about that. Think about that when
13 you go back there.

14 Fortunately, unfortunately, however you want to look
15 at it, it's reality. A bunch of people showed up at the
16 scene. After his death.

17 Robert Thompson, remember him, Russ Baer, they run
18 out there, they're turning him over, they're checking his
19 pulse, shaking him, et cetera. They get him turned over.
20 Police officers show up. A lot of cops show up. And then
21 the paramedics show up.

22 You talk -- they talked about how many hairs
23 people -- hair people lose. 80 to 120. With the exception
24 of defense counsel. But, ladies and gentlemen, that's a
25 fact. Okay? That happens. The fact that there's a foreign

1 hair in that bag does not mean it's the real bad guy's.
2 Remember on jury selection, we talked about those things. We
3 talked about the CSI show stuff.

4 You know, we accept the burden of proof in this
5 case. We accept it. We understand that. But just because
6 we've got the burden of proof doesn't mean that they can tell
7 you a cock-and-bull story and you have to believe it.

8 The fingerprints. We've got -- when you go back
9 there, if you want to look at the evidence, remember this
10 chart we've got with the fingerprints? It's got the car and
11 then the diagrams and the blue and the red; some are inside,
12 some are outside? It will talk about where the prints were,
13 et cetera? Okay? There were some unknown prints back in the
14 back of the car, on the inside, and there was one on the rear
15 view mirror. Okay? The rest of them, you couldn't tell --
16 you couldn't use them. They were smudged or screwed up in
17 some fashion, or they were identified as the victim's, as
18 Kali Heitholt, his daughter's. Remember we had testimony:
19 Other people rode in the car. Coworkers. Friends of Kali.
20 Red herring, ladies and gentlemen.

21 You know, also at opening statement, defense counsel
22 said that Ryan Ferguson's story had never changed. He said
23 he left with Chuck, went home from the bar, and got home, and
24 then got on the phone, sitting out front on the curb.

25 Well, that's not the case, ladies and gentlemen.

1 Mr. Ferguson sat on the stand and told you he didn't tell
2 that story when he was first interviewed. He didn't think of
3 that until later. Remember? And he said the reason why he
4 didn't think of it: "I was worried about the test the next
5 day." Mr. Rogers is implying that the cops -- the police
6 were awful rough on him, is his implication. Well, it
7 doesn't sound like it. Ferguson said all he could think
8 about was getting back for that exam. He didn't really want
9 to tell them about the phone records. That wasn't none of
10 their business. Remember that? Unbelievable --

11 MR. ROGERS: That misstates the --

12 MR. CRANE: -- ladies and gentlemen --

13 MR. ROGERS: Excuse me. Objection. That misstates
14 the evidence. There is no evidence that he thought his phone
15 records were none of their business. That's made up by the
16 prosecutor --

17 MR. CRANE: No, it's not.

18 MR. ROGERS: -- and that's improper.

19 MR. CRANE: That's not coming off my time, is it?

20 THE COURT: No. We don't count argument.

21 MR. CRANE: Okay.

22 THE COURT: The jury will remember the evidence.

23 MR. CRANE: Now, sitting on the curb. Again, we've
24 got the burden of proof. We accept that. But I tell you
25 what. Think about this. What evidence is there that he was

1 sitting on the curb, while this crime is going on, out in
2 front of his house? One guy. The defendant. Holly Admire,
3 she said she didn't know where he was. Kelly Ferguson said
4 she didn't know where he was. Now, we got evidence about
5 where he was between 2:09 and 2:26 a.m.? Yeah. Chuck
6 Erickson. He accounts for the whereabouts of Ryan Ferguson.
7 And also the janitors. Two white males.

8 You know, Mr. Rogers spent a little bit of time
9 talking about how Charles Erickson's stories changed. You
10 know, he read the police reports and all that. Hey, you
11 know, he read the police reports apparently about that dog
12 going up above the Flat Branch area. You know, going a
13 different way. Not going over Flat Branch and over the Osco
14 lot. Well, if Chuck Erickson wanted to, I guess when he came
15 back for his proffer in October, he could have said, "Hey,
16 I'm going to go the way the dog went. The dog went" --
17 nuh-uh. He goes, "No, I didn't go that way." If he was so
18 hell-bent on adopting this story the way -- why doesn't he
19 say he had Sketchers on? He could have done that. Could
20 have said, "Yeah, I got rid of them." No, he didn't do that.

21 And ladies and gentlemen, I mean, with all due
22 respect to the dog, it didn't testify. There's no evidence
23 that that dog was on the trail of the real killer. That's
24 what they want you to think. Chuck Erickson and Ryan
25 Ferguson, ladies and gentlemen, they're the real killers.

1 For that matter, I guess Charles Erickson could have
2 said, "You know, I change my mind. We didn't go back inside
3 the bar after we got done with the murder." You know, he
4 said that originally, to the police. He said, "I -- you
5 know, we went back and we went inside." Okay? If he's
6 trying to please law enforcement, I guess he could have gone,
7 "Well, no, I'm going to take that part out. I didn't go in
8 there."

9 But you know what, ladies and gentlemen? What do
10 you think about that bar? How do you think they're running
11 that place? 16, 17-year-olds all over the place, drinking
12 alcohol. And you know, they never called one person that
13 testified that they were there during the time Chuck Erickson
14 talks about. Now, understandably --

15 MR. ROGERS: I'll object to that as either
16 misstating the evidence or ludicrous. I mean, the evidence
17 was that the bar was closed, so nobody was there.

18 MR. CRANE: No. No. We can argue the evidence,
19 Judge.

20 MR. ROGERS: We had evidence of who was there when
21 the bar was open.

22 THE COURT: The jury will remember the evidence.

23 MR. CRANE: Melissa Griggs, Kelly Ferguson, and that
24 Canada guy, the guy with the beard, the big guy? Okay? They
25 testified that they left when the lights came on. Canada

1 said, "I was one of the first workers out of there." He's
2 the guy that said, "Man, we got shut down all the time for
3 liquor control." He's the guy that said, "We should have
4 closed and nobody been in there that late." Then I said,
5 "Well, you shouldn't have had kids in there either." He
6 goes, "Yeah, that's right." Did he have an exact memory of
7 that night? No. No. He didn't. He's gone. He thinks.

8 You know, he's right. Ryan Ferguson never said he
9 did this killing. Because he doesn't want to get caught. He
10 doesn't want to have judgment passed on him. And that's why.

11 And you know, Charles Erickson, he's a killer too.
12 He did a horrible, horrible thing. My gosh, it's a terrible
13 crime. Running up and ambushing, not giving him any warning,
14 and beating this guy down with a tire tool. Having him die
15 in his own blood. Being strangled with his own belt. And
16 Charles Erickson was a big, big part of that, ladies and
17 gentlemen.

18 And you know, let's not forget, Mr. Heitholt, he was
19 a real guy. Don't think these photos of the crime scene are
20 abstractions. Because that's the way they left him.

21 And Erickson, for his part, did a horrible thing.
22 But you know, he has risen up from his very worst moment,
23 and, over time, admitted to himself, that was step number
24 one, and then admitted to his friends -- he had to talk about
25 it, it was eating him up -- and then to the police, and then

1 to the prosecutor, and then to a judge in open court, and
2 then to you, what he did. And that is the difference between
3 Charles Erickson and Ryan Ferguson.

4 Charles Erickson and the defendant are both killers.
5 And robbers. But the difference is: Charles couldn't take
6 it. It was eating at his very soul. And even -- even at the
7 cost of his youth, which is what he's going to pay, what he's
8 been paying since March 10th, 2004, even at the cost of his
9 own freedom, he's going to do the right thing. The defense
10 wants you to think that anybody that does the right thing has
11 got to be a nut. They got to be a dreamer. Nobody comes in
12 and does this. Are you that cynical? Are you that cynical
13 that you think that, in this day and age, nobody has a
14 conscience? If you are, we may not have any hope.

15 He knew when he pled guilty that there wasn't any
16 evidence at the crime scene. He knew that. But he made the
17 choice to do the right thing.

18 Yeah, those tapes, he's hesitant; he tries to back
19 out. But why wouldn't you? You know what he said, what
20 Erickson said. He said, "The cost of remembering, the more I
21 remembered, the more I was going to embarrass my family, have
22 to admit to myself that I had done this terrible thing to
23 this guy that didn't deserve it." And also, he was going to
24 go to prison.

25 Their expert testified in front of you that there

1 was no evidence Charles Erickson ever had it suggested to him
2 that he held that weapon and that he beat that victim down.
3 Never had it suggested that Ryan Ferguson held that belt and
4 jerked it up and held it there long enough to break his neck
5 and strangle him. Nobody ever suggested that, ladies and
6 gentlemen. And that is the essence of this case. The
7 newspaper didn't say it. His buddies that he talked to, they
8 didn't say it. He never went to some doctor that said, "Let
9 me get into your head and convince you you've done this
10 terrible thing." He said it, he remembered it, because it
11 happened. And it was torturing him not to talk about it.

12 Folks, this is a sad, sad situation. And
13 Mr. Ferguson obviously has a lot of people that love him.
14 And Charles Erickson has a lot of people that love him too.
15 And a lot of people loved Kent Heitholt.

16 This defendant, ladies and gentlemen, is a dangerous
17 individual. This conduct (indicating), this conduct
18 demonstrates it. You have the evidence beyond a reasonable
19 doubt to convict on murder one and robbery first.

20 And you know, we talked about this when we were in
21 -- back in Troy. Nobody said this was going to be easy. My
22 gosh, it's not easy. But you all have got good sense. And
23 you're all reasonable. And you know what the truth is.
24 Guilty. Both counts.

25 Thank you.

1 THE COURT: Are all the bailiffs sworn? Are all the
2 marshals sworn in this case?

3 DEPUTY COURT MARSHAL: Yes, Judge.

4 THE COURT: I know we have over a period of time.

5 Ladies and gentlemen -- may I have -- I don't have
6 all the instructions together. I need to put in some verdict
7 forms.

8 Ladies and gentlemen, I know this has been a
9 hardship for all of you. And I need to know if there's
10 anyone here who either is not feeling well, or has some
11 serious problem back at home that you've learned about that
12 maybe you've not shared with us, that would prevent your
13 deliberation in this matter, because we do have two
14 alternates. And very frequently we have to use those
15 alternates, because things happen during a trial of this
16 length, and we would have to start all over again, without
17 alternates. And even though -- and let me just ask: Is
18 there anyone who wants to speak now about a circumstance that
19 we don't know about? That you've not informed our marshals
20 about. And I don't see anyone saying anything.

21 But I will say that from time to time during
22 deliberations something happens to an individual. They
23 become ill. Can't continue. And we yet sometimes use
24 alternates to begin again and deliberate on the case. And so
25 the two alternates that I'm going to indicate, and I will

1 thank those individuals in advance. I need to find my notes
2 to see those that are. I'm going to ask that those
3 individuals be kept in a separate place. I'm looking for the
4 list. All right.

5 Those two alternates will be kept in a separate
6 place. And I will ask you two to stay in the courtroom,
7 because I do have further instructions for you.

8 As to the other jurors, you may begin your
9 deliberations. The previous caution about discussing the
10 case, talking about the case, is certainly no longer in
11 effect.

12 The exhibits that have been admitted into evidence,
13 most of them are available for you to take back into your
14 room. Any CDs or DVDs, we do not send those back. But
15 anything else -- and you don't have to tell us that it's
16 Exhibit 88C. I wouldn't expect you to remember those
17 numbers. If you just sort of describe what it is, then we
18 will have those sent back to you.

19 I would ask Juror 48 and 51 to remain in the
20 courtroom. I don't know if you remember your numbers. But
21 it is Juror Miller and Gaines. If you would remain here,
22 because I do have another instruction for you. And the other
23 jurors may begin their deliberations.

24 (The jury went into deliberations at 4:06 p.m.)

25 - - -

1 The following proceedings were held out of the presence
2 of the jury:

3 THE COURT: As to the two alternates, gentlemen,
4 again I want to thank you so much for your careful
5 consideration of this case. You yet might have to
6 participate in it as a juror.

7 The Court again reminds you of what you were told at
8 the first recess of the Court. Until you retire to consider
9 a verdict, you must not discuss this case among yourselves or
10 with others, or permit anyone to discuss it in your hearing.
11 You should not form or express any opinion about the case
12 until it is finally given to you to decide. Do not read,
13 view, or listen to any newspaper, radio, or television report
14 of the trial.

15 I've arranged for a separate place for you to be
16 while the jurors begin their deliberations. And if it is
17 necessary that one or more of you be substituted for the
18 jurors that are deliberating, you will be notified.

19 You may be excused at this time.

20 And I'd ask the attorneys to remain in the courtroom
21 so that we might organize the exhibits.

22 (Two alternates excused from the courtroom.)

23 (Noise in the courtroom.)

24 DEPUTY COURT MARSHAL LANE: Please remain quiet. We
25 are still in session.

1 THE COURT: You may step outside if you want to
2 talk. I am just going to deal with getting exhibits in
3 order, in case the jury should request those.

4 I'd ask the deputy, if you need to take Mr. Ferguson
5 to some secure location, you may do that, but he needs to
6 remain in the courthouse in case some issue comes up.

7 SHERIFF'S DEPUTY: Yes, ma'am.

8 THE COURT: I don't know what your plans are.
9 Mr. Crane.

10 MR. CRANE: Sorry.

11 THE COURT: Yeah. Would you mind -- I realize you
12 need to talk to these folks. If you wouldn't mind -- if
13 you're not able to, if Mr. Knight would gather up these
14 exhibits.

15 MR. CRANE: Yeah, get them all lined out. Yeah, we
16 can do that. Let me grab the exhibit list.

17 THE COURT: And if you might get them in some form
18 of order.

19 MR. CRANE: Yeah. I think what we'll do is --

20 THE COURT: We went over which ones you had admitted
21 and which ones you had not. And I do not usually allow tapes
22 or videos or DVDs to go back into the jury room, because we
23 don't have a way of, first of all, of playing it back there.
24 And secondly, I believe it emphasizes some testimony more
25 than others, just like -- and I forgot to tell them they

1 couldn't ask for the court reporter. Sometimes they'll do
2 that. And I know that Diana's probably a little miffed that
3 I didn't tell them that, but it's like having testimony two
4 or three or four times back in the jury room, and it -- I
5 believe it unduly emphasizes that. Photographs, other items,
6 they may have.

7 And I had -- if you would go into that side room; I
8 think I had a legal pad that I'd written down which of the
9 defendants exhibits have been admitted.

10 MR. CRANE: Judge.

11 THE COURT: Yeah.

12 MR. CRANE: Jeremy.

13 MR. WEIS: Yeah.

14 MR. CRANE: We're going to get all the exhibits
15 together, from both sides, that we agree that don't --
16 there's no alteration that needs to be done to it. But I've
17 still got that photo to mess with. You know, those two
18 photos on that board.

19 THE COURT: Yes.

20 MR. CRANE: And we also need to -- Mr. -- actually,
21 Mr. Rogers and I were talking about how we're going to do the
22 phone records, just with the ones that were testified to.

23 (Defendant left the courtroom.)

24 THE COURT: Yes.

25 MR. CRANE: So we haven't done that yet. And was

1 there something else? There's something I was forgetting.

2 Oh, I know what it was. The jail tape.

3 MR. ROGERS: Jail tapes.

4 MR. CRANE: Are we okay with sending in the one
5 that's got the portion of yours and mine on it?

6 THE COURT: Well, I don't know that -- are they --
7 how are they supposed to hear this?

8 MR. ROGERS: Their DVD player will also play a CD.

9 MR. CRANE: Yeah, we can give them a CD player.
10 They can have the same CD player they listened to the 911
11 call. The jail tape was just a CD.

12 MR. ROGERS: Was that the only one we actually
13 published to them? The rest basically I think I read from
14 transcripts or notes or whatever I had.

15 MR. CRANE: Yeah. All I'm saying is, there's some
16 things that --

17 MR. ROGERS: But I don't care --

18 MR. CRANE: -- we'll get squared away --

19 THE COURT: Wait. There's a reporter here, taking
20 this down. You can't both talk at the same time.

21 MR. ROGERS: I forgot we're on the record.

22 MR. CRANE: There's some things that we're going
23 to --

24 DEPUTY COURT MARSHAL LANE: We need everybody to
25 hold it down, please.

1 MR. CRANE: -- get to yet, and then there's a few
2 things that we're still going to work on.

3 THE COURT: All right. Well, this is a hard-working
4 jury, and I suspect that we will have a note before long.

5 MR. CRANE: They're doing it right now. They're
6 doing it right now. There are just some things that are
7 going to take us a couple seconds, that --

8 THE COURT: All right.

9 MR. CRANE: Well, longer than that, probably.

10 THE COURT: But I also want to hear, as to items
11 that are in evidence, if there is a specific objection to the
12 jury receiving it, either from the state or the defense. And
13 let me -- let me go with Mr. Weis, because I've done this
14 with the prosecutor.

15 Mr. Weis, I show that Defendant's Exhibits -- and
16 I'm not saying they all go back, but I want to know ones that
17 have been admitted. A, B, B-1, B-2, and B-3, C, D, E, F, G.

18 MR. WEIS: Yep.

19 THE COURT: H.

20 MR. WEIS: Yeah, I got that.

21 THE COURT: I.

22 MR. WEIS: I --

23 THE COURT: Did I come in?

24 MR. WEIS: I don't even know what it is. I don't
25 have it in front of me. I was --

1 THE COURT: All right. Why don't we come back to I.
2 J.

3 MR. WEIS: And that one I don't have either. That's
4 another one I skipped.

5 THE COURT: All right. I show that Q, R, S, T, U,
6 V, and Z are admitted. That W, X, and Y are not admitted.
7 And that I don't show that there was ever any mention of K,
8 L, M, N, O, P.

9 MR. WEIS: And those were -- those were the CDs that
10 we used with Mr. Singer, and we didn't move to admit those.

11 THE COURT: You didn't use those.

12 MR. WEIS: No.

13 THE COURT: So those definitely are not in. We need
14 to look at I and J. And as I say, I didn't have --

15 MR. ROGERS: Also, Your Honor, AA. That was this
16 morning.

17 THE COURT: We had a AA as well. We did have a AA.
18 And I initialed that. That's why I try to do that, if we
19 don't have an exhibit list that I can check things off on.

20 Let me see if I can, from my notes, figure out --

21 MR. ROGERS: I and J were --

22 THE COURT: I can tell you that it was on
23 cross-examination, I believe. Let me see who it was.

24 MR. WEIS: Well --

25 THE COURT: I think it was Mr. Singer who was

1 testifying. And it must have been either on direct or
2 redirect that I and J were handed to him. And it was in the
3 inquiry relating to the luminol. It related to that subject
4 matter. Because I made a note in the margin of my notes that
5 you were questioning him in that area.

6 J is the enlargement of the Sketchers shoe.

7 MR. ROGERS: Oh, that's right. And I is the
8 photograph with the footprints and the smaller thing --

9 MR. WEIS: Right, right, right. We'll find it.

10 MR. ROGERS: We'll find it. That's exactly what
11 they are.

12 THE COURT: Well, if we try a case again, would you
13 mind doing an exhibit list?

14 MR. ROGERS: I --

15 THE COURT: Hopefully it won't be this one.

16 MR. ROGERS: That's why I have this extensive staff,
17 but apparently they're letting me slide down.

18 THE COURT: Well, you may need to talk with them
19 about that. They seem to be very well organized in all
20 others, so they --

21 MR. ROGERS: I haven't shown up naked, so they're
22 doing their job.

23 THE COURT: All right. So the only two that you
24 have an issue with were I and J. And --

25 MR. ROGERS: And those are in --

1 THE COURT: They are in evidence.

2 MR. ROGERS: Yeah.

3 THE COURT: All right. If you would gather those
4 together, and let me know about -- if there needs to be some
5 redacting, particularly, and I don't remember the exhibit
6 number, but it was the picture of the Mercedes. The last
7 two. The last one was not admitted, which was G. F, part of
8 it was admitted, which was identified.

9 MR. ROGERS: And that one we probably need to --

10 MR. KNIGHT: What number is that?

11 MR. ROGERS: Kevin had it. He probably took it with
12 him.

13 THE COURT: I don't know if he did. It's possible
14 -- I guess it's possible to take those off of the board and
15 to redact the one. Because he did have separate ones of
16 those two exhibits. Of the tools.

17 MR. ROGERS: He did have separate ones. And what I
18 was suggesting was that somebody other than me, who can get
19 through security with a pocketknife, just splice the bottom
20 one off and leave the bottom part on, and then --

21 MR. HAWES: He might have taken that downstairs,
22 Judge.

23 MR. ROGERS: He may have taken that down to work on
24 it.

25 THE COURT: All right. This is a hard-working jury,

1 so I know that they probably will ask for things. If they
2 don't, and return a very quick verdict, I assume that the
3 defense will be delighted to hear that.

4 MR. ROGERS: We will if it turns out right, that's
5 for sure. And I would predict that a quick one would be like
6 that.

7 THE COURT: Well, I was going to say, a quick
8 verdict, without looking at anything, I assume would have to
9 be a defense verdict, but I don't know. I'm not --

10 MR. ROGERS: A quick guilty would not delight me, I
11 can tell you that.

12 THE COURT: You don't have a note or anything; is
13 that right?

14 DEPUTY COURT MARSHAL BAER: No, Judge.

15 THE COURT: And do I assume that counsel will be
16 available if the jury comes back with a note? At least one
17 person on a side? Yes, Mr. Knight?

18 MR. KNIGHT: Yes, Your Honor.

19 MR. ROGERS: Yes. Yes.

20 THE COURT: Someone will be here. I know you
21 mentioned something about eating.

22 MR. ROGERS: I --

23 THE COURT: You're not going to eat.

24 MR. ROGERS: I had a salad over at the Grinder
25 place, so I'm okay.

1 THE COURT: Okay. All right.

2 With that, we'll be in recess then. You'll just let
3 me know about how you're getting things together.

4 (Recess taken.)

5 - - -

6 At 4:29 p.m. a note was received from the jury, and the
7 following proceedings were held out of the presence of the
8 jury and the defendant:

9 THE COURT: We have a note. Quicker than a speeding
10 bullet.

11 That's interesting, who the foreperson is. I'll
12 tell you in just a moment.

13 "All cell phone records" is what they would like.
14 We can figure out what those are. "The diary page."

15 MR. WEIS: That's theirs.

16 MR. CRANE: Yeah. It's in.

17 THE COURT: "Photo" -- and as we go through this, I
18 want to write down what exhibits we're talking about.

19 The diary page is State's Exhibit what?

20 MR. CRANE: 103.

21 THE COURT: State's 103. All right. And the cell
22 phone records are?

23 MR. WEIS: H, U, and V.

24 THE COURT: H, U, and V?

25 MR. WEIS: That's correct.

1 MR. CRANE: And those are going to be subject to us
2 trying to get the --

3 THE COURT: Well, they want it now, so you --
4 whatever you need with a black marker to take it out, I
5 suggest to do that. But let me finish telling you.

6 "Photos of Ryan's car."

7 MR. CRANE: Right here. That's 87.

8 THE COURT: Yes. And you've taken off those two
9 bottom ones, except for that one there. All right.

10 "The inside of Kent's car."

11 MR. CRANE: I put that over here. That's 34.

12 THE COURT: All right.

13 MR. ROGERS: Well, there were others of the inside
14 of Kent's car too.

15 MR. CRANE: Oh. Okay. Yeah, you're right.

16 MR. WHITE: 74.

17 MR. CRANE: Okay. There's something on the back of
18 it there.

19 THE COURT: Had you written something?

20 MR. CRANE: Okay.

21 THE COURT: 74 --

22 MR. CRANE: This is a photo of the -- right, Judge?
23 I agree with him. He says there's another -- there's two
24 photos.

25 THE COURT: All right. 34 and 74?

1 MR. CRANE: Got it.

2 THE COURT: All right.

3 Now they ask for the inside car video. And I don't
4 recollect that there was a video inside the car. There was a
5 video outside in the parking lot.

6 MS. BENSON: When Charles was driven around by the
7 officer inside the car.

8 MR. CRANE: Yeah.

9 THE COURT: Oh, that's what they're talking about?

10 MS. BENSON: Uh-huh.

11 MR. CRANE: Yeah.

12 THE COURT: Let me move on to the others, and then
13 maybe we can come back to that one.

14 "Parking lot layout drawing."

15 MR. CRANE: Okay.

16 MR. WEIS: Right behind you.

17 MR. CRANE: That's 12.

18 THE COURT: Exhibit 12?

19 "Color photo of city." That has to be the state's
20 exhibit, not yours.

21 MR. CRANE: That's Number 9.

22 MR. ROGERS: Because ours comes next. "Misleading
23 old photos."

24 THE COURT: All right.

25 And then something that was not admitted, which was

1 Detective Short's interview which was not videotaped.

2 MR. CRANE: Oh.

3 THE COURT: And that was not admitted.

4 MS. BENSON: But there was one that was videotaped.

5 MR. ROGERS: No, it says --

6 MS. BENSON: Oh, they want the first one that

7 wasn't --

8 THE COURT: They want the police report, is what

9 they want. Which was not admitted.

10 I would have to say that Detective Short's

11 interview, which was not videotaped, I would just have to put

12 "not admitted."

13 MR. ROGERS: Correct.

14 THE COURT: Is that agreeable with the state?

15 MR. CRANE: Uh-huh. Well, there wasn't -- they're

16 talking about the report?

17 MR. ROGERS: Yes.

18 THE COURT: Yes. Which was not videotaped.

19 MR. CRANE: Yeah. "The report was not admitted into

20 evidence"?

21 THE COURT: Can I say, "Report not admitted"?

22 MR. ROGERS: Yes, Your Honor.

23 THE COURT: Would that be agreeable for the state?

24 MR. CRANE: Okay.

25 THE COURT: And the -- because I don't want them to

1 believe that what was testified to was not admitted. But the
2 physical report was not admitted.

3 MS. BENSON: Uh-huh.

4 THE COURT: Correct?

5 MR. ROGERS: Yes.

6 MR. CRANE: I mean, the actual report, do you want
7 to clarify that or --

8 THE COURT: I'm going to write, "Report not
9 admitted."

10 So there are the redaction on those cell phone
11 records that we need to do. And then there's the issue of
12 the car video, which I don't have any way of playing. And I
13 guess I need to have at least the reaction of both the state
14 and the defense to that particular piece of evidence --

15 MR. ROGERS: Your Honor, I --

16 THE COURT: -- going back. I mean, I can give them
17 the DVD. But they certainly, unless they have unusual
18 talents, I don't think they'd be able to look at it.

19 MR. ROGERS: Earlier I saw Mr. Hawes and Mr. White
20 with the cart, with a television and a DVD player on it. And
21 I figure, if you send that in there, they can play what they
22 want to play. The whole thing was played in evidence. And I
23 think it's a significant piece of evidence.

24 THE COURT: What is the state's position?

25 MR. CRANE: We have a player and a TV. It's up to

1 the Court.

2 THE COURT: Are you in agreement that it can go
3 back? Because I will tell you normally interviews,
4 depositions, things of that nature that come in, I don't send
5 back to the jury. That's why there are 12 of them to
6 collectively remember the issues. Otherwise, we can send the
7 reporter back and have her read the whole trial over to them.
8 And I'm certainly not going to do that.

9 MR. ROGERS: They couldn't hear her.

10 THE COURT: She'd have to do sign language. I mean,
11 to me, it opens up the issue of all the other videos.

12 Why don't we do this. Why don't we take back those
13 things to which there is no dispute about. Which would be
14 Exhibit -- are those the ones? 103, 87, 34, 12, and 9.
15 Those can go back. And you can tell them we're getting --
16 we're working on the others.

17 (Exhibits sent back to the jury room.)

18 THE COURT: Because to me, if I let in the video
19 that took place inside the police car, I think what would
20 naturally follow would be the other videos that were offered
21 and admitted.

22 MR. ROGERS: The only difference being that we
23 played a lot more clips from the other ones than we did from
24 this one. But this one is I think unique, in that it shows
25 the scene when he was being shown it by the police and his

1 reaction to those places, to some extent. You're right, it
2 is an interview statement. Although, I don't know that
3 statements like that, which are, in fact, in evidence in
4 their entirety, are analogous to depositions or read-backs,
5 because they are, in fact, physical objects, which there is
6 no confrontation issue with. Depositions, even though
7 they're filed with the court, they're not admitted in
8 evidence. They're only used for impeachment or
9 rehabilitation kinds of purposes in a case like this.

10 THE COURT: Sometimes there might be a medical
11 examiner who has been deposed, who won't be available, and
12 the defendant is present and defense counsel and the state,
13 and we offer those into evidence. And we would not do that.
14 I have to say that if it were a written statement that the
15 defendant made, or a codefendant, I would let that back.

16 MR. ROGERS: That's --

17 THE COURT: That type of thing I would let back.

18 MR. ROGERS: My position, Your Honor, is that these
19 particular videotapes are more analogous to that than they
20 are to a -- certainly a deposition to preserve testimony. A
21 deposition to preserve testimony is admitted as evidence just
22 as if the testimony occurred in court. And Missouri being a
23 non read-back kind of state, I think it's correct that those
24 should not be treated -- testimony should not be given from
25 some witnesses and not from others. But with regard to

1 statements which are introduced in evidence, whatever the
2 means of recording is, once they are in evidence, they are, I
3 think, items of evidence like any other, and they're not like
4 testimony.

5 THE COURT: Mr. Crane, do you have a position on
6 whether the car videotape goes back? Because I can tell you
7 that I'm going to rule consistently on other videos that have
8 been admitted. I don't think it would be right to admit --
9 to send this one back and not send the others, should they
10 ask for them. I'm not sending them back unrequested.

11 MR. CRANE: Well, they saw it in court; right?

12 THE COURT: Yes.

13 (Discussion off the record between Mr. Crane and
14 Mr. Knight.)

15 MS. BENSON: The other problem is that since, during
16 Charlie's closing, he assumed that they would go back, since
17 they're in evidence, he told the jury.

18 THE COURT: Well, he did tell them that, but we had
19 a discussion before he made that statement, at the bench,
20 that I wasn't allowing -- when you were suggesting you
21 weren't going to play W, X, and Y, now maybe you weren't at
22 the bench at that time, but I suggested that even if they
23 were admitted, I wasn't going to permit them to go back.

24 MS. BENSON: That was about Ryan's videos.

25 THE COURT: That's true. And that's a different

1 issue.

2 MR. ROGERS: If the state had offered --

3 MR. CRANE: Judge, I'm going to defer to the Court.

4 THE COURT: And it is the defendant's position that
5 you'd like the videos that have been admitted as statements
6 of the codefendant, if you want to call him that, he's not
7 charged in the same instrument, but obviously charged as
8 acting in concert with --

9 MR. ROGERS: Right. It's my --

10 THE COURT: -- to go back?

11 MR. ROGERS: Our position, Your Honor, is that all
12 statements which are in evidence in some sort of physical
13 form, recorded form, whether it be by written or
14 tape-recorded or videotaped, are in evidence. They're
15 statements like -- like themselves, and not in-court
16 testimony, like other kinds of statements, and therefore I
17 think they're -- the defendant has a right to have the jury
18 consider any item which is in evidence, which -- and by
19 "item," I mean other than testimony -- which they request.

20 THE COURT: Now, there was testimony in court about
21 what Short's statement with the codefendant was. But, of
22 course, that's quite different.

23 MR. ROGERS: Exactly.

24 THE COURT: That was a witness's -- a witness
25 testifying as to that.

1 MR. ROGERS: Right.

2 THE COURT: And you're not suggesting that ought to
3 go back.

4 MR. ROGERS: No. And that's not -- and the short
5 answer is: It's not in evidence. And the reason it's not in
6 evidence is because it was used for impeachment and
7 rehabilitation and cross-examination of experts who relied on
8 it and stuff like that, and not as evidence itself. And
9 Short didn't come to testify to be cross-examined about it.

10 THE COURT: All right. I will allow the car video
11 to go back, as long as we have some way to play it.

12 MR. ROGERS: Okay. We do have.

13 MS. BENSON: Okay. Bill, can you get us that TV
14 thing that will play the DVD?

15 THE COURT: And what is the exhibit letter for the
16 car video?

17 MR. ROGERS: That is Exhibit C.

18 THE COURT: All right. Have you redacted those
19 parts of the phone records that don't appear to be relevant?

20 MR. CRANE: You know, I think we're getting to where
21 we're so wore out, we may just go ahead and --

22 MR. ROGERS: They can figure it out.

23 MR. CRANE: Yeah, I -- you know, what we really
24 ought to do is highlight the ones that were pertinent.

25 THE COURT: I'm not going to allow you to do

1 anything to that exhibit that was not already there when it
2 was admitted.

3 MR. CRANE: Oh, then we can't redact it.

4 THE COURT: Well --

5 MR. CRANE: I guess that answers that question.

6 THE COURT: No.

7 MR. ROGERS: No, no. When it was admitted, you
8 talked about redacting it.

9 THE COURT: You actually talked about redacting it.
10 And there were references to particular times and to
11 particular places. The other ones were not. So I think it
12 might be different to redact those that were not part of the
13 testimony -- part of the exhibit and to which there was an
14 objection reserved. Unless you wish to withdraw your
15 objection to the entire exhibit, in which case we can have it
16 all go back.

17 I don't want you to take that back. I'll get one of
18 our marshals in.

19 MR. HAWES: All right, Judge.

20 THE COURT: Hopefully there's someone who's handy
21 with electronics and can read stuff.

22 And by the way, one of the three women is the
23 foreperson of this jury.

24 MR. ROGERS: Which one?

25 THE COURT: Carol Ieppert.

1 MR. ROGERS: Ieppert.

2 THE COURT: Ieppert?

3 MR. ROGERS: Uh-huh. She was actually my second
4 pick for foreperson.

5 THE COURT: Who was your first pick? The gentleman
6 that seemed to know everyone in the city of Troy?

7 MR. ROGERS: Yes. Brown? Is that his name?

8 THE COURT: I don't know if it was Brown. Maybe.

9 MR. WEIS: Kevin and I wanted to --

10 THE COURT: All right. Are you agreeing that they
11 all go back?

12 MR. WEIS: Yes. And the only thing we did with
13 respect to Defendant's Exhibit H was we took out -- well,
14 this is a full month. It goes into September. We took out
15 all the dates before October 31st and then after -- well, it
16 looks like November 5th.

17 THE COURT: All right.

18 MR. WEIS: All those extra, superfluous pages.

19 THE COURT: Mr. Crane, then, you're agreeable that
20 this could --

21 MR. CRANE: Yeah. We didn't do anything to it. He
22 pulled a couple pages off of it.

23 You didn't do anything else to it?

24 MR. WEIS: No.

25 THE COURT: All right. You can send the note back,

1 so they'll know. I definitely don't want the note to get
2 lost. I want it to be in the file eventually.

3 MR. ROGERS: Your Honor, we have found duplicates of
4 the missing exhibits, which I am sort of guessing Mr. Singer
5 may have taken with him, because we can't find them. And so
6 the state has agreed that we can have these marked.

7 THE COURT: One was J and one was I.

8 MR. ROGERS: And use your list to say which is
9 which.

10 THE COURT: Well, I'm not the court reporter. It
11 just happens that I wrote down -- I have J as being the
12 enlargement of the Sketchers shoe. No. That's -- no, no.
13 The enlargement is the other one. That's the enlargement.

14 MR. ROGERS: I is the enlargement? Or J?

15 THE COURT: J. So I has to be the other one. It is
16 a combination of State's Exhibit 39E and 39F, with the
17 Sketchers running shoe. That's what I had indicated.

18 MR. ROGERS: That's my --

19 THE COURT: Aren't you glad I take good notes?

20 MR. ROGERS: Yes, Your Honor, I am.

21 THE COURT: All right.

22 MR. ROGERS: And I don't claim to rely on --

23 MR. CRANE: That came -- that actually came into
24 evidence? That Sketchers shoe came in.

25 MR. ROGERS: It did.

1 MR. CRANE: I don't remember that.

2 THE COURT: It says "Part of 39," in your records,
3 because I see it somewhere around here. 39. It's your
4 Exhibit 39.

5 MR. HAWES: Right here.

6 MR. CRANE: Oh, they want that?

7 THE COURT: No, no. They had lost their exhibit.
8 They think maybe their witness took it. But there were two
9 pictures of 39, and then there was a picture of the bottom of
10 the Sketchers shoe.

11 All right.

12 MR. CRANE: You want to just give them that board?

13 THE COURT: No, no. They haven't asked for that
14 yet.

15 MR. CRANE: Yeah, but I thought you couldn't find --

16 MR. ROGERS: We're just remarking these two. They
17 haven't asked for these either.

18 MR. CRANE: Oh.

19 MR. ROGERS: Don't be having a cow.

20 THE COURT: They haven't asked for that.

21 MR. CRANE: Oh, I thought you -- they had asked for
22 the Sketchers shoe.

23 MR. ROGERS: No, no. We're --

24 THE COURT: No. He just lost it.

25 MR. CRANE: Oh. Okay. I apologize. I thought they

1 said they wanted that. Okay.

2 THE COURT: All right. I am going to run to the
3 post office, real fast.

4 (Exhibits sent back to the jury room.)

5 (Recess taken.)

6 (Defendant's Exhibits I and J remarked.)

7 - - -

8 At 5:04 p.m. a note was received from the jury, and the
9 following proceedings were held out of the presence of the
10 jury and the defendant:

11 THE COURT: Okay. Nothing really exciting. All
12 right. Kevin? Do you care to hear?

13 "Photo of lit parking lot with dock doors."

14 MR. CRANE: Lit parking lot?

15 MS. BENSON: Like night time?

16 THE COURT: "Lit parking lot with dock doors."

17 MR. CRANE: Well, that's -- there's this.

18 THE COURT: That's what I have to feel that they
19 were talking about.

20 MR. CRANE: That's 16. Now wait a minute. Here's a
21 lit parking lot. There's dock doors. And there's dock
22 doors.

23 THE COURT: How about if I send both 16 and 13.

24 All right. "Sketches and photos of Ryan and Chuck."

25 MR. CRANE: Here.

1 Did you check off 13 and 16?

2 THE COURT: I have 13 and 16. Clearly the
3 photographs would be 17, 18, 19, and 20? Is that correct?

4 MR. CRANE: Uh-huh.

5 THE COURT: And then I don't know -- this composite
6 is Number 26.

7 MR. CRANE: It was right there. Did it fall over?

8 MR. ROGERS: Yes.

9 MR. CRANE: That's Number --

10 THE COURT: 26 and 27.

11 MR. CRANE: Okay, Ben, 16, 17, 18, 19, 20.

12 THE COURT: And then --

13 MR. CRANE: 26 and 27.

14 MR. WHITE: What about 13?

15 THE COURT: Where is 13?

16 MR. CRANE: Right here. Right here.

17 THE COURT: Okay.

18 MR. CRANE: What else, Judge?

19 THE COURT: That's it.

20 MR. CRANE: And that's going back; correct?

21 THE COURT: Yes. Without objection from either
22 side.

23 MR. ROGERS: Subject to any objections we may have
24 made at the time, which I have lost that memory. It's beyond
25 retrieval, I can tell you that.

1 (Exhibits sent back to the jury room.)

2 MR. ROGERS: Your Honor, we have to go back to our
3 hotel and change rooms. Ms. Benson will be here, though.

4 THE COURT: Is it agreeable, if a note comes out,
5 she can handle it?

6 MR. ROGERS: It's more than agreeable. It's a known
7 fact.

8 MR. CRANE: You're doing what?

9 MR. ROGERS: We're going back to change hotel rooms
10 and leaving Kathryn at the helm of the ship. She's licensed.

11 MR. CRANE: Okay.

12 THE COURT: And do you have -- should there be a
13 conviction on one or both of the counts submitted, do you
14 have those instructions that deal with submitting punishment?

15 MR. CRANE: No.

16 MR. ROGERS: Me either.

17 THE COURT: I think that --

18 MR. ROGERS: Not my problem.

19 THE COURT: -- someone in your office does.

20 MR. CRANE: I'll check it out.

21 THE COURT: Another note:

22 "Black and white photo with all overlays." Well,
23 that's yours.

24 MR. WEIS: Yea.

25 MR. ROGERS: Yea.

1 THE COURT: Is that agreeable? That's B and B-1.
2 Just a minute. Let me write it down. That's B.

3 MR. ROGERS: And B-1 and 2 and 3.

4 THE COURT: B, B-1, B-2, and B-3.

5 (Exhibits sent back to the jury room.)

6 THE COURT: Let me just ask, there was -- there were
7 two photographs of the parking lot. I believe one was 13 and
8 one was 16. And both sides agreed that we could send both of
9 those back, because we didn't know which one they exactly
10 wanted.

11 MR. ROGERS: Exactly. One was of the right of the
12 parking lot and one was of the dock doors.

13 THE COURT: And some of the dock doors were apparent
14 on the lighted parking lot, but some were not.

15 MR. ROGERS: That's correct.

16 THE COURT: So we sent back both, by agreement.
17 Yes?

18 MR. CRANE: Yes.

19 THE COURT: Okay.

20 (Recess taken.)

21 - - -

22 The following proceedings were held out of the presence
23 of the jury:

24 THE COURT: Let me suggest that it's come to my
25 attention that the instruction on murder in the first degree

1 -- I'm going to look for the number here.

2 MR. ROGERS: 314.02, Your Honor.

3 THE COURT: No, that's the number there. But I'm
4 talking about what we gave the jury. That the jury -- and
5 I'll make you copies of all of these. That the jury
6 Instruction Number -- I believe it was 7. But I'll look and
7 see.

8 As to jury Instruction Number 7, which is MAI
9 314.02, neglected to have the last paragraph regarding
10 punishment and -- on the tail. But that the agreement
11 between the state and the defense attorney is is that the
12 Court not give them a new Instruction Number 7, with the
13 proper tail, which was eliminated, which was, "If you do find
14 the defendant guilty under Count I of murder in the first
15 degree, you are to assess and declare the punishment at
16 imprisonment for life without eligibility for probation or
17 parole," not be given at this point. That if they return a
18 verdict finding him guilty under Count I of murder in the
19 first degree, they be given a direction that that is the
20 punishment that they are to return. Is that correct?

21 MR. ROGERS: That is correct, Your Honor.

22 THE COURT: Have I stated it correctly? That's what
23 you would want to do.

24 MR. ROGERS: Yes, Your Honor. From the defense it
25 is.

1 THE COURT: And is the state willing to accede to
2 that request?

3 MS. GOROVSKY: Yes, Your Honor.

4 THE COURT: All right. Then I will not do that.
5 But then you will have to draft, for the punishment phase,
6 "You have found defendant guilty under Count I of murder in
7 the first degree. You are to assess and declare his
8 punishment at imprisonment for life without eligibility for
9 probation or parole." And then we would have an appropriate
10 form of verdict on that as well.

11 MS. GOROVSKY: Okay.

12 THE COURT: On punishment.

13 MS. GOROVSKY: That's correct.

14 THE COURT: Okay.

15 MS. GOROVSKY: Wait. I'm sorry. The verdict form?

16 THE COURT: Yes.

17 MR. ROGERS: "Having found the defendant guilty."

18 THE COURT: They're given an instruction -- you're
19 giving an instruction telling them what to return a verdict
20 on. And then they will make --

21 MS. GOROVSKY: And we have to type it in as it is,
22 and then just -- so this won't be blank any more. It will
23 have that filled in.

24 MR. ROGERS: Right.

25 MS. GOROVSKY: And then this will be the same.

1 MR. ROGERS: Right.

2 MS. GOROVSKY: Essentially.

3 THE COURT: Well -- I don't understand. We need a
4 separate instruction.

5 MS. GOROVSKY: Right. A new one, that looks like
6 this, except it will say, "murder in the first degree." And
7 then here --

8 MR. ROGERS: You would say this (indicating).

9 MS. GOROVSKY: -- it will say --

10 MR. ROGERS: "Assess and declare the punishment for
11 murder in the first" --

12 THE COURT: That is what the verdict will say. You
13 need another instruction.

14 MS. GOROVSKY: Right. Right. I thought we had
15 already talked about that one.

16 THE COURT: Okay.

17 MS. GOROVSKY: And then we were talking about the
18 verdict form.

19 THE COURT: Okay.

20 MS. GOROVSKY: We need two new ones.

21 THE COURT: Yes.

22 MS. GOROVSKY: Okay.

23 THE COURT: A new verdict form to go with the
24 instruction dealing with a finding of guilt of murder in the
25 first degree.

1 MS. GOROVSKY: Yes. Okay.

2 THE COURT: All right.

3 MS. GOROVSKY: Got it. I will get that. And I
4 apologize, Your Honor.

5 THE COURT: With that understanding -- I don't know
6 if dinner has arrived for Mr. Ferguson or not.

7 SHERIFF'S DEPUTY: Not yet, Judge.

8 THE COURT: Well, the jurors have not asked for
9 dinner. We've offered to order it, but they've not asked for
10 dinner yet.

11 All right.

12 (Recess taken.)

13

- - -

14 At 7:30 p.m. a note was received from the jury, and the
15 following proceedings were held out of the presence of the
16 jury and the defendant:

17 THE COURT: We have a note.

18 The only thing I can say is: "You must consider the
19 instructions." Or, "I can give you no further instructions."
20 What would you --

21 MR. ROGERS: I think the first -- maybe "be guided
22 by"? "You must be guided by the instructions you've already
23 been given"?

24 MR. CRANE: Huh? What's that?

25 MR. ROGERS: "Must be guided by the instructions

1 you've already been given."

2 MR. CRANE: Okay.

3 THE COURT: Is that agreeable?

4 MR. ROGERS: That would be agreeable with us.

5 THE COURT: Well, normally I would say, "I can give
6 you no further instructions."

7 MR. ROGERS: That's okay. I don't care. Either
8 way.

9 THE COURT: I'll just say, "You should be guided by
10 the instructions you have been given."

11 MR. ROGERS: Yes.

12 THE COURT: Mr. Crane?

13 MR. CRANE: Yes.

14 THE COURT: This is what I'm sending back.

15 MR. CRANE: Which is what Mr. Rogers suggested.

16 MR. ROGERS: Right.

17 THE COURT: Okay.

18 (Recess taken.)

19 - - -

20 The following proceedings were held out of the presence
21 of the jury:

22 THE COURT: Has the jury reached verdicts in this
23 case?

24 DEPUTY COURT MARSHAL BAER: Yes, Your Honor.

25 THE COURT: Are they ready to come into the

1 courtroom at this time?

2 DEPUTY COURT MARSHAL BAER: Yes, Your Honor.

3 THE COURT: Okay. You may return them to the
4 courtroom.

5 And I would ask that -- pardon?

6 DEPUTY COURT MARSHAL BAER: The two alternates?

7 THE COURT: The two alternates may come into the
8 courtroom as well. But I would have them sit perhaps here,
9 rather than in the jury box, please.

10 DEPUTY COURT MARSHAL BAER: Okay.

11 THE COURT: Would ask there be no demonstration of
12 any kind.

13 - - -

14 At 9:42 p.m. the jury returned with their verdicts, and
15 the following proceedings were held in the presence of the
16 jury:

17 THE COURT: Madam Foreman, has the jury reached
18 verdicts on both of the counts submitted to you?

19 JURY FOREMAN: Yes, we have.

20 THE COURT: If you would give those, together with
21 the instructions, to our marshal here, please.

22 As to Count I, we, the jury, find the defendant Ryan
23 William Ferguson guilty of murder in the second degree as
24 submitted in Instruction Number 11.

25 Madam Foreman, is this the verdict of the jury on

1 Count I?

2 JURY FOREMAN: Yes, it is.

3 THE COURT: As to Count II, we, the jury, find the
4 defendant, Ryan William Ferguson, guilty of robbery in the
5 first degree as submitted in Instruction Number 13.

6 Madam Foreman, is this the verdict of the jury with
7 respect to Count II?

8 JURY FOREMAN: Yes, it is.

9 THE COURT: Would defense counsel want to have the
10 jurors polled as to their verdicts as to Count I and Count
11 II?

12 MR. ROGERS: Yes, Your Honor, please.

13 THE COURT: Let us take each count separately, if
14 you would. As the clerk calls your name, if the verdict that
15 I have just read with respect to Count I is your verdict,
16 would you please signify by answering yes. If it is not,
17 would you signify by answering no.

18 (Each juror, upon being polled by Deputy Clerk Julie
19 Smith, responded in the affirmative.)

20 THE COURT: Thank you. You can keep that. I have
21 another one.

22 Ladies and gentlemen, in this case the jury is
23 required to fix punishment, because of certain laws that our
24 General Assembly has passed. We separate the issue of guilt
25 from that of punishment in this case. I need to confer very

1 briefly with the attorneys to see if they wish to present
2 further evidence. They may, or they may not. But I need to
3 discuss this matter with them.

4 We will take about a 5-minute break and come back.
5 You may be excused at this time.

6 Would ask you not to discuss any issue concerning
7 punishment among yourselves or with others or remain in the
8 presence of anyone who might be discussing this issue.

9 We will excuse the alternates at this time finally,
10 and thank them very, very much for their time and
11 consideration. Without your participation, if we'd had an
12 illness or a problem in our jury, we would, again, not be
13 able to reach a conclusion today. And we do thank you very
14 much. But you are excused and discharged, as to the
15 alternates.

16 And if you would return the jury to the deliberation
17 room, briefly.

18 - - -

19 The following proceedings were held out of the presence
20 of the jury:

21 THE COURT: They were polled on Count I. When they
22 return, I am sleepy myself, I will have them polled on Count
23 II.

24 Let me ask the state if the state intends to present
25 any further evidence on the issue of punishment.

1 MR. CRANE: Could I talk to Mr. Rogers just a
2 moment, Judge?

3 THE COURT: Yes.

4 (Discussion off the record between Mr. Crane and
5 Mr. Rogers.)

6 MR. ROGERS: Your Honor, may I have a moment to
7 consult with my co-counsel and my client?

8 THE COURT: Surely.

9 (Discussion off the record between Mr. Rogers and
10 co-counsel and the defendant.)

11 MR. ROGERS: We've consulted. I believe the
12 question pending was addressed to the government -- or to the
13 state, as to whether or not they intended to adduce evidence.

14 THE COURT: That is correct.

15 MR. CRANE: We do, Judge.

16 THE COURT: All right. Do we have the proposed
17 instructions on the issue of punishment in the second stage
18 of the trial then? I think that --

19 MR. CRANE: We do, Judge.

20 THE COURT: Have you provided copies to defense
21 counsel?

22 MS. GOROVSKY: Not yet, Your Honor.

23 Your Honor, would you like me to do this here?

24 THE COURT: Pardon?

25 MS. GOROVSKY: Do it here?

1 THE COURT: Yes.

2 MS. GOROVSKY: Okay.

3 MR. CRANE: I got to run down and get my files.

4 I'll be right back.

5 (Mr. Crane left the courtroom.)

6 MS. GOROVSKY: Judge, this is the clean -- one clean
7 and one dirty for each instruction.

8 THE COURT: All right.

9 (Mr. Crane present in the courtroom.)

10 THE COURT: Initially the Court read Instructions
11 through Number 17, I believe, which was 302.06. I will let
12 defense counsel take a look at 305.01, which would be the
13 first instruction to be read after a finding of guilt. And I
14 will certainly poll this jury on Count II before we proceed
15 with this.

16 As to 305.01, the first instruction at this stage,
17 is there an objection to the form of that instruction?

18 MR. ROGERS: No objection to the form of the
19 instruction, Your Honor.

20 THE COURT: It will be numbered Number 18.

21 Number 19 would be instruction number 305.02. Would
22 the defendant have an objection to the form of that
23 instruction?

24 MR. ROGERS: No objection to the form of that
25 instruction, Your Honor.

1 THE COURT: All right. That would be Number 19.

2 At the conclusion of the presenting of evidence, the
3 Court would propose to read instruction number 305.03, which
4 would be numbered as Number 20. Is there an objection to the
5 form of that instruction?

6 MR. ROGERS: No objection to the form, Your Honor.

7 THE COURT: And finally -- the final instruction
8 would be 305.04, which would be Number 21. Is there an
9 objection to the form of that instruction?

10 MR. ROGERS: No objection to the form.

11 THE COURT: The state has provided forms of verdict
12 for Count I and for Count II, based on 304.40. Are there
13 objections to the form of those instructions -- of those
14 forms of verdict?

15 MR. ROGERS: No, Your Honor.

16 THE COURT: The Court would also be giving and
17 returning to the jury Instructions 1 and 2, which go along
18 with this packet.

19 Let me ask about closing arguments at this point, on
20 the punishment phase. Court is inclined to give you 15
21 minutes each on punishment.

22 MR. CRANE: How long?

23 THE COURT: 15 minutes. Would that --

24 MR. CRANE: Yeah. I'm not sure what the defense is
25 putting on, but, I mean, that's probably sufficient.

1 15?

2 MR. ROGERS: I have no clue as to what evidence the
3 state will adduce or attempt to adduce, Your Honor, but that
4 certainly should be --

5 THE COURT: I'm not limiting you on time for
6 presenting evidence. I'm talking about the time you would be
7 allowed --

8 MR. CRANE: Well, no, I know. I guess I'm saying, I
9 don't know how long my closing will be, not knowing what
10 all's coming on.

11 THE COURT: All right. Why don't I reserve that
12 until the conclusion --

13 MR. CRANE: Right now, 15 minutes sounds all right.

14 THE COURT: All right. If it looks like that would
15 be not sufficient based on the evidence adduced on either or
16 both sides, you'll let me know. And the state will let me
17 know how you're going to split your time.

18 Is there anything further at this point?

19 MR. CRANE: Oh, I thought you were asking me
20 something else. No. You got the instructions; right?

21 THE COURT: I have the instructions.

22 MR. CRANE: Okay. And -- no. I guess we're --
23 yeah, we're ready to go, Judge.

24 THE COURT: Is the defendant ready to go at this
25 point?

1 MR. ROGERS: Yes, Your Honor.

2 THE COURT: All right.

3 If you would return the jury to the courtroom,
4 please.

5 - - -

6 The following proceedings were held in the presence of
7 the jury:

8 THE COURT: Ladies and gentlemen, due to the
9 lateness of the hour, I neglected to have you polled on Count
10 II, which was the robbery first degree. If the verdict read
11 by the Court as your verdict is your verdict, would you
12 signify on Count II by saying yes. And if it is not, would
13 you say no, please.

14 (Each juror, upon being polled by Deputy Clerk Julie
15 Smith, responded in the affirmative.)

16 THE COURT: I have two instructions to read to you,
17 ladies and gentlemen, and then the parties may present
18 evidence to you if they wish to do so.

19 (Instructions 18 and 19 read to the jury.)

20 THE COURT: Mr. Crane, do you wish to make a
21 statement at this time to the jury, outlining what evidence
22 you will present?

23 MR. CRANE: Yes, Judge. Thank you.

24 - - -

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

OPENING STATEMENT

BY MR. CRANE:

Ladies and gentlemen, thank you for your verdicts. Certainly this is a difficult process. You have one more task. And that is to decide the appropriate punishment on the charges that you've returned verdicts of guilty on. Both of those have a range of punishment that's the same: 10 years up to 30 years, or life in prison. Each one of those offenses has the same range.

In this part of the trial, you'll hear from Mrs. -- Deborah Evangelista, the victim's wife; and daughter, Kali Heitholt; and also a friend of Mr. Heitholt's, Jim Robertson. They will present to you victim impact testimony.

With that, I have nothing further.

THE COURT: Does defense counsel at this time wish to make an opening statement on the issue of punishment? Or do you wish to reserve?

MR. ROGERS: I wish to make an opening statement.

May it please the Court.

THE COURT: You may proceed.

- - -

OPENING STATEMENT

BY MR. ROGERS:

We trust that you have done your duty as you see it. We disagree with your verdicts. We would like to adduce

1 evidence of the effects, not your verdicts, but this charge
2 had upon Ryan Ferguson and upon his family. We will attempt
3 to persuade you that it would be a grave miscarriage of
4 justice to sentence Mr. Ferguson to more time in the
5 penitentiary than the state saw fit to give Mr. Erickson.

6 Thank you.

7 THE COURT: State may call its first witness.

8 MR. CRANE: Judge, before I do that, I'd like to
9 offer all evidence admitted in the guilt stage of the trial,
10 all exhibits, documents, photographs, or things that were
11 admitted in the guilt stage.

12 THE COURT: And this is for the state's -- as far as
13 the state's exhibits go; is --

14 MR. CRANE: Yes.

15 THE COURT: -- that correct?

16 MR. CRANE: That's correct, Judge.

17 THE COURT: Is there an objection?

18 MR. ROGERS: Yes, Your Honor. I think that's
19 superfluous. I think everything that's in evidence already
20 stays in evidence. And I think the Court's instructions
21 indicate that. And will indicate that.

22 THE COURT: I'm going to sustain the state's request
23 to admit all the evidence. They may consider the evidence
24 that they heard in the guilt stage of the trial, as well as
25 any additional evidence that they are to hear now.

1 MR. CRANE: State calls Deborah Evangelista.

2 THE COURT: Would you be sworn by the clerk, please.

3 - - -

4 DEBORAH LYNN EVANGELISTA,

5 being first duly sworn by Julie Smith, Deputy Clerk,

6 testified as follows:

7 - - -

8 DIRECT EXAMINATION

9 BY MR. CRANE:

10 Q. The jury remembers you, but can you give us your
11 name again?

12 A. Deborah Lynn Evangelista.

13 Q. Deborah, are you holding up okay?

14 A. I'm fine.

15 Q. In the -- when you testified the first time, there
16 were some things that we -- weren't appropriate to get into
17 in the guilt stage of the trial. And this is your
18 opportunity now to let the jury know what effect losing your
19 husband Kent had on you. Can you talk about that?

20 A. Yes.

21 Q. Okay.

22 A. I wanted to thank you.

23 This is hard. I'm not good at speaking. They told
24 me I could write things down, but I thought it was best if I
25 just talk from my heart.

1 My husband, Kent William Heitholt, was and always
2 will be the love of my life. On November 1st, that day, All
3 Saint's Day, my life changed completely. I had a good
4 marriage, fine children, a good job. I had dreams.

5 I had known Kent for almost 25 years. I met him in
6 college. We traveled. I went with him when he got different
7 jobs. I told him, I said, "I'll follow you. Wherever you
8 find a job, we'll go." And we did.

9 And we had two children. We had dreams. We were
10 going to stay in Columbia, but we were going to find a little
11 place out in the country, kind of outskirts.

12 Q. Deborah, what's -- since Kent's murder, what's
13 happened? I mean, you lost Kent. Did you stay in Columbia
14 or what did you do?

15 A. I waited until Kali graduated from high school. And
16 then I felt like I needed to leave here. I felt like I
17 couldn't live here any more. Too many memories. There's too
18 many things that reminded me of my husband. My husband was
19 known by so many people. He was loved by so many people.
20 Because he had that way about him. He was a much better
21 person than I'll ever be. There was no one that he
22 treated -- that was -- he treated as being sub -- being under
23 him. He treated everybody with dignity and respect. And you
24 loved to be around him, because he had a love for life. And
25 you just loved to be around him.

1 Q. Ma'am, what is your life like now?

2 A. I moved to Texas, to a little small town. I thought
3 it would be best. I do like where I live. I have a nice
4 neighborhood, nice people that live around me, but my life is
5 empty.

6 MR. CRANE: Approach the witness, Judge?

7 THE COURT: You may.

8 Q. Ma'am, I want to show you what's marked for
9 identification as State's Exhibit 104, 104A through 104G. Do
10 you recognize these photographs?

11 A. I do.

12 Q. And these are generally photographs of your husband
13 at various times during his life; is that correct?

14 A. That's correct. I gave these to you. I told you I
15 kept the best ones for myself, but these are some good ones.

16 MR. CRANE: Judge, I'd offer State's Exhibit 104,
17 104A through 104G.

18 MR. ROGERS: No objection, Your Honor.

19 THE COURT: State's Exhibit 104, 104A through 104G,
20 are admitted.

21 - - -

22 State's Exhibits 104, 104A through 104G, admitted
23 into evidence.

24 - - -

25 Q. Can you just tell us a little bit about what's in

1 these photographs? Can you see that okay?

2 A. Sure.

3 Q. Here. Why don't you --

4 MR. CRANE: Can she step down, Judge?

5 THE COURT: She may.

6 A. This is after -- we were all together. We had eaten
7 dinner. This is my father's house in Warrenton, Missouri,
8 out in the country. That's my father. And this is my
9 family. And there's Kent. And there's Kali, clowning around
10 with her dad.

11 Q. Are there some of the family members here with you
12 today?

13 A. My mom's passed away, but everybody else is here.

14 There's Kali. There's me. There's Vanessa, who's
15 here. And Robin's not in there.

16 Q. What about this photograph here?

17 A. This was in --

18 Q. Where's Kent on that one?

19 A. He's right here. He was coaching Little League
20 baseball. And there's Vince. And there's Kali. She thought
21 she was the cheerleader.

22 Q. And Vince is your son; right?

23 A. Yeah.

24 Q. And who's this little guy right here?

25 A. That's Kent when he was a baby.

1 This is when we went to Disney World. We saved up
2 our money. We put our change in this big milk jar, and we
3 saved to go to Disney World.

4 Q. Is that Kali?

5 A. There's Kali. And Vince is taking the picture. She
6 was getting aggravated, because he was taking so long.

7 This is Kent, and there's Vince, in front of our
8 house where my kids were born.

9 Q. And the bottom two?

10 A. This is Kent and Vince.

11 And this is Kent and Kali and Vince at a friend's
12 Christmas party. And they had a Santa there.

13 Q. Ma'am, did you have anything you wanted to add to
14 your testimony?

15 A. Yes.

16 I'm going to speak a little bit until I can't speak
17 any more, because I need to let you know how wonderful my
18 husband was.

19 When he died, I remember telling the police
20 officers, I just didn't want him to be afraid and I didn't
21 want him to be in pain.

22 I had dreams. I miss my husband every single day of
23 my life. And I always will. He and I just got along so
24 well. We were so -- we got -- we were a lot alike. Except
25 he had the good sense of humor.

1 JIM ROBERTSON,
2 being first duly sworn by Julie Smith, Deputy Clerk,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. CRANE:

6 Q. Give us your name, sir.

7 A. My name is Jim Robertson.

8 Q. What's your occupation?

9 A. I'm managing editor of the Columbia Daily Tribune.

10 Q. This is a strange set of circumstances for you and
11 me.

12 A. Yes, sir.

13 Q. How did you know Kent Heitholt?

14 A. I hired Kent to be sports editor at the Tribune in
15 1996, I believe.

16 Q. And he had applied for an opening there at the
17 Tribune?

18 A. Yes. We had an opening for a sports editor. I
19 advertised nationally to fill it, and Kent applied.

20 Q. He met with you, and did you -- you interviewed him?

21 A. Uh-huh.

22 Q. Okay. And hired him.

23 A. Yes, I did.

24 Q. And did you know him before that?

25 A. I did not.

1 Q. And after that, how did you guys get along?

2 A. We got along great. He had two young kids, and I
3 had two young kids. We were about the same age. Same --
4 contemporaries at the School of Journalism, although I didn't
5 know him. And we just -- he was an easy guy to like.

6 Q. Around the office, around the workplace, how do you
7 remember -- you were his boss; right?

8 A. Right.

9 Q. And he was a supervisor of the other people in the
10 sports department.

11 A. That's correct.

12 Q. How do you recall Kent getting along with people at
13 work?

14 A. Everybody at the Tribune loved Kent. You know, he
15 would come in in the morning, put out the section. We're an
16 afternoon paper, so he'd have to get there fairly early in
17 the morning, get the sports section together. And then he'd
18 go home, meet the kids after school or whatever, and come
19 back in the evening, because most sports coverage happens in
20 the evening and on weekends. So Kent was always there. He
21 knew everybody in the building. Everybody knew him. And
22 he'd always speak to them; he'd joke with them. He was a big
23 jovial Teddy Bear of a guy, you know, and everybody loved
24 him.

25 Q. How did he treat his subordinates, if you will?

1 People that worked under him?

2 A. They were like a family in the sports department.

3 You know, those guys aren't overpaid, but they were there all
4 the time, and Kent was the -- sort of the center of
5 attention. He had been at various newspapers, over at
6 Southeast mostly. Covered big-time sports, pro sports.
7 Knew, you know, all the famous coaches and all that. And
8 these guys who worked with him ate that up. You know. It
9 was -- he was like a Pied Piper almost.

10 Q. We talked -- Bob Thompson testified earlier. How
11 did Bob Thompson come to work at the Tribune?

12 A. You know, Bob was a perfect example, I think, of
13 Kent's magnetism and his goodness. I think in Shreveport,
14 Kent was an editor down there, a sports editor and columnist,
15 and Bob was just a kid who wanted to get his foot into
16 sports. I think he was in -- like a copy boy or something at
17 the newspaper. And he asked Kent if he could work in sports.
18 And so Kent gave him his first job. And nurtured him, bought
19 him along. And then when Kent came to Columbia, Bob pretty
20 soon was up here. And he gave him another chance to cover
21 prep sports. And he worked as a -- Bob's a good sports
22 writer now.

23 Q. So he helped him develop.

24 A. He definitely did.

25 Q. And that would be the case with other people that

1 worked with Kent?

2 A. Yeah. Mike Boyd, who might have been the last --
3 undoubtedly was the last Tribune employee to see him alive, I
4 remember Kent gave him -- he hired him. Mike had a family,
5 young family. Didn't have any money. Kent loaned him shirts
6 to wear to work.

7 Q. We've seen this photograph that's in 1B quite a few
8 times during this trial. And we've talk about the little guy
9 next to Kent there. Who is that guy?

10 A. He just makes me look little in comparison.

11 Q. All right.

12 A. That's me.

13 Q. What do you remember about that day? That's
14 Halloween of 2001?

15 A. Yeah. That's his fifth anniversary at the Tribune.
16 And you know, when you get five years longevity, you get to
17 go through a catalog and pick out a fabulous gift. And he
18 picked out some golf balls.

19 Q. All right. So that is, in fact, what that is. That
20 was the fabulous gift he picked out of a catalog?

21 A. That's right.

22 Q. Okay.

23 A. And we have a little ceremonial, where I go present
24 him with his gift that he already knows what it is, and then
25 they snap a picture of it to put in the company newsletter.

1 And, you know, usually I stick out my hand and we do a
2 grip-and-grin and he shakes hand and they take the picture.
3 I stuck out my hand, and he grabbed ahold and hugged me, so I
4 just hugged him back.

5 Q. What about his work ethic?

6 A. He was there all the time. I mean, he wasn't there
7 all the time, because I know that he went home and spent time
8 with his kids and his family, but he was there early in the
9 morning and he was there late at night; he was there
10 weekends.

11 Q. He loved his job?

12 A. Oh, he loved it.

13 Q. And he loved sports.

14 A. He lived sports.

15 Q. Was Kent the kind of guy that just wanted to cover
16 the big-time, high profile, like an MU basketball game?

17 A. You know, that was -- people -- I mean, people still
18 talk about Kent. And no disrespect to the staff we've got
19 now, but Kent made time, and many, many times did it himself,
20 he'd cover little girls softball games. The marathon -- we
21 have a marathon that happens every Labor Day. One of the
22 last times I saw him covering something, he was out on a
23 Saturday morning, covering that. It starts at 6:30 in the
24 morning. These are lonely sports. You know, they're not the
25 kind of sports that draw fifty, sixty thousand people to a

1 football game or twenty thousand to a basketball game. But
2 he gave them as much attention and gave them as much respect
3 as he would a Big 12 game.

4 Q. You miss your friend.

5 A. Yeah. Absolutely.

6 MR. CRANE: No further questions.

7 THE COURT: You may inquire.

8 MR. ROGERS: Thank you, Your Honor.

9 - - -

10 CROSS-EXAMINATION

11 BY MR. ROGERS:

12 Q. Good evening, sir.

13 A. Hi.

14 Q. You mentioned Mike Boyd. Correct?

15 A. Yes.

16 Q. Somebody that was close to Kent?

17 A. He worked with Kent.

18 Q. Kent not only helped him out professionally, but
19 personally with some things.

20 A. Yes, sir.

21 Q. And how did you feel sitting in this courtroom when
22 the state's star witness called Mike Boyd a regular-sized,
23 regular-build, middle-aged white guy?

24 A. Well, he was regular size. I wouldn't disagree with
25 that. His skin color is not how it was described, but it was

1 dark.

2 Q. It's clear that the witness was making up
3 characteristics.

4 A. I don't have any opinion about that, sir.

5 Q. And you don't have an opinion about Ryan Ferguson
6 either, do you, sir?

7 A. No, sir.

8 MR. ROGERS: Thank you.

9 THE COURT: Redirect?

10 - - -

11 REDIRECT EXAMINATION

12 BY MR. CRANE:

13 Q. Do you know what Boyd's car looked like?

14 A. No.

15 Q. That's fine.

16 MR. CRANE: No further questions, Judge.

17 THE COURT: Anything further for the defendant?

18 MR. ROGERS: No, Your Honor.

19 THE COURT: You may step down, sir. Thank you.

20 State may call its next witness.

21 MR. CRANE: Kali Heitholt.

22 THE COURT: Would you please raise your right hand
23 and be sworn.

24 - - -

25

1 KALI ROSE HEITHOLT,
2 being first duly sworn by Julie Smith, Deputy Clerk,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. CRANE:

6 Q. Could you give us your name, ma'am?

7 A. Kali Rose Heitholt.

8 Q. And what was your relationship to the late Kent
9 Heitholt?

10 A. I'm his daughter.

11 Q. And how old are you now?

12 A. I'll be 19 Monday.

13 Q. Kali, how old were you when your dad was murdered?

14 A. I just turned 15.

15 Q. How did you find out about it?

16 A. I had just gotten home like a couple hours before,
17 probably around 10:00, from being with some friends at
18 Shakespeare's Pizza eating, for Halloween. And I remember I
19 still had all of my makeup on from Halloween. And I heard
20 the doorbell ring, and I went downstairs to go answer the
21 door. And our house was a split-level. So there were stairs
22 in front of the door, leading up. And my mom came out, and
23 she was standing behind me on top of the stairs, and I
24 answered the door, and it was two police officers. So my mom
25 asked them to come in. And they came and they sat down with

1 my mom. And they told me that I might want to go to my room.
2 So I went to the hallway, and I kind of idled. I didn't know
3 why they were there. I was like, "Oh, I wonder what the cops
4 are doing here so late. That's really weird." And then they
5 said, "There's been a horrific act committed against your
6 husband" to my mom. And I remember thinking, "I'm not going
7 to cry; I'm not going to cry." And then I just started
8 balling. And my mom came and consoled me. And that mind --
9 I mean, that moment in my mind sticks out. I just can never
10 forget it. I just think about it all the time.

11 Q. What did you and your dad used to do together?

12 A. He used to take me to concerts and we'd go to movies
13 together and we'd go out to eat and --

14 Q. Did your dad eat quite a bit?

15 A. Yes. He ate so much. But he was just a great guy.
16 He just wanted to spend so much time with me. And --

17 Q. How would he -- I'm sorry.

18 A. That's all right.

19 Q. How would he help you?

20 A. Well, he'd help me with school papers, because I'm
21 not that good of a writer. So he'd sit down with me when I
22 had a big essay due and like help me revise it and see what
23 kind of things I was stating wrong and help me cite things.
24 And he'd also come to our school, both me as well as my
25 brother, and he'd talk and give everyone a look on how it was

1 like to be a sports editor. And that was always really,
2 really awesome to have him come and talk to our school.

3 Q. After your father's death, did you finish up high
4 school?

5 A. Yeah. I was a sophomore when it happened, and so I
6 graduated when I was a junior in 2003. So we didn't have to
7 stay in Columbia any more.

8 Q. What happened? Where did you go?

9 A. I moved to Sweden, because I -- I didn't want to be
10 anywhere near Columbia any more, because it was just too
11 tough to be here.

12 Q. What were you -- what are you doing there?

13 A. I went to art school for a year.

14 Q. And then what?

15 A. And then I moved to Boston. And then after Boston I
16 moved to Chicago, where I currently reside.

17 Q. Okay. Kali, what -- what are you thinking about the
18 future?

19 A. I just -- I want to finish school. And I just -- I
20 want other people to be able to know my father, but they
21 never will, and that just -- it hurts so bad for me, because
22 it's not fair that his life was taken away so early and then
23 not everyone can know how great he was.

24 Q. You know, you heard some testimony -- you've sat
25 through most of this trial, haven't you?

1 A. Uh-huh.

2 Q. There was some talk about a cat.

3 A. Uh-huh.

4 Q. That your dad was feeding or used to feed out there.

5 Is that --

6 A. Yeah.

7 Q. -- something you were aware of?

8 A. Yeah. There was a stray cat that lived in the

9 Tribune parking lot and around the Tribune area. And my dad

10 always kept cat food in his car. And so every night before

11 he left to go home, he would put some cat food on the ledge

12 and let the cat have some food to eat so it would survive.

13 Q. What happened to the cat after your dad was killed?

14 A. I think the Humane Society, I'm not sure who, but

15 someone caught the cat for us and now we own it.

16 Q. You got the cat?

17 A. Yeah.

18 MR. CRANE: No further questions.

19 THE COURT: You may inquire.

20 MR. ROGERS: No questions.

21 Thank you.

22 THE COURT: You may step down.

23 THE WITNESS: Thank you.

24 THE COURT: Further evidence for the state?

25 MR. CRANE: No further evidence, Judge.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - -

STATE RESTS

- - -

THE COURT: The defendant may present evidence.

MR. ROGERS: Thank you, Your Honor.

Defendant would call Leslie Ferguson.

THE COURT: Would you be sworn, please.

- - -

LESLIE FERGUSON,

being first duly sworn by Julie Smith, Deputy Clerk,
testified as follows:

DIRECT EXAMINATION

BY MR. ROGERS:

Q. Tell us your name, please.

A. Leslie Ferguson.

Q. And get kind of close to that flat black microphone,
if you will, because I'm having trouble hearing.

You're Ryan's mom?

A. Yes.

Q. How did you feel when you heard that he had been
arrested and accused of this?

A. I couldn't believe it. And I still can't believe
it. Ryan is innocent. And I know that some day his
innocence will be proven. I have faith that the truth will
come out. God will reveal the truth one day.

1 Q. Let me ask you, tonight, when you heard the
2 verdicts, the opposite of what you just told us, how did you
3 feel about that?

4 A. I feel that the truth hasn't come out. I feel that
5 the real murderer is still out there. And I feel that Ryan
6 is a victim. I feel our family is a victim.

7 Q. What has it done to your family?

8 A. I can't even tell you what it's done to us. It has
9 been horrific. I feel very bad for the Heitholt family. I
10 can't imagine what they've had to go through this week. But
11 there's no reason for my family or for Ryan to have had to go
12 through any of this. We shouldn't be sitting here.

13 Q. Is there anything else you'd like to say?

14 A. I just -- I'm just in a state of shock. I don't
15 even know how to respond, because I know he's innocent. And
16 I believe very strongly in his innocence.

17 Q. Thank you.

18 MR. ROGERS: I have no further questions, Your
19 Honor.

20 MR. CRANE: No questions.

21 Thank you, ma'am.

22 THE COURT: You may step down, Mrs. Ferguson.

23 MR. ROGERS: Defendant calls Bill Ferguson.

24 THE COURT: Would you be sworn, sir.

25 - - -

1 BILL FERGUSON,
2 being first duly sworn by Julie Smith, Deputy Clerk,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. ROGERS:

6 Q. Tell us your name, please.

7 A. Bill Ferguson.

8 Q. And what's your relationship to Ryan?

9 A. He's my son.

10 Q. Calling your attention back to March of 2004, when
11 you learned that Ryan had been arrested and accused of this
12 murder, how did you feel?

13 A. I didn't believe it. I was shocked. Devastated.
14 It just could not be possible. They must have a different --
15 the wrong -- the right name, wrong person.

16 Q. And then when you realized it was, in fact, your son
17 who was accused, what did you think?

18 A. I thought -- the first couple of days I was in total
19 shock. And then I started -- I remembered, when we lived in
20 Australia, where a woman was falsely accused, manipulated by
21 the police and the prosecutor and the media. And it was
22 later found that she was totally innocent and released from
23 prison. And I thought, "Oh, my gosh. I have a duty to check
24 this out." And I started investigating on my own. And I'm
25 totally convinced that he is innocent.

1 Q. And have you done what you could to get information,
2 bring it to people, and try and demonstrate Ryan's innocence?

3 A. You know, I thought up to a few minutes ago I had.
4 But apparently I -- obviously since I'm an amateur at this,
5 I'm going to learn a lot more about this, and I'm going to
6 prove my son's innocent, and so will my family. And so we're
7 going to learn how to do this. And so we're going to --
8 we're going to go back through it and we're going to learn,
9 and we're going to come out just like that lady in Australia
10 did. We're going to be vindicated.

11 Q. You understand this jury has found Ryan guilty on
12 both those counts?

13 A. Yes.

14 Q. And that they now have the duty of fixing
15 punishment. Is there anything you would like to say to them
16 in that regard?

17 A. Well, I'd like to say two things.

18 One, we feel very, very badly for the Heitholt
19 family. I mean, that was a horrible thing that they had to
20 experience. They have a beautiful family, wonderful friends,
21 a great future. They had everything going. And an innocent
22 man's life has been taken away. But it was not my son that
23 took it away. And I feel very sorry for them. And there's
24 nothing I can do about that. I feel very badly about that.
25 So I just want that to be on the record. I feel very bad.

1 Q. And was there --

2 A. But in regards to my son, he just turned 21 here in
3 court. He had a great future ahead of him. He graduated
4 from high school early. He was an Eagle Scout. And he was
5 my best friend.

6 And it's going to be really very difficult. And if
7 he gets the jail sentence that I'm hearing, I'll never live
8 long enough to see him outside of jail. I was there when he
9 was born. I was right there when he was born. And if he
10 goes to jail, the time we're talking about, I'm never going
11 to see my son again. I mean, I'm going to see him, but he's
12 been in jail 19 months. I haven't even been able to touch
13 him. Haven't been able to touch my own son. He's my best
14 friend.

15 And he'd be out in the mall, out with his friends,
16 and he'd see me, with his friends, with his peer group, and
17 he'd stop, he'd come over and give me a hug, with his peer
18 group there. How many teenagers do that? I don't think very
19 many. I tell you what, moms and dads, that's a good feeling.
20 And I want that feeling back.

21 And I know you've made your decision. I think it
22 was wrong, but I respect it. I'm going to prove that, just
23 like that lady in Australia.

24 But please, when you consider the sentence, putting
25 my son in jail for X number of years is not going to help the

1 Heitholt family one bit. Let's get my son back out here,
2 make him a productive person. Some benefit to society.
3 That's what would be good. That would be a better legacy for
4 the Heitholt family, for our family, and for my son. Putting
5 a good person in prison for X number of years will serve no
6 benefit to anybody at all.

7 And if anybody would ever bother to check his high
8 school record, or his friends, he never, ever, ever was in a
9 fistfight, any kind of altercation that I've ever been aware
10 about, ever came out in court. He got along with everybody.
11 He was a peacemaker, not a troublemaker. And he's always
12 been like that.

13 And you saw how he spoke. When he was harangued
14 and -- which I presume is the job of the prosecutor, he never
15 raised his voice. Much cooler than I am. He kept the same
16 demeanor, same voice, and was very respectful. That is my
17 son. That's not a murderer. That's not a person who goes
18 out and kills people.

19 This is a nice kid that got caught up -- I think
20 that Erickson was just an abused person that got taken
21 advantage of by the state.

22 And now here we find: No blood in the car. How
23 could that possibly happen? How could you have a bloody
24 crime scene like this and, in the car, not one drop of blood?
25 How can you go to the victim's house -- I mean, Erickson's

1 house, and do a luminol test of his entire house, bedroom,
2 carpet, not one drop of blood.

3 I tell you what, I know my son is an Eagle Scout,
4 but I don't believe he got a badge called crime, where he
5 became a master crime-master, to be able to commit a crime
6 like that, that was so bloody, and not transfer any of the
7 blood to his car, Erickson's house, our house, anywhere.
8 That's magical.

9 And it's beyond me how anybody could ever find him
10 guilty just on that, never mind By George being closed at
11 1:30. Never mind Dallas Mallory not even showing up. Now,
12 why did the state not call him? I think that's kind of
13 interesting. Dallas Mallory was not even anywhere around --

14 Q. Mr. Ferguson, I think --

15 A. Sorry.

16 Q. I realize it's a pretty broad question.

17 A. Sorry. Sorry. Sorry.

18 Q. In terms of the length of sentence to the jury, the
19 jury has imposed -- is to impose or will choose to impose, do
20 you have anything to say concerning that? Concerning not
21 issues already decided, but punishment.

22 A. Please just make it as short a time as possible.
23 I'd like to be able to hold my son before I die. I'd like to
24 just give him a good hug. I'd like to spend some more time
25 with him. We spent an inordinate amount of time together.

1 Give him the shortest sentence possible. It will serve no
2 purpose to keep him in jail. What purpose would that
3 possibly serve?

4 His mother and myself, his sister, we love him so
5 much and we want him back so badly. And we do feel sorry for
6 the Heitholt family. It's a horrible situation for the
7 community. But if just will, please, the shortest sentence
8 possible, please.

9 MR. ROGERS: Thank you.

10 THE COURT: Mr. Crane, do you have any questions?

11 MR. CRANE: No.

12 Thank you, sir.

13 THE COURT: You may step down, Mr. Ferguson.

14 THE WITNESS: Thank you.

15 THE COURT: Defendant wish to call any further
16 witnesses or present any further evidence?

17 MR. ROGERS: May I have a moment, Your Honor?

18 For the record, Your Honor, out of an abundance of
19 caution, we would at this time offer all exhibits offered by
20 the defense during the guilt or innocence phase of the trial.

21 THE COURT: Is there an objection?

22 MR. CRANE: No objection.

23 THE COURT: All of the exhibits received in evidence
24 during the guilt phase on behalf of the defendant will be
25 received at this time.

1 Anything further then?

2 MR. ROGERS: No, Your Honor. Thank you.

3 - - -

4 DEFENDANT RESTS

5 - - -

6 THE COURT: Rebuttal, Mr. Crane?

7 MR. CRANE: I'm sorry?

8 THE COURT: Rebuttal?

9 MR. CRANE: No.

10 THE COURT: We spoke about the time for your closing

11 argument. And I spoke to both counsel about that.

12 MR. CRANE: I think Mr. Rogers has a suggestion.

13 MR. ROGERS: I think five minutes per side should be

14 sufficient.

15 THE COURT: Is that agreeable?

16 MR. CRANE: Yes, ma'am.

17 THE COURT: How would you like to split your five

18 minutes?

19 MR. CRANE: Three and two.

20 THE COURT: You may address the jury.

21 - - -

22 OPENING ARGUMENT

23 BY MR. CRANE:

24 Ladies and gentlemen, it's late. I know it's been a

25 long day and a long, tough week.

1 doubts that in any way, shape, or form. There is nothing you
2 can do to Ryan Ferguson that will in any way bring back Kent
3 Heitholt. There's nothing you can do to Ryan Ferguson that
4 will in any way take away the pain and suffering that his
5 widow and his daughter and his son have undergone.

6 Whoever killed Kent Heitholt on November 1st, 2001,
7 put an end to a very worthwhile life; put an end to a
8 beautiful relationship; put an end to the completeness of a
9 beautiful family.

10 In a sense, your verdicts tonight have also put an
11 end to the completeness of a good, worthwhile family. And I
12 don't mean to compare things here, because those aren't --
13 comparisons would not be appropriate.

14 But you do have at least one remaining decision that
15 might perhaps mitigate, lessen the devastation that your
16 verdicts have brought to the Ferguson family. There's no way
17 we can mitigate or lessen the devastation that the murder of
18 Kent Heitholt brought to his family. But this young man
19 here, who turned 21 the day before yesterday, who had turned
20 17 a couple weeks before Halloween in 2001, still could have
21 a future, despite your verdicts. We ask you to let the
22 devastation end as much as it can. Do as little harm as you
23 can with the punishments you impose.

24 The range is a minimum of 10 years, maximum of 30
25 years, or life imprisonment for each count. You don't have a

1 choice as to whether the sentences are consecutive or
2 concurrent. That's up to the Court. But you do have the
3 opportunity to at least mitigate, insofar as possible, the
4 effects of your verdicts on Ryan Ferguson, on his family, by
5 assessing the minimum sentence.

6 That is not to say that Kent Heitholt is not -- was
7 not a very valuable, wonderful, warm, and loving person. His
8 worth is measured in the family he leaves behind and friends,
9 not in the years of Ryan Ferguson's life.

10 Thank you.

11 THE COURT: Is it over? Thank you.

12 You may reply briefly, Mr. Crane.

13 - - -

14 CLOSING ARGUMENT

15 BY MR. CRANE:

16 Ladies and gentlemen, obviously Ryan Ferguson's got
17 a mom and dad that love him. He had a good life. A
18 privileged life. But he should receive the same punishment
19 for a crime of this nature as anybody else.

20 Total disregard for human life.

21 Ladies and gentlemen, make no mistake. Ryan
22 Ferguson is not a victim of circumstance. He is the creator
23 of the circumstances he's in right now. And ultimately it's
24 up to the individual person not to do things like this. Not
25 to leave a man like that (indicating).

1 Ladies and gentlemen, the maximum. That's what he
2 deserves.

3 Thank you.

4 THE COURT: I have two more instructions to read to
5 you.

6 (Instruction 20 read to the jury.)

7 THE COURT: And indeed, this matter should have been
8 read to you before. And I apologize. And I'm certainly
9 willing to give counsel additional argument, if you wish,
10 because there is an instruction regarding the argument.

11 (Instruction 21 read to the jury.)

12 THE COURT: You did not receive this instruction
13 before argument, and I'm more than happy to allow state and
14 the defendant to have closing arguments, to have the last
15 word with this jury, if you wish to do so.

16 Mr. Crane.

17 MR. CRANE: I think we're both through.

18 MR. ROGERS: I'm through.

19 THE COURT: All right. With that, ladies and
20 gentlemen, I'll hand you the instructions.

21 If you wish to see any of the exhibits, you may
22 request that. If you become weary and wish to retire for the
23 evening and resume your deliberations tomorrow, you will let
24 me know.

25 Jury be in recess.

1 (Jury went into deliberations at 10:50 p.m.)

2 - - -

3 The following proceedings were held out of the presence
4 of the jury:

5 THE COURT: We'll be in recess.

6 (Recess taken.)

7 - - -

8 At 11:05 p.m. a note was received from the jury, and the
9 following proceedings were held out of the presence of the
10 jury and the defendant:

11 MR. ROGERS: Kevin, we have a question.

12 THE COURT: The note is: "Can you supply us a
13 reminder of what Charles Erickson's agreement was?"

14 There was an exhibit offered of the agreement." I
15 don't know where that is. I don't remember the number.

16 MR. CRANE: Yeah. I bet I ran downstairs with that.
17 Should that exhibit come in?

18 MR. KNIGHT: Let me go find it.

19 THE COURT: You've offered all exhibits.

20 MR. CRANE: Yeah, I know. Do you want me to get the
21 agreement?

22 THE COURT: Well, let me just suggest --

23 MR. CRANE: Is that the way you want to do it?

24 THE COURT: I'm not going to give them -- I'm not
25 going to write them and tell them what I think the agreement

1 is.

2 MR. CRANE: Okay. I'll go get the letter.

3 (Mr. Crane left the courtroom and then returned.)

4 MR. CRANE: It would be State's Exhibit 25.

5 THE COURT: Is the plea agreement. State's
6 agreement with Charles Erickson. It is Exhibit 25. And the
7 Court would intend to send that back, unless there's an
8 objection by the state or the defendant.

9 MR. CRANE: No objection.

10 MR. ROGERS: No objection.

11 (Exhibit sent back to the jury room.)

12 (Recess taken.)

13 - - -

14 The following proceedings were held out of the presence
15 of the jury:

16 (The defendant not present in the courtroom.)

17 THE COURT: Would you care to withdraw these
18 depositions that you filed? And --

19 MR. ROGERS: Yes.

20 THE COURT: -- the clerk --

21 MR. ROGERS: If that's the local practice, I'm happy
22 to do that.

23 THE COURT: We don't normally keep them, unless they
24 become of issue. I don't know if they would be needed in
25 case of appeal.

1 (Depositions withdrawn.)

2 (The defendant present in the courtroom.)

3 THE COURT: Has the jury reached verdicts on the
4 issue of punishment?

5 DEPUTY COURT MARSHAL: Yes, Your Honor.

6 THE COURT: Would you return the jury to the
7 courtroom, please.

8 - - -

9 At 11:42 p.m. the jury returned with their verdicts, and
10 the following proceedings were held in the presence of the
11 jury:

12 THE COURT: Madam Foreman, has the jury reached
13 verdicts on the issue of punishment on Counts I and II in
14 this cause?

15 JURY FOREMAN: Yes, we have.

16 THE COURT: Would you hand those, together with the
17 instructions that you have. And I don't know if you have the
18 exhibits, but we'll get those from the jury room.

19 As to Count I, we, the jury, having found defendant
20 Ryan William Ferguson guilty of murder in the second degree,
21 assess and declare the punishment for murder in the second
22 degree at imprisonment for a term of 30 years.

23 Madam Foreman, is this the verdict of the jury with
24 respect to punishment on Count I?

25 JURY FOREMAN: Yes, it is.

1 THE COURT: As to Count II, we, the jury, having
2 found defendant Ryan William Ferguson guilty of robbery in
3 the first degree, assess and declare the punishment for
4 robbery in the first degree at imprisonment for a term of 10
5 years.

6 Is this the verdict of the jury with respect to
7 punishment on Count II?

8 JURY FOREMAN: Yes, it is.

9 THE COURT: Does defendant wish to have the jurors
10 polled as to their verdicts on punishment?

11 MR. ROGERS: No, Your Honor. Thank you.

12 THE COURT: Ladies and gentlemen, thank you is
13 inadequate to express our gratitude for your service here.

14 You are certainly welcome to spend the night here,
15 or we will arrange to take you back to your homes this
16 evening.

17 You are no longer under a prohibition about talking
18 about the case, but you're not required to, if you choose not
19 to talk about the case. That's your decision, personally.

20 I will ask that the jury be free to pass through the
21 courthouse now and go to wherever they choose to go, without
22 disturbance. But you may talk to whomever, family, friends,
23 or the media, if you choose to do that, once you leave this
24 courtroom.

25 The Court will order an investigation prior to

1 I would hope that we would have reports and any kind of
2 post-trial motions to be heard at that particular time.

3 Is that date agreeable with the state?

4 MR. CRANE: As far as I know.

5 THE COURT: I mean, you're planning to be here and
6 there's not a conflict on that Monday.

7 MR. CRANE: I'll be here.

8 THE COURT: Are you looking at your calendar?

9 MR. WEIS: Yeah.

10 MR. ROGERS: I've looked at mine, Your Honor, and I
11 am available on that date.

12 THE COURT: All right.

13 Final disposition then is set for the 5th of
14 December, 2005, 9:00 a.m., Division III.

15 If you wanted to set it a little bit later in the
16 morning, since you travel from Kansas City, I would be
17 agreeable to do that. If you anticipate that you want to
18 present evidence at final disposition, in addition to
19 whatever we've heard during this trial, if you'll let me
20 know. And perhaps we would need a different date, so that
21 I'd be sure and have enough time, because usually a law day
22 is a busy day and it's hard to have very lengthy hearings on
23 those days.

24 MR. ROGERS: Very well, Your Honor. We'll do that.

25 THE COURT: And I'm permitting counsel on both sides

1 to withdraw all the exhibits. And we will make sure that we
2 have the exhibits for you before you leave the courtroom.

3 Were you about to say something?

4 MR. ROGERS: Yes, Your Honor. We would request an
5 additional 10 days, for a total of 25 days in which to file
6 post-trial motions.

7 THE COURT: All right.

8 Defendant is given additional 10 days to file motion
9 for new trial.

10 And that still should be within that time frame,
11 since today --

12 MR. ROGERS: Yes.

13 THE COURT: -- is the 21st of October. And I'm sure
14 this probably will get out on Monday, I hope. Yes?

15 DEPUTY CLERK SMITH: Yes.

16 THE COURT: Okay. At least the order will get to
17 probation and parole to begin its investigation.

18 Anything further then for the state?

19 MR. CRANE: Nothing further, Judge.

20 THE COURT: For the defendant?

21 MR. ROGERS: No, Your Honor. Thank you.

22 THE COURT: Thank you.

23 What I'm going to do is leave it on the bench.

24 DEPUTY CLERK SMITH: That's fine.

25 THE COURT: And I thought I had an extra paper clip.

1 I'm going to put the docket sheets together.

2 Would you give this to Mr. Rogers.

3 This is part of the deposition of Erickson that you
4 had filed that I've allowed you to withdraw. And I believe
5 this goes with it, because this appears to be an exhibit to
6 that deposition.

7 MR. ROGERS: Thank you, Your Honor.

8 THE COURT: Uh-huh.

9 And are there any exhibits in the jury room?

10 DEPUTY COURT MARSHAL BAER: Yes, Judge.

11 THE COURT: If you would provide those exhibits to
12 counsel, please.

13 DEPUTY COURT MARSHAL BAER: Okay, Judge.

14 (Hearing adjourned.)

15 - - -

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

December 5, 2005

- - -

THE COURT: Case Number 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: What says the defendant?

MR. ROGERS: Your Honor, can we have about ten minutes to discuss some things?

THE COURT: You need ten minutes? Okay. I will take up the civil docket then.

(Other cases heard.)

THE COURT: Mr. Rogers.

MR. ROGERS: Yes.

THE COURT: Are you ready to proceed in State versus Ferguson at this time? Have you had sufficient time to consult?

MR. ROGERS: Yes, Your Honor.

THE COURT: We will then take up Case Number 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: And what says the defendant?

MR. ROGERS: Ready, Your Honor.

THE COURT: Mr. Rogers, you may be heard on your

1 motion for judgment of acquittal, or, in the alternative, for
2 new trial.

3 MR. ROGERS: Thank you, Your Honor.

4 I have been practicing criminal defense for going on
5 30 years. And I have conducted many hearings such as this.
6 And what usually happens is: I usually stand up and say,
7 "Your Honor, we rest on the motion for new trial as filed and
8 have no additional argument," and the motion is usually
9 overruled, and then we proceed to sentencing, because in the
10 usual case the function of a motion like this is to preserve
11 issues for appeal. This, as the Court is well aware, is not
12 a usual case. And therefore, we are asking for extraordinary
13 consideration of parts of this motion.

14 With regard to the first 14 points raised, those are
15 points which were raised at trial, and those are points which
16 I do not intend to argue this morning, although I -- I do not
17 want to waive any of them, obviously. But with regard to the
18 15th and 16th points, I think it deserves consideration.

19 The reason this is not a usual case is because our
20 system usually works. Usually when you have a jury trial,
21 the jury reaches the right conclusion. They didn't this
22 time. We have here a young man who has been found guilty, by
23 a jury, after a week-long trial, of a crime that he had no
24 involvement in. And so that's why we need to take a long
25 hard look and see how that happened.

1 And paragraph 15 in the motion for new trial is a
2 claim of newly discovered evidence. You'll recall, Your
3 Honor, that during the trial we located some witnesses, two
4 witnesses, Miss Griggs and Mr. Canada, who had not been
5 disclosed to the state. And the reason we didn't disclose
6 them is because we didn't know about them. And we were able
7 to demonstrate at a hearing outside of the presence of the
8 jury that the state had, in fact, known about these
9 witnesses; that they had interviewed these witnesses; that
10 they had not prepared any reports of the interviews; and that
11 the exculpatory information these witnesses gave had not been
12 disclosed to the defense.

13 That is the same with the evidence referred to in
14 paragraph 15, Your Honor. And that's evidence which has been
15 filed as part of the motion supported by the affidavit of the
16 records custodian. Evidence of the -- I call it liquor
17 control, but I guess the official name is the Missouri
18 Division of Alcohol and Tobacco Control-Licensing.

19 And the Court will recall that one of the major
20 issues in this case was Charles Erickson's claim that this
21 robbery was committed for the purpose of gaining money to go
22 back to By George's nightclub and spend on alcohol. And yet
23 the robbery occurred after 2:00 in the morning. And the
24 testimony of Miss Canada -- or excuse me, Mr. Canada and
25 Miss Griggs was that By George's closed before 1:30, and at

1 1:30 everybody was supposed to be out and they locked the
2 door.

3 The state, during its argument, and during its
4 cross-examination of Griggs and Canada, made much of the fact
5 that By George's routinely violated the liquor law which
6 prohibits the sale of alcohol to minors. Or the possession
7 of alcohol by minors on the premises. And questioned them
8 about numerous citations that By George's had received from
9 liquor control.

10 After the trial, we were able to acquire those
11 citations, which have been filed with the Court. Those were
12 in the possession of the State of Missouri throughout.
13 Therefore, they're clearly within the possession -- the
14 constructive possession of the prosecutor's office. They
15 were not disclosed to us beforehand.

16 Yet they showed numerous citations, as the state
17 pointed out, for serving alcohol to minors or for minor in
18 possession on the premises. Not one single citation over the
19 years for being open after hours, for ever being open after
20 hours, which is the point that the state tried to argue.

21 So, here we have evidence which is material, within
22 the meaning of Brady and Kyles versus Whitley, which is in
23 the possession of the state, State of Missouri, which is not
24 disclosed to the defense. And therefore, I think the Court
25 is well aware of the precedence which require such

1 disclosure.

2 And I think that that is a very powerful claim. And
3 it goes, at least to some extent, to answering the question
4 of how this kid got convicted of a crime he didn't commit.
5 Because the state had evidence that showed that their theory,
6 that they went back and drank afterwards, evidence
7 inconsistent with that, evidence which impeaches the
8 testimony of Charles Erickson, and they didn't disclose it.
9 Just like they didn't disclose the evidence from Miss Griggs
10 or Mr. Canada, even though they knew about that.

11 So that's our claim with regard to Brady versus
12 Maryland and Giglio versus United States.

13 Your Honor, let me now move to paragraph 16, which
14 is the claim that the verdict -- the verdicts in this case
15 are against the weight of the credible evidence.

16 Although in the usual case motions for new trial
17 are -- they're always necessary and they're usually
18 sufficient to preserve a claim for appeal, this is a claim
19 which the appellate courts of Missouri have frequently said
20 they cannot entertain. It is, however, a claim which this
21 Court has the right, the authority, and the obligation to
22 entertain. And it is sometimes said that the trial court in
23 a situation like this sits as a 13th juror, which cannot
24 enter a judgment of acquittal, but can say, "Hey, I don't
25 care whether the other 12 believed it or not, I'm going to

1 make this as if there were a hung jury." And that's what
2 we're asking you to do on the case of the -- in this case,
3 based upon the weight of the credible evidence.

4 The only evidence that in any way involves Ryan
5 Ferguson in the death of Kent Heitholt is the testimony of
6 Charles Erickson. That testimony, taken as a whole, is
7 unworthy of belief. Even though the jury obviously believed
8 it.

9 And the reason -- there are several reasons it's
10 unworthy of belief. One of the reasons is: It has changed,
11 over time, to fit the convenience of the prosecution. The
12 route that he originally told the police they took is
13 different than the route that he testified in court they
14 took. The route they testified in court is more consistent,
15 although not totally consistent, with the route followed by
16 the police dog in the early morning of November 1st.

17 The whole point of this robbery, according to
18 Erickson, was to get money to go back to By George's and
19 spend it drinking. But I don't think it can be seriously
20 contested that By George's was closed at the time. There's
21 no way they could have gone back and continued drinking.
22 It's just not worthy of belief. Every possible check on
23 Erickson's veracity comes out negative.

24 Physical evidence at the scene. There's a hair
25 found in the bag removed from the hand of the decedent, which

1 is not the decedent's, which is not Erickson's, which is not
2 Ferguson's. There are fingerprints in the car which are not
3 the decedent's, not his daughter's, not Erickson's, not
4 Ferguson's. There are bloody footprints at the scene, left
5 by Sketchers shoes. Erickson says he wasn't wearing
6 Sketchers shoes. Although the footprints are in the area
7 where he said he was. There is no evidence whatsoever from
8 anybody, including Erickson, that Mr. Ferguson has ever owned
9 or worn Sketchers shoes.

10 You saw the photographs of the crime scene. Blood
11 spatter up on the fender of the car. A pool of blood all
12 over the parking lot. Blood spatter many feet away from
13 where the body was found. Yet nobody claims there's any
14 blood on the clothing of Ryan Ferguson. Charles Erickson
15 doesn't say, "I woke up the next morning and found blood on
16 my clothing." No bloody clothing anywhere.

17 No blood on the interior of the car when it's tested
18 for luminol. Admittedly that's a while later, but blood
19 stains last, unless something's done to somehow chemically
20 alter them. They would still luminesce. And there's no
21 blood found.

22 Those are just a few of the items, Your Honor.

23 You sat through the trial and paid close attention.
24 What we're asking you to do now is weigh the evidence and
25 correct the mistake the jury has made and give us a new trial

1 based upon the weight of the evidence.

2 That's all I have to say about the motion for new
3 trial, Your Honor.

4 THE COURT: Mr. Crane, you may be heard.

5 MR. CRANE: Just a couple quick responses, Judge.

6 On that number 15, that's the one about the liquor
7 control records, I'd just bring the Court's attention to a
8 portion of the transcript, which I know isn't totally
9 completed, but there was a section I wanted to highlight in
10 the testimony of Mr. Canada, Kristopher Canada, a defense
11 witness who was asked on redirect by defense counsel,
12 Mr. Rogers, about liquor law violations.

13 And Mr. Canada indicated that he recalled that the
14 business, By George's, was closed by liquor control four or
15 five times. And was asked if it was ever closed for staying
16 open after hours. Mr. Canada responded, "No, sir." And he
17 was asked, "Did at any time when you were working there, did
18 the police come in after hours and say, 'Wait a minute. You
19 guys are supposed to be closed.'" Answer: "No, sir."

20 Those were questions asked by defense counsel of
21 their witness. I can't imagine that Mr. Rogers would ask
22 such questions if he didn't know the answer.

23 There was testimony, evidence in this case, that the
24 bar was closed for having people under age. In their motion
25 for new trial, they say that I mentioned that during the

1 course of it, either via the witnesses' testimony, Melissa
2 Griggs, Mr. Canada, et cetera. I did. That is not
3 exculpatory for the defense.

4 If this argument -- quite frankly, I don't
5 understand the argument. But I believe that it's basically
6 that if liquor control had shut down By George's at some
7 point, then that would somehow indicate whether or not they
8 were open late on the night in question. It's like: If you
9 get caught speeding, you sped. But if you don't get caught
10 speeding, it never happened.

11 You'll remember, Judge, that on the night in
12 question, there were underage drinkers. Ms. Griggs, a
13 defense witness, was 16 years old. The defendant and Chuck
14 Erickson were 17 years old. There's evidence that there were
15 numerous other people in there on the night in question. I
16 don't think liquor control busted them for underage drinking
17 that night. But that obviously doesn't mean there weren't
18 underage drinkers in the bar. So the argument doesn't
19 follow.

20 To suggest that the jury's decision would have been
21 different, even though this evidence did actually come in, if
22 they had liquor control records, in other words, if they were
23 proving a negative, is -- is beyond the pale. I mean,
24 there's no possibility that that would have occurred.

25 So, it's not exculpatory. And the second major

1 thing is: It did not result in any prejudice to the
2 defendant.

3 Insofar as -- insofar as the 16th point is
4 concerned, Judge, I mean, there was ample evidence -- I'm not
5 going to go into what I disagree with on the comments of
6 Mr. Rogers, but there was ample evidence to convict. I mean,
7 this was a situation where the jury listened to this case and
8 heard the evidence and made a decision. The defense did a
9 good job of bringing forth points that arguably contradicted
10 the state's evidence.

11 The jury made the decision in this case, after
12 careful and impartial consideration of the evidence, and
13 their verdict should stand.

14 THE COURT: Do you care to briefly reply,
15 Mr. Rogers?

16 MR. ROGERS: Yes. And I heard the word "briefly,"
17 Your Honor.

18 THE COURT: Well, I'm trying to be -- I mean, I'm
19 not giving you a time -- I'm not having an alarm go off. But
20 Mr. Crane's remarks were rather brief in response to your
21 motion --

22 MR. ROGERS: Right.

23 THE COURT: -- and so your response should likewise
24 be brief.

25 MR. ROGERS: And it will.

1 I want to make sure -- I think Mr. Crane does, in
2 fact, understand the argument, but I want to make sure that
3 not only he does, but everybody else does too.

4 The argument is that the evidence which was not
5 disclosed is evidence not only showing that there was never a
6 citation, let alone a closing of By George's for being open
7 after hours, but also evidence that there were numerous
8 citations of By George's over the period of time when it was
9 in business, showing not only that they were not closed for
10 being open after hours, but also showing that they were in
11 the attention of the liquor control people. That liquor
12 control showed up there fairly frequently and cited them for
13 the violations that they found.

14 And putting those two together, I think there is
15 certainly a -- an exculpatory and material aspect to that
16 evidence, because Mr. Crane made to the jury the same
17 argument he's making today, which is: Just the fact that
18 they're serving underage people means they don't care about
19 the law, so therefore you can assume they might have been
20 open late.

21 I also do recall asking Mr. Canada about the
22 closings. That was after the cross-examination by Mr. Crane,
23 which indicated several occasions where By George's had been
24 closed by liquor control, as it turned out, for having
25 underage drinkers.

1 I did ask a question to which I did not know the
2 answer. And I got the answer that I hoped to get. But that
3 answer is totally -- it is not on the par with having
4 evidence from an official agency showing what the closings
5 were for, when the closings occurred, and showing the utter
6 lack of any hint or intimation that they were ever open after
7 hours.

8 So, even though I -- and, in fact, the second
9 question that Mr. Crane read was: Any time while he was
10 working there. So that obviously further limits the
11 questioning, and it's not nearly -- his answers were neither
12 as persuasive nor as inclusive as the records would have
13 been, had they been disclosed to us.

14 Point 16, we're not talking about the sufficiency of
15 the evidence. We do talk about that on one technical point
16 earlier, but we're talking about the weight of the evidence.
17 And we're not asking you to hold that there was not
18 sufficient evidence to send this case to the jury under point
19 16. What we're asking you to do is to weigh that evidence
20 and say: It's not enough to send this kid to prison.

21 THE COURT: Is this the only other motion that you
22 have filed with respect to post conviction?

23 MR. ROGERS: Yes, Your Honor.

24 THE COURT: Okay. I want to make sure I didn't
25 overlook something in the file.

1 Defendant's motion for judgment of acquittal, or, in
2 the alternative, for a new trial is argued and is overruled.

3 I received only recently a pre-sentence
4 investigation.

5 Let me ask whether or not, first, did the state
6 receive a pre-sentence?

7 MR. CRANE: We did, Judge.

8 THE COURT: And did defense counsel receive a
9 pre-sentence?

10 MR. ROGERS: Yes, we did, Your Honor.

11 THE COURT: And have you had an opportunity to look
12 at that and talk about it with your client?

13 MR. ROGERS: Yes, we have. That's what we did in
14 our ten minutes.

15 THE COURT: All right. Are there additions or
16 corrections that the defendant wishes to make to the
17 pre-sentence that I -- I just received on the 30th of
18 November?

19 MR. ROGERS: Yes, Your Honor. On I believe it's
20 page 7 of 8.

21 THE COURT: All right. Let me find that page.

22 Well, I only have five pages. Let me see if I --

23 MR. ROGERS: Okay. Maybe that's the fax number.

24 THE COURT: Maybe. If you --

25 MR. ROGERS: Next to the last page.

1 THE COURT: There is a little page number up in the
2 right-hand corner. And I see a page 4, which would be the
3 next-to-the-last page that I have.

4 MR. ROGERS: I don't see --

5 THE COURT: Why don't you --

6 MR. ROGERS: Let me read the first part of the
7 paragraph.

8 THE COURT: All right.

9 MR. ROGERS: It says, "Ferguson stated that he
10 attended one trimester."

11 THE COURT: Okay. And is that at the very top?

12 MR. ROGERS: No. It's the sixth paragraph. The
13 fifth complete paragraph.

14 THE COURT: Okay. I have that. That is the
15 next-to-the-last page.

16 MR. ROGERS: All right.

17 THE COURT: My page 4. Yes.

18 MR. ROGERS: There's just a couple of minor errors,
19 which are probably clerical more than anything else.

20 It says, "Ferguson stated he was to begin taking
21 classes. However, was arrested for the present offense in
22 March of 2004, prior to the start of the term." That's
23 inaccurate. I believe the Court will recall his trial
24 testimony. In fact, to the effect that he was enrolled and
25 taking classes during the -- at the time of his arrest, which

1 makes sense, because it's in March, and the term starts in
2 January.

3 And, in fact, I believe the testimony was: He was
4 concerned about, at the time of his arrest, concerned about
5 exams scheduled for the next day or later that week.

6 And then the other inaccuracy is that "Ferguson
7 stated he wanted to obtain an associate's degree in art."
8 Actually what he wanted to obtain was an associate of arts
9 degree.

10 So those are the only actual corrections we have to
11 the pre-sentence investigation report, Your Honor.

12 THE COURT: All right. Does the state have any
13 evidence on dis -- on disposition?

14 MR. CRANE: No evidence. Brief comments.

15 THE COURT: All right. Does the defendant have any
16 evidence on disposition?

17 MR. ROGERS: No evidence, Your Honor.

18 THE COURT: All right.

19 I'll hear the state's comments.

20 MR. CRANE: Your Honor, you heard the trial
21 evidence, obviously. And you've -- you heard at the
22 conclusion of the case the victim impact testimony from the
23 victim's wife and daughter. Miss Kali Heitholt is here with
24 us this morning. Second row back there.

25 The -- you've, again, reviewed the pre-sentence

1 investigation. The victim impact comments in that.

2 Considering all that, Judge, on behalf of the State
3 of Missouri, on behalf of the Heitholt family, I ask that you
4 follow the jury's recommendation: 30 years as to Count I and
5 10 years as to Count II. And further, the state would
6 respectfully request that you order those sentences to run
7 consecutively and not concurrently.

8 THE COURT: Mr. Rogers.

9 MR. ROGERS: Your Honor, first of all, there's no
10 question that this is a serious case. However, the
11 pre-sentence investigation is very favorable. It reflects
12 almost exclusively positive ideas.

13 I do not anticipate that the Court is going to
14 seriously consider probation in this case. And so I would
15 just state for the record that Mr. Ferguson has indicated
16 that, if he is placed on probation, he certainly would abide
17 by all of the special conditions recommended in the
18 pre-sentence report.

19 I think the state's position about the seriousness
20 of the case is somewhat inconsistent with its plea agreement
21 with Mr. Erickson. Mr. Erickson testified that he
22 anticipates receiving a 15-year sentence and a 10-year
23 sentence, consecutive. I think that -- I'm not
24 Mr. Erickson's lawyer, so I don't really need to comment on
25 whether I think that's appropriate for him. Certainly it is

1 I think inappropriate to sentence Mr. Ferguson more harshly
2 than Mr. Erickson, when, according to Erickson's own
3 testimony, he's the one who initiated the attack. He's the
4 one who decided the time had come to physically assault
5 somebody. There's no indication that there was any plan to
6 do that beforehand.

7 Having said that, Your Honor, I would ask the Court
8 to look at Mr. Ferguson, consider the positive things he has
9 going for him, and to show mercy.

10 THE COURT: Do you care to respond, Mr. Crane?

11 MR. CRANE: (Shaking head from side to side.)

12 THE COURT: State appears by prosecuting attorney
13 and assistant prosecuting attorney. Defendant appears in
14 person and by counsel. Defendant's motion for judgment of
15 acquittal, or, in the alternative, for new trial is argued
16 and is overruled. Pre-sentence investigation is considered,
17 corrections noted, and is ordered sealed. In accordance with
18 this jury's verdict, Court will fix punishment --

19 MR. ROGERS: Your Honor, before you pronounce
20 sentence, Mr. Ferguson would like to address the Court.

21 THE COURT: All right.

22 THE DEFENDANT: May I stand?

23 THE COURT: You may.

24 THE DEFENDANT: Thank you. Appreciate the time to
25 speak.

1 I really just wanted to say that today is a sad day,
2 because the justice system has failed not only my family and
3 I, but the Heitholts and the community. It has failed
4 because they're sending an innocent man to jail. Because
5 they're letting a horrible person run free, without a care.
6 They don't have to worry about the police looking for them.
7 I can't understand that. I don't see how Crane can live with
8 himself with that.

9 But some day the truth will come out and everyone
10 will see that I am innocent, and I will be free. And that
11 will be a great day, because on that day the justice system
12 will finally have done justice. That's it.

13 Thank you, Your Honor.

14 THE COURT: You may be seated.

15 And I would have given him an opportunity to be
16 heard, because I do allow allocution.

17 In accordance with the jury's verdict, the Court
18 would fix punishment at 30 years on Count I and 10 years on
19 Count II.

20 Mr. Ferguson, although I have heard your statement,
21 I need to ask you if you have any legal reason why the
22 judgment and sentence of this Court should not be pronounced
23 upon you at this time.

24 THE DEFENDANT: No.

25 THE COURT: Allocution is granted. Defendant is

1 sentenced to 30 years on Count I and 10 years on Count II,
2 the sentence on Count II to run consecutively to the sentence
3 on Count I.

4 Mr. Ferguson, you do have a right to appeal the
5 jury's verdict and this Court's judgment. If you are unable,
6 by reason of indigency, to pay for an attorney, the Court
7 will appoint an attorney for you, for the purpose of appeal.
8 You do have private counsel now, I note, but that is not
9 always the case on appeal. So I'm required to inform you of
10 this right. And need to know whether or not, first of all,
11 you wish the Court to consider appointing appellate counsel
12 for you, due to indigency.

13 THE DEFENDANT: I haven't discussed these matters
14 yet. Is it all right if I --

15 THE COURT: Well, I would assume then that a notice
16 of appeal would be filed by present private counsel, so that
17 the opportunity either to request appointment of counsel or
18 to continue with private counsel would be available.

19 Mr. Rogers, I assume that you would do that on
20 behalf of this defendant?

21 MR. ROGERS: Yes, we will, Your Honor.

22 THE COURT: All right.

23 The record will reflect, though, that defendant has
24 been so informed.

25 Mr. Ferguson, one of your basic rights under our

1 constitution is to have an effective -- or effective
2 attorneys represent you in connection with your case. It is
3 somewhat difficult to ask you the question with your attorney
4 sitting there by you at counsel table, but I'm required by
5 law to do so. And need to know if you have any complaint
6 about their services to you. And I'm talking about those
7 attorneys who represented you previous to trial, as well as
8 during the trial of this case, as well as after the trial of
9 the case. Do you have complaints about their services?

10 THE DEFENDANT: Over the whole period there were
11 concerns, but we're still discussing those, and we're in the
12 process of --

13 THE COURT: Do you have any specific complaints
14 about Mr. Rogers' services to you?

15 THE DEFENDANT: Still we're discussing those as
16 well. Not at this time.

17 THE COURT: Do you have any specific complaints
18 about Miss Benson's services to you at this time?

19 THE DEFENDANT: Not at this time.

20 THE COURT: All right.

21 Record will reflect that there is no probable cause
22 at least at this time to believe counsel has been
23 ineffective, and therefore trial counsel may continue to
24 represent the defendant in any post-sentencing matters.

25 Mr. Ferguson, in addition to your right to appeal

1 this case, you have other rights as well. In the
2 unlikelihood that you do not appeal the case, you may bring
3 to this Court a motion asking that the Court consider your
4 sentence if you believe the sentence is larger on either or
5 both of those counts than permitted by law or if you believe
6 any of your constitutional rights, either guaranteed by the
7 U.S. or by the state constitution, have been violated.

8 In the event that you take an appeal -- and if you
9 do not appeal, you must bring this motion within 180 days.
10 In the event that you do appeal, and I have every reason,
11 from what you've said and counsel has said, that you do
12 intend to appeal, and the appellate court affirms the
13 convictions, you have 90 days after the mandate of that court
14 affirming the convictions. And it is not just an opinion.
15 After the opinion is written, there is a particular mandate
16 sent to counsel, to you, and to the Court, with respect to
17 this. If the convictions are affirmed, then you have 90
18 days. You still have the right to bring a motion, but
19 instead of having 180 days, as you would if there were no
20 appeal, you only have 90 days to bring the motion if your
21 convictions have been affirmed by the appellate court.

22 Do you understand those rights?

23 THE DEFENDANT: Yes.

24 THE COURT: Record will reflect that defendant is
25 informed of his rights under Supreme Court Rule 29.15 and the

1 time limitations therefore. Judgment is entered in favor of
2 the Crime Victims Compensation Fund and against the defendant
3 in the sum of \$45. Costs to be taxed to the defendant.
4 Sheriff is authorized one deputy in transporting defendant to
5 the department of corrections.

6 Does the state have any other matters to bring
7 before this Court?

8 MR. CRANE: No, Your Honor.

9 THE COURT: Does the defendant?

10 MR. ROGERS: No, Your Honor.

11 THE COURT: Although you haven't mentioned it,
12 certainly the defendant is entitled to an appeal bond. And I
13 had originally set the bond as I would in a case where a
14 first degree murder is charged. This defendant has not been
15 convicted of first degree murder. And the Court would invite
16 both counsel for the state as well as defense counsel, if you
17 wish, to suggest an appeal bond in this case.

18 Mr. Crane? Do you --

19 MR. CRANE: I'm not going to suggest.

20 THE COURT: All right.

21 MR. ROGERS: I would suggest, Your Honor, that, in
22 terms of the sentence which has been imposed, which is a
23 40-year sentence, all told, that perhaps an appeal bond in
24 the amount of \$200,000 would be sufficient. It's \$5,000 per
25 year of sentence.

1 THE COURT: Mr. Crane?

2 MR. CRANE: We're opposed to that, Judge.

3 MR. ROGERS: Your Honor, I'm sorry. It's my
4 understanding that by statute there is no appeal bond on
5 second degree murder.

6 THE COURT: On second -- you are probably -- that
7 is -- you are correct.

8 MR. ROGERS: I knew that I hadn't deliberately left
9 that out.

10 THE COURT: Right. I knew you hadn't either. And I
11 know on first degree there definitely is not.

12 We would then ask that the defendant be taken from
13 this courtroom. That the courtroom be closed until he has
14 been transported out of the courthouse. And the Court would
15 take a recess at this time.

16 Would ask that the doors be closed until the
17 defendant is secure or outside this courtroom.

18 We'll be in recess.

19 (Recess taken.)

20 (The defendant was not present for the following
21 proceedings.)

22 THE COURT: Yes.

23 MR. ROGERS: Your Honor, you should have before you
24 a motion to permit Mr. Ferguson to appeal as a poor person.

25 THE COURT: Well, let me just call the case --

1 MR. ROGERS: Okay.

2 THE COURT: -- since you filed something.

3 Case Number 165368-01, State of Missouri versus Ryan
4 William Ferguson. Mr. Crane is not here. Miss Gorovsky,
5 state -- this is a motion for an order allowing an appeal as
6 a poor person on that case. Does -- is the state ready to
7 take up the motion?

8 MS. GOROVSKY: I don't believe the state has any
9 position on the motion, Your Honor.

10 THE COURT: And Mr. Ferguson is not here. I could
11 have done it in chambers, but certainly would allow him to
12 perfect his appeal --

13 MR. ROGERS: I have a proposed order, Your Honor.

14 THE COURT: -- as a poor person.

15 All right. I will show defendant files motion to
16 appeal as a poor person. Motion is granted.

17 The clerk will note I'm giving Mr. Rogers his copy.
18 And then the other party's copy, including one directly to
19 Mr. Ferguson, ought to be mailed to him as well.

20 MR. ROGERS: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 (Hearing adjourned.)

23 - - -

24

25