

1 Validity is like, if I have a ruler here, I have a valid
2 measure of length, you know, I can demonstrate by using it
3 that I really measure length.

4 Q. Okay. All right. So, in other words, you have that
5 ruler, right, and suppose it measures twelve inches?

6 A. Um-hum.

7 Q. Okay. And you know that that ruler is twelve inches,
8 it's reliable, okay? You have checked it out with other
9 rulers and you can show that is a twelve-inch ruler ?

10 A. It is reliable if it doesn't stretch. Well, that is the
11 concept of reliability.

12 Q. That is the concept of reliability. Okay. Let me ask
13 you this, let's go back to my example of the boy with the
14 I.Q. test, okay? In terms of validity?

15 A. Um-hum.

16 Q. Okay. If somebody has an I.Q. of one hundred and ten

17 -- A. Um-hum.

18 Q. Okay? This is somewhat above average, correct?

19 A. Yes.

20 Q. Okay. Would you expect his intellectual achievements
21 to be somewhere above average? A. Well, in
22 some degrees, yes.

23 Q. So let me give you this example, we have somebody with
24 an I.Q. of one hundred and ten, somewhat above average, you
25 would expect his intellectual achievements to be somewhat
26 above average, so in order to find this out, to find the

1 validity of this expectation you would study his intellectual
2 level in relation to his achievements in school, if he was
3 a school child? Right? A. That is one
4 of the frustrations about intelligence testing. We find it
5 has about fifty percent correlation with grades. We think
6 we are really measuring aptitude, and if in fact we are --

7 MR. ROBINSON: Well --

8 MR. PESTARINO: Excuse me, let him finish.

9 THE WITNESS: It simply means what you are trying
10 to measure is an aptitude. The school grades are an
11 achievement and they have quite a motivation base.

12 Achievement is more based on motivation than it is ability.

13 You may find a bright child with one hundred forty I.Q. and
14 he is into Marijuana and drugs, he flunks out of school.

15 Q. What you are saying then, I.Q. tests only have about a
16 fifty percent chance of being accurate in terms of predicting
17 future behavior?

18 A. No, they measure
19 potential and given this potential. The original I.Q.
20 tests were developed by Binet, a Frenchman, and what he
21 wanted to do was to sort school children to see which one
22 had the greatest probability of achievement.

23 Q. The Stanford-Binet Test, right?

24 A. It lead to Stanford-Binet later, but Binet developed
25 it much earlier.

26 Q. Now, suppose you have one hundred witnesses in a trial,
okay?

A. Um-hum.

1 Q. So what we are looking for, psychologists would be
2 looking for is the relationship between a person having blue
3 eyes and killing somebody, correct?

4 A. Well, I don't know what your example leads to. But
5 all right.

6 Q. Well, to show validity. If you have X, somebody with
7 blue eyes, you have Y? A. Well, it just
8 is not the kind of logic that I guess I want to use. But if
9 you will go further maybe I will understand what you are
10 trying to say.

11 Q. Well, I'm trying to say, you told about validity as the
12 relationship between one factor variable to another,
13 correct? That is your definition of validity?

14 A. No, that was your definition.

15 Q. What is your definition?

16 A. Validity is a scale which measures what I think it
17 measures. If I think I am measuring length and I am really
18 measuring length, the scale is valid.

19 Q. Can you give me another definition because I am not
20 comprehending that at all.

21 A. If I want to measure what I call intelligence, I do
22 have to relate it to something. All right? To
23 demonstrate.

24 Q. To make it valid? A. To be sure that I
25 am measuring what I think I am measuring.

26 Q. Okay. A. And that is about

1 as good as I can do. What else could I say? Let's see --
2 if I want to develop a scale about violence --

3 Q. Um-hum.

4 A. -- and I seek out those people who are most prone to
5 violence, and maybe I am working with a children's group,
6 so I would then, I would develop the items that I want to
7 use to try to predict or evaluate that a person has a
8 tendency to violence, and then I might have four or five
9 different groups of children. One group, let's say one of
10 my criteria might be that the children are conforming, and I
11 might use their attendance in school as being conforming.
12 That would be a little bit off to the side, but it might be
13 useful. I might, maybe the simplest thing I could do would
14 be to use the teacher rating. The teachers who know these
15 children best and observe them a great deal, they could
16 classify their children in groups of say, five, in a scale of
17 one to five. These children have the most tendency to hit
18 somebody else, these have the least tendency to hit somebody
19 else.

20 Q. Let me stop you right there. In terms of conforming,
21 what you want to do is you want to show what is the
22 relationship between violence and children in school,
23 right?

24 A. I want to be able
25 to, if I am going to do this, what I would like to do is
26 measure children before they have to go through the agony
of conflicting with the system where they are not going to

1 work, maybe I want to group them in a different way, and so
2 I want to anticipate their tendency to violence, so I go to
3 the school situation where I truly know, you know, that we
4 have the behavior demonstrated. I ask the people who know
5 these children best to tell me which are the most violent.
6 I get a scale.

7 Q. Now, the people that you ask that know these children
8 best would give you a subjective opinion?

9 A. They would give me a rating. They would compare all
10 children with all other children.

11 Q. Is that a subjective opinion?

12 A. All things are subjective.

13 Q. Now, let's talk about base rates?

14 A. Base?

15 Q. Base rates. Are you familiar with that term?

16 A. No. Better tell me what you mean.

17 Q. Isn't base rates a common term in psychology?

18 A. If it is I haven't heard it.

19 Q. All right. Base rates in psychological matters refers
20 to the extent to which a behavioral propensity characteristic
21 or other psychological phenomena exists in the general
22 population, or if relevant in a particular sub-population.

23 A. You are talking about some base level for a particular
24 behavior; is that correct?

25 Q. Correct. Base rates.

A. Well, all

26 right. A base level?

1 Q. Okay. A. You say rate, then you
2 have to tell me, rate of what?

3 Q. It is just a term, base rate.

4 A. Rate refers to frequency?

5 Q. Frequency, right. It has to do with events in time.

6 A. Well, events over what period of time? See, if you
7 say basil level, we are just talking about a concept that
8 says this is a kind of norm for a population.

9 Q. The norm for population, right.

10 A. All right.

11 Q. So are base rates vitally important in determining
12 the significance or meaning attached to a particular
13 phenomena or behavior?

A. The norms are the
14 things that we do refer to as psychologists to compare
15 people to see whether they vary or not.

16 Q. I got you. So, for example, if you wanted to attach
17 some significance to a person, say, packing a gun, okay?
18 Let's assume that.

19 A. Um-hum.

20 Q. What you would do is , you'd see what the base rate is,
21 what the norm in the community is for packing a gun before
22 before you could establish any significance on this person
23 packing a gun, right?

A. Well, assuming
24 you didn't do it on frontier day in Nevada City, yeah.

25 Q. So you would look at the society and you would say --
26 suppose nobody in society packed a gun, only this individual

1 did, then you could say there was something unusual because
2 it didn't conform to the norm or base rate, correct?

3 A. If it is unusual for the person to be doing it, it
4 varies from the norm, yeah.

5 Q. Okay. And if in contrast one hundred percent of the
6 society packed a gun, okay? Then what the individual is
7 doing didn't differ from the norm? He didn't do anything
8 unusual?

A. It is not unusual, yes.

9 Q. Okay. So is it a fair statement to say without base
10 rates, without knowing what the base rate or norm is, I'll
11 use your term, we have no way of knowing what an individual's
12 behavior signifies? You have to know the norm first?

13 A. It is good to know the norm, yes.

14 Q. Well, it's good to know the norm, you have to know the
15 norm, don't you?

16 A. There are some things
17 about people, about people that don't refer to norms. We
18 have a nethanomathetic procedure to refer to norms, and it
19 is a very good procedure. We have an idiosyncratic
20 procedure in which we try to make sense out of the individual
21 just in himself. We don't try to compare everything with
22 everybody else because we figure people are unique as well
23 as they are, also -- they have a quality of being similar to
24 others and they have a personal uniqueness.

24 Q. Let me ask you this, what is the norm in the Assyrian
25 community regarding their religion?

26 A. The norm of what?

1 Q. The norm of how these people --

2 A. Whether they believe --

3 Q. Whether they are religious, non religious, what is the
4 norm, the base rate, what is the average?

5 A. Well, I haven't studied Assyrians in the flesh so I
6 don't know what the one point seven million Assyrians really
7 feel about the church.

8 Q. What is the base rate, the norm in the Assyrian
9 community about how the individuals feel about their father?

10 A. Well, they come from a history of a sacred king, so
11 I'd assume that they are a fairly paternalistic society.

12 Q. So if somebody else was fairly paternalistic and he
13 was from Syria that wouldn't violate the norm, wouldn't
14 violate the base rate?

15 A. That would seem
16 to be consistent with the history depending on what sub-
17 group they happened to be in.

18 Q. What about the Barnum effect, tell me a little bit
19 about that?

A. The Barnum effect?

20 Q. Um-hum.
21 A. Would you tell me
22 what you mean?

23 Q. Okay. The Barnum effect is basically a failure of
24 the psychologist to take into account base rates or norms.
25 In other words, it consists of essentially of making
26 statements about an individual that would be true of large
numbers of the people for the purpose of demonstrating that
one understands and, therefore, can describe salient aspects

1 of the individual. Does that make sense to you?

2 A. No.

3 Q. No? Okay. Let me give you another example of the
4 Barnum effect, sir. You ever go to a carnival and see a
5 handwriting analysis person at a carnival?

6 A. Yes, I have.

7 Q. And this person stands in a booth and without knowing
8 anybody, anything about the person, he has the person, the
9 prospective client write out something, write out something
10 and he is going to analyze his handwriting and tell him about
11 himself?

A. Yes.

12 Q. Do you think that this handwriting person is some sort
13 of mystic that knows what is going on inside that person's
14 mind?

15 A. Are you asking me whether
16 he can read the writing and make something out of it? Or are
17 you asking me if he is psychic?

18 Q. Yeah, I am asking you if he is psychic.

19 A. Well, I don't know. There is a science of Graphology
20 and in Europe it is used extensively. Here it is not.

21 Q. Let me give you an example of what I mean by the
22 Barnum effect. It is things that are common to all of us.
23 For example, this handwriting person might look at the person
24 who wrote out his handwriting and want to know something
25 about himself, and make a statement, something like this,
26 "Sometime s you get angry about things you realize afterwards

1 were unimportant. " Okay? Is that true of all of us?

2 A. Well, it sounds like a rather general statement, yes.

3 Q. Okay. That is what I mean by the Barnum effect. A
4 general statement that applies to everybody. Okay?

5 A. All right.

6 Q. All right. So, for example, somebody did something
7 because they loved their father. Okay? Is it a general
8 statement that applies to most of the population that
9 people love their fathers? A. Not the

10 people who come to see me.

11 Q. Not the people that come to see you. They don't love
12 their fathers? A. Well, they seem to

13 have a reverse feeling mostly.

14 Q. They hate their fathers? A. Often.

15 Q. Okay. A. Maybe I should say
16 love - hate, both.

17 Q. Let's talk a little bit about your clinical exam, if
18 we might. Okay? You are a clinical psychologist?

19 A. True.

20 Q. Okay. And what does the clinical exam consist of?

21 A. "A" clinical exam? You know --

22 Q. Your clinical exam. A. My
23 clinical exam?

24 Q. Yes, sir. A. For what? You know,
25 there is no standard clinical exam that I know of.

26 Q. There is no standard? A. Well, you

1 tell me your objective and --

2 A. Go ahead, tell -- A. No.

3 Q. -- tell me your objective and what?

4 A. Whatever the objective of the examination is one
5 tailors the work more or less to it.

6 Q. And what was your objective, of your examination with
7 Mr. Ismail? A. It was to attempt to

8 understand him as much as possible. The work of psychology
9 and psychotherapy is essentially a search for truth. Truth
10 is very hard to come by. So that is what we are after, so
11 we use all of the procedures we can.

12 Q. You are after truth, correct? A. As basic
13 a truth as possible.

14 Q. Have you taken any courses in school about learning
15 how to, how you can decide if somebody is telling you the
16 truth or not? A. Well, I haven't been

17 in school for ten years.

18 Q. Did you take any? A. Not that I can
19 recall.

20 Q. All right. Have you done any work experience in
21 determining whether or not somebody tells you something they
22 are telling you the truth or not? A. No, the

23 whole work of clinical psychology and psychotherapy and
24 psychiatry is to attempt to get around what is the most
25 common thing of all, which is self-deception.

26 Q. Self-deception? A. Yes. In a

1 sense we find that over and over, that most everybody
2 deceives himself or herself about what the truth of their
3 situation is. One of the words used for this is
4 "rationalization." We find all kinds of explanations to
5 explain away our responsibility or our guilt or that we
6 could have in any way been wrong, so anybody who practices
7 in my field is accustomed to having people come and wanting,
8 you know, they want you to believe it the way they say it.

9 Q. Sure. And I take it when somebody comes in and you
10 know that from your experience that they want to believe
11 the way they say it, you sort of look at what they say with
12 a jaundiced eye, would that be fair to say?

13 A. Well, I think what I tend to do, first I try to hear
14 completely what the person is saying.

15 Q. And then is it safe to say that you can't rely upon
16 what the person tells you, that you have to do other
17 outside work to find out what the other side of the story
18 is?

19 A. Well, we do that, and we
20 continue to talk.

21 Q. Okay. Fine. What outside work did you do in this
22 case?

23 A. What outside work did I do
24 in this case about what?

25 Q. You are down here on a murder case. You know that?

26 A. I think it is a very serious matter, sir, I do.

Q. That wasn't apparent from the way you were laughing
yesterday.

1 MR. PESTARINO: That is argumentative.

2 MR. ROBINSON: Okay.

3 Q. (By Mr. Robinson) Did you read the police reports in
4 this case? A. They have not been
5 given to me.

6 Q. Did you ask for them? A. No, I did not
7 ask for them.

8 Q. Why not? A. Well, I originally asked
9 of the defense staff that they provide me with all of the
10 information that was available. They didn't give me very
11 much information. And I just assumed that what they wanted
12 me to do was to give as objective an evaluation as I could
13 without being too much influenced by, too much by whatever
14 else had taken place. So that is what I did.

15 Q. You made -- so what information did you base, or what
16 information did you use to form your opinion that you gave
17 us yesterday that Mr. Ismail isn't a cold premeditated
18 murderer? A. I used ten years

19 experience as a clinical psychologist. I used twenty-four
20 years experience as a psychologist and my intelligence and
21 my skills in trying to evaluate another human being.

22 Q. And you told us before that you had never testified
23 and never evaluated before in your ten years experience a
24 cold premeditated murderer? A. I have

25 examined people that have killed other people.

26 Q. That were insane? A. Well, they were

1 in state institutions.

2 Q. You told us that you always have to sort of look with
3 a jaundiced eye as to what the individual tells you because
4 he tries to minimize his involvement, rationalize it, things
5 like that?

6 A. No, jaundiced is not my word.
7 What I say is, I am aware that people want to deceive
8 themselves and others, and so I am always looking to see
9 what the nature of the information is that they are giving
10 me.

11 Q. Did you ever contact the District Attorney's office
12 and ask to be provided with the police reports?

13 A. I did not. If the time had not been so short I might
14 have attempted that.

15 Q. And if you had been, would you like to -- strike that.

16 Would it have aided you in your opinions and your
17 examination of Mr. Ismail if you did have the police reports?

18 A. Well, I don't know that it would have.

19 Q. Then why did you want the police reports?

20 A. I use all information that I can obtain.

21 Q. And in this case you didn't use all of the information
22 that was available?

23 A. Well, I felt my
24 primary problem was to evaluate Mr. Ismail, not what some-
25 body else said about him.

26 Q. Did you ask Mr. Ismail -- well -- did you question
Mr. Ismail regarding what had happened?

A. Yes. I asked him to tell me everything that he

1 remembered.

2 Q. And did Mr. Hernandez, Mr. Pestarino's investigator
3 provide you with what happened?

4 A. No.

5 Q. What did he tell you? A. Well, when
6 I mentioned that he had given me a few little bits of
7 information he had, they were not, they did not have to do
8 with whatever had happened with regard to the person being
9 dead.

10 Q. Okay. And so, did you ask Mr. Ismail where he got the
11 gun? A. He told me where he got the
12 gun.

13 Q. Where did he tell you that he got it?

14 A. He told me he bought it.

15 Q. Okay. And did he tell you where he bought it?

16 A. Um-hum.

17 Q. Where? A. I think that is all
18 a matter of record. He told me he bought it in a bar.

19 Q. And did you believe him? A. I didn't
20 disbelieve him. I didn't find any reason to disbelieve him.
21 I didn't try to protest that particular segment.

22 Q. Did you feel that was significant as to where he got
23 the gun and how he got it? A. Well, there is
24 so many variables in terms of where you get a gun, you know,
25 it seems significant to me where he got the gun, I didn't
26 figure that I had the tools with which to really define where

1 he got the gun, so I accepted more or less what he had said
2 for the time being.

3 Q. All right. You feel it wasn't significant in forming
4 the opinion you have told us about that Mr. Ismail wasn't
5 a cold premeditated murderer as to where he got the gun?

6 A. Well, if you could demonstrate to me that Mr. Ismail
7 had gone and gotten this gun with the intent to shoot
8 somebody, of course that would be a different matter. It is
9 just that there are so many different ways that a gun can
10 come to one's hands and one is not supposed to carry a gun,
11 so the possibilities of Mr. Ismail protecting somebody else
12 had occurred to me, so I didn't push him in his explanation
13 of where he got the gun. What he told me seemed to hold
14 together. It was a little odd. But then that wasn't my
15 place to try to define where the gun came from. My place,
16 as I saw it, was to try to evaluate Mr. Ismail.

17 Q. Evaluate him in respect to what?

18 A. In respect to what kind of a person he is.

19 Q. What kind of a person he is now or what kind of a
20 person he was on November the 6th, 1975?

21 A. What kind of a person he is now and probably was then.

22 Q. So if you were trying to evaluate him as to what kind
23 of a person he probably was on November 6th, 1975, you'd
24 want to know if he had lied to you about anything, wouldn't
25 you?

26 A. Well, I didn't examine him,
you know, drunk either. So I wasn't examining him exactly

1 the way I understand he was on that day. As a matter of
2 fact, that might have been a little helpful, but I didn't
3 feel that I had the freedom to suggest that.

4 Q. Is it your understanding he was drunk on the night of
5 November 6th? A. That is one piece of
6 information I have accepted and haven't really checked out.
7 I understand he had a point zero eight blood alcohol when
8 he was in the jail.

9 Q. Does that indicate to you that somebody is drunk?

10 A. It indicates to me that somebody has been drinking.

11 Q. You just told us that he was drunk. Does that point
12 zero eight indicate to you that somebody is drunk?

13 A. It is not the legal classification for drunk driving,
14 but it is getting close to it.

15 Q. Is there a legal classification for drunk driving?

16 A. My understanding is that blood level above a certain
17 point is, and maybe that it is, that point zero eight is
18 above it, I don't really remember that exactly. I did a
19 study not too long ago with a Mr. Belardas in which we
20 deliberately attempted to produce a certain blood alcohol
21 level, and we got to that blood alcohol level in the course
22 of several hours by having the man ingest a pint of whiskey.
23 And I watched him do it, and I participated in the
24 evaluation of him while this was going on. At the end of
25 that period of time my recollection is that he had gotten
26 to a one three level, so I have some notion of where a point

1 zero eight falls. In terms of the exact legal definition
2 of driving intoxicated, I am not acquainted, am not really
3 sure of that. But I have a real notion of what that means.

4 Q. You saw one individual at a point thirteen blood
5 alcohol? A. Um-hum.

6 Q. Okay. Was this individual able to think?

7 A. He was pretty woozy. He could think some.

8 Q. Could he premeditate? A. I don't
9 think so.

10 Q. You don't think he could? A. No.

11 Q. What do you base that opinion on?

12 A. My testing of that man at that time.

13 Q. What sort of test did you give him regarding
14 premeditation, ability to premeditate?

15 A. Well, ability to premeditate requires a certain
16 intellectual control, and his intellectual control had
17 loosened considerably at that time, Mr. Belardas, and I
18 just wouldn't have felt he could plan to do very much of
19 anything. He was just a kind of person that was kind of
20 rolling, and anything that would happen he would respond to
21 it.

22 Q. That is Mr. Belardas? A. Mr. Belardas.

23 Q. He was an experienced drinker?

24 A. He sure was.

25 Q. And he was at point thirteen rolling wherever he'd go?

26 A. He could be led emotionally or intellectually almost

1 anywhere.

2 Q. Now, the clinical interview that you conducted, okay?

3 A. The interview that I conducted, yes.

4 Q. Well, that is a clinical interview, isn't it?

5 A. Well, it wasn't in a clinic, but it is an interview.

6 Q. Give me the definition of a clinical interview.

7 A. Well, in a clinical interview you are dealing with
8 somebody who has known psychopathology and you are doing a
9 clinical job , it is in a clinic. That is where the word
10 comes from. I don't like to use that word so much about
11 people that I talked to, so if I talk to somebody I have an
12 interview with a person. I don't see a patient. I don't
13 see somebody who is sick. I see somebody who is like
14 everybody else, as much as possible.

15 Q. Now, are there any drawbacks to the interview process
16 that you conduct? A. Interviews are
17 known to be difficult, you know, in the sense that they
18 have less reliability than other procedures, and so much on
19 the interviewer.

20 Q. Depends a lot on the interviewer?

21 A. Yes.

22 Q. And does it also depend a lot on the interpretation
23 of the interview by the interviewer?

24 A. I think like all interviews, surely.

25 Q. Okay. And does it depend a lot on the place where the
26 interview is conducted? A. Certainly that

1 has an effect.

2 Q. Okay. Does that have a substantial effect on the
3 interview?

4 A. I guess it depends
5 on your objective. The police use interviews very
6 effectively in jail. I was in a jail. Maybe my interview
7 was as effective as theirs. I'm not sure.

8 Q. But you have come on and you have testified to a
9 certain mental state that the police can't do, so you are
10 obviously more qualified to interview people than the
11 police. You have a different objective when you interview?

12 A. I'm sure that I respond to different cues but we are
13 both in search of truth.

14 Q. Have you ever known a police officer that interviews
15 a prospective defendant without reviewing the police report?

16 A. I haven't talked to police officers too much about how
17 they interview.

18 Q. Okay. Now, did you videotape this interview with Mr.
19 Ismail?

20 A. I think you know I did not.

21 Q. Okay. Did you taperecord it ?

22 A. No, I did not.

23 Q. Okay. Any special reason why not?

24 A. I rarely tape-record.

25 Q. Any special reason?

26 A. I find it
intimidating to the people I am talking to. I want them to
feel as free and open as they possibly can. If I walk around
with a videotape or a taping device I am immediately leading

1 the person to feel guarded.

2 Q. Okay. Are you familiar with various tape recording
3 devices that can be secreted or hidden?

4 A. The thing about a clinical psychologist is he tries to
5 be honest. He tries to be up straight so he is not going
6 to try to conceal anything and fool you.

7 Q. Okay. So when -- but you are searching for the truth,
8 too?

9 A. That is a function of two
10 people, yeah, trying to get it together.

11 Q. Okay. Now, when you write down your information in
12 the interview, Okay?

13 A. Um-hum.

14 Q. Do you pick out certain things that you write down
15 and purposely leave out other things, other responses, or do
16 you write everything down?

17 A. Well, it is
18 impossible for me to write everything down. Even if I could
19 take shorthand I wouldn't because then I wouldn't have
20 anything left to think with, all of my attention would be on
21 copying the material.

22 Q. So wouldn't it be better if you tape-recorded
23 something so that would be permanently recorded and your
24 attention could be focused on the individual and how he
25 responds to questions?

26 A. I don't find
that tape-recording is useful to me. I don't like to do it.

Q. Now, the place of the interview is certainly
significant on your interpretation of the interview,
correct?

A. Well, it has some effect.

1 Q. Okay. It has some effect on the data that you
2 receive as a result of the interview?

3 A. It has some effect on the mood and emotion of the
4 individual which then, you know, is a little bit annoyed,
5 a variance in terms of my interpreting what is happening
6 to him.

7 Q. So would it be fair to say that the results of an
8 interview, if you had interviewed Mr. Ismail in your office
9 as opposed to the jail, it might have been different?

10 A. It is possible it might have been.

11 Q. Okay. And is it fair to say that the results of the
12 interview, if you had interviewed Mr. Ismail as a regular
13 client as opposed to somebody charged with murder, might
14 have been different? A. Of course it is
15 possible.

16 Q. Okay. Well, isn't it probable?

17 A. No, I wouldn't think so.

18 Q. Isn't there a substantial amount of authority in the
19 field that says that the place of the interview is very
20 significant on the results that you obtain from the
21 interview? A. Well, there are so many

22 authorities that I find that I view them with the same care
23 that I do any other piece of information. I don't think
24 there is anybody who is authoritative enough to tell you
25 how to relate to another human being. That is a skill you
26 learn. Nobody can tell you how to do that. You can have

1 rapport and be close together in a lifeboat when you are
2 going to be dead in five minutes, or any other place.

3 It is what happens between the two people that is
4 significant. So there is no way for an authority to really
5 tell you what to do. There is no way to learn by somebody
6 telling you what to do in my field.

7 Q. Is there a substantial amount of authority in your
8 field that says that the place of the interview is crucial
9 regarding the data that you obtain from the interview?

10 A. Not in my opinion.

11 Q. Not in your opinion? A. No. You see,
12 I function out of my own experience. Now, all of the
13 authorities are there to tell you what you should and
14 shouldn't do. It is like learning to fly an airplane. You
15 know, your instructor can tell you what you should and
16 shouldn't do, but you learn to fly the airplane after he
17 has guided you to a certain point. It is fine to accept
18 authority when you know nothing. After you begin to learn
19 how to fly, you fly the airplane. After you learn how to
20 be a clinical psychologist you become a clinical psychologist.

21 Q. How did you learn how to examine people charged with
22 murder? A. I learned how to examine
23 people charged with murder the same way I learned how to
24 examine every other person with every other crime attached
25 to them. Whether they happen to be legal items or whether
26 they have been cited into Court or not. We all commit crime

1 after crime. That is the nature of a human being.

2 Q. So you would examine someone charged with murder the
3 same way you would examine somebody in your office that
4 wasn't charged with any crime? A. When I

5 talk to people day in and day out, some of whom can kill
6 themselves or somebody else, I have a certain fair feeling
7 about, what people are like in terms of other people.

8 Q. You talk to people in your office that aren't charged
9 with crimes that you say can kill themselves or somebody
10 else? A. That is correct.

11 Q. And you are able to diagnose this, that somebody can
12 kill somebody else? A. I can certainly see the
13 possibility.

14 Q. Possibility all right. Anything is possible, right?

15 A. My judgments are usually based on some --

16 Q. Excuse me, can you answer my question and then explain?

17 A. If you want me to agree with you that everything is
18 possible or anything is possible, surely anything is possible
19 in this world, including that you should rise up off of that
20 seat, you know, levitate. It's possible.

21 Q. And you are telling us that some people you interview
22 in your office, you say there is a possibility they will go
23 out and commit a murder? A. I have talked

24 to police officers who have killed people, aside from the
25 kind -- in my office as clients, aside from the kind of
26 people that I have talked to who want to do it, and aren't

1 sure whether they will or won't , which is a very difficult
2 place for a clinical psychologist to be in, or any
3 psychotherapist, you know, when you talk to somebody who
4 are ready to do somebody in, that is kind of an uncomfortable
5 place.

6 Q. Can you accurately predict, based upon your experience,
7 based upon your study, that somebody is the sort of person
8 who will commit murder?

9 A. So far I have
10 been fortunate, nobody has killed themselves with me nor
11 anyone else. Some of my friends in Berkeley, not so
12 fortunate.

13 Q. Can you accurately predict --

14 A. Apparently I have been accurate.

15 Q. Okay. And your friends in Berkeley, did that involve
16 the case of the Regents of the University of California?

17 A. Yes, it did.

18 Q. Okay. And are you familiar with the brief that was
19 filed in that case?

20 A. Some time ago
21 I read it.

22 Q. And in that case some psychiatrists and some
23 psychologists were sued by the victim, by the parents of a
24 victim, correct?

25 A. The suit, I believe,
26 was against the head of the clinic and the University.

Q. Okay. And basically the facts of that case were that
a man went in, okay? And he gave some information, and
he said he was going to kill somebody?

1 A. Um-hum.

2 Q. Named a specific person? A. Um-hum.

3 Q. And then went out and killed that person, right?

4 A. Subsequently.

5 Q. And the psychologist and psychiatrists didn't warn
6 that person that this man was going to kill him?

7 A. They attempted to, one psychologist and one
8 psychiatrist attempted to stop the man. The head of the
9 clinic apparently decided that that was not to be, and he
10 reversed these two people who were closest to the man who
11 actually did the killing.

12 Q. And you told us that you are familiar with the brief
13 filed in that case? A. I am not totally
14 familiar with it. I simply have read it at one time.

15 Q. Let me ask you this, if this rings a bell, a brief
16 filed by the American Psychiatric Association, "Study after
17 study has shown that the psychiatrist is ill-
18 equipped to undertake the prediction of his
19 patient's potential dangerousness. The Court's
20 formulation of the duty to warn fundamentally
21 misconceives the skills of the psychotherapist
22 in its assumption that mental health professionals
23 are in some way more qualified than the general
24 public to predict future violent behavior of their
25 patients. Unfortunately study after study has
26 shown that this fond hope of the capability

1 accurately to predict violence in advance is
2 simply not fulfilled. Neither psychiatrists nor
3 anyone else have reliably demonstrated an
4 ability to predict future violence or dangerous-
5 ness. Neither has any psychiatric expertise in
6 this area been established. Indeed, if the
7 Court is intent upon finding a duty to warn of
8 a potential aggressive act, this duty should more
9 properly attach to members of professions such
10 as correctional officers, actuaries or members of
11 the general public who have proved more able to
12 make such predictions."

13 Are you familiar with that language?

14 MR. PESTARINO: Objection.

15 THE COURT: What is the objection?

16 MR. PESTARINO: The objection is hearsay. There
17 is no foundation laid that the witness based his opinion on
18 these.

19 THE COURT: Well, that is what counsel is asking
20 him, whether he was familiar with that, and also --

21 MR. PESTARINO: You ask him if you are familiar
22 with the journal. You don't read the whole thing.

23 THE COURT: Well, otherwise he could not --

24 MR. PESTARINO: Let him read it to himself.

25 THE COURT: Well, it has already been read.

26 MR. PESTARINO: I know it has. I will withdraw

1 the objection. Go ahead.

2 Do you understand the question?

3 THE WITNESS: I don't know whether I understand
4 the question.

5 THE COURT: The question is: Are you familiar
6 with that statement?

7 THE WITNESS: I have never -- yeah, I think I
8 have read it briefly before, and I can give you a response
9 to it, if you wish. It is a very self-serving document by
10 a group who does not want to be attacked as responsible to
11 prevent crimes that they possibly could. They are concerned
12 about a breach of confidentiality, and they are fighting
13 like crazy to reverse the Supreme Court's judgment in this
14 state which says they will be responsible in case somebody
15 gets killed and they could have prevented it. And there are
16 certain safeguards the Court did request which I think are
17 very substantial and important and I consider it almost
18 unethical of the American Psychiatric Association to put
19 that brief together. And I disagree with it totally. And I
20 think it is in very bad taste, and I see that it has no
21 particular -- I just don't respond to it very graciously.

22 Q. (By Mr. Robinson) But the American Psychiatric
23 Association that is -- can you tell us a little bit about
24 that group?

A. That is the group that
25 fought the institution of health programs.

26 Q. Well, what I want to know, what does it represent?

1 A. It represents a very fixed conservative position
2 forensic and academic psychiatry. And I am a psychologist.
3 I am a mental health professional.

4 Q. Do you agree with the contentions in this brief that
5 was filed in the Supreme Court of the State of California
6 --

A. One of the problems --

7 Q. -- that psychiatrists and psychologists cannot
8 accurately predict future violence?

9 A. They didn't say psychologists.

10 Q. Psychotherapists? Aren't you a psychotherapist?

11 A. I think they said mental health professionals.

12 Q. Skills of the psychotherapist.

13 A. All right.

14 Q. "It is an assumption that mental health professionals
15 are in some way more qualified than the general public."

16 A. Well, I happen to think they are.

17 Q. And you are a psychotherapist? A. Well,
18 I am a psychotherapist in the sense that I am a
19 psychologist and psychotherapist.

20 Q. Now, in terms of the place where the interview takes
21 place, okay?

A. All right.

22 Q. You are saying that because of your experience it
23 doesn't effect you at all or the interview or the results
24 of the interview if it is conducted in the jail as opposed
25 to your office? A. I think it is less
26 easy to work with a person in a jail. But I have done it

1 some, and I am not offended by the jail at this point, so my
2 sense is that I am not prejudiced by being in the jail.
3 Therefore, the only problem I have to work against is the
4 mood of the individual. You know, his mood is a function of
5 being.

6 Q. And in making your conclusions you have to base, you
7 have to base your conclusions on information that you
8 received in this interview, correct?

9 A. I tested the man for over six hours and I interviewed
10 him for forty-five minutes.

11 Q. So in making your conclusions you have to base it, you
12 have to base your conclusion on some sort of data, correct?

13 A. That is what I am doing, yeah.

14 Q. Hopefully that is what we are doing. You get some
15 data and you base a conclusion on it, right?

16 A. That is correct.

17 Q. And the data that you receive consisted of what?

18 A. Six hours of testing and forty-five minutes of
19 interview.

20 Q. Now, is it safe to say that your conclusion is only as
21 good as the data on which you base it?

22 A. Well, I will have to be subject to my data which come
23 from my perception. Right? I mean, I am there and I am
24 viewing the person in the situation, and I am collecting
25 observations. That is what I base my conclusions on.

26 Q. Is it safe to say then that your conclusion is only as

1 valid as the data on which you base it on?

2 A. Your question makes no sense to me. I am there as a
3 collector of information.

4 Q. Okay. All right. And this information -- okay --

5 A. Yeah.

6 Q. -- you collect it, and you make a conclusion based
7 upon that information?

8 A. Upon my
9 observations, yes.

10 Q. And if that information is wrong would it therefore
11 follow that your conclusion is wrong?

12 A. I would be terribly wrong if my observations are
13 wrong. I will obviously come to the wrong conclusion.

14 Q. And if that information was incomplete -- okay -- there
15 was a lot more information to be had, would it follow,
16 therefore, your conclusions might be wrong?

17 A. My conclusions based on my standard procedures in
18 light of what I am to do. Your question is very good, you
19 know, like am I not looking at the whole world of data I
20 could have of Assyrians and Mr. Ismail. I don't happen to
21 have the capacity to have all of that, so I cannot do a
22 detailed history of Mr. Ismail and write a seven-fold
23 volume on him. But I can do some observations and come to
24 a conclusion about him.

25 Q. Are there any psychological tests that were designed
26 for the purpose of measuring or assessing a legal issue?

A. What legal issue?

1 Q. Any legal -- A. Well, a test
2 that I am going to measure, I am going to use to measure a
3 person with regard to a legal issue?

4 Q. What I am asking you -- A. The
5 intelligence test does that. It divides, you know,
6 prescribes a set of diagnoses which are important to the law
7 in terms of mental capacity.

8 Q. And those psychological tests were designed -- listen
9 to my question, okay? A. Okay.

10 Q. Were there any psychological tests that were designed
11 for the purpose of measuring or assessing a legal issue?

12 A. I don't know of any. I don't understand your question,
13 perhaps.

14 Q. Yeah. You want to find out something -- okay?

15 A. Okay.

16 Q. All right. -- so you design a test to find out about
17 this thing, right? A. Um-hum.

18 Q. Okay. My question is, were there any psychological
19 tests designed for the purpose of finding out about a legal
20 issue? A. Well, I think that I am

21 falling on "a legal issue." I have no idea what you mean.

22 Q. Well, you don't know anything about legal issues, do
23 you?

24 MR. PESTARINO: Well, do --

25 Q. (By Mr. Robinson) Do you?

26 A. I am not here as an attorney.

1 Q. You are here as somebody who gave us an opinion that a
2 man couldn't cold bloodedly deliberate and kill. That is a
3 legal issue. Now, what do you know about it?

4 A. I am here to define that issue as well as I can as a
5 professional psychologist.

6 Q. You have to know about something before you can define
7 it, don't you?

8 MR. PESTARINO: Excuse me, the witness has been
9 interrupted and I would like him to finish.

10 THE COURT: The witness may finish. And, counsel,
11 I would admonish you to lower your voice.

12 MR. ROBINSON: Sorry, Your Honor. But I feel
13 stuff like this --

14 THE COURT: However you feel there is no reason
15 to shout at the witness.

16 THE WITNESS: My understanding is that I am here
17 as a professional psychologist, not as a legal expert.

18 Q. (By Mr. Robinson) Sir, you gave us an opinion,
19 right?

A. I certainly did.

20 Q. Your opinion was that this man is not the type of
21 person who could be a cold premeditated killer?

22 A. That is my opinion.

23 Q. And you didn't know the definition of murder, did you,
24 when you came in here? A. Apparently I
25 didn't from your questions.

26 Q. You thought that in order to have malice aforethought

1 you had to have some hatred or ill-will toward the victim,
2 didn't you? A. I believe you lead me
3 to that conclusion.

4 Q. I asked you a question, sir, and you are an experienced
5 person. A. I am just a professional
6 psychologist. You can lead me wherever you want.

7 Q. Did the defendant lead you wherever he wanted to?

8 A. I hope not. But he didn't have me under quite as much
9 stress as you do.

10 Q. You are under stress now? A. Well, you
11 are shouting at me.

12 Q. Does that make you nervous? A. Well, it
13 is not pleasant.

14 Q. Now, give us the reasons for your opinion that Mr.
15 Ismail isn't a cold premeditated killer.

16 A. Well, based on both the evaluation of his intelligence,
17 which is modest and my evaluation through the projective
18 tests, what seemed to be his motive, his structure, his
19 feeling of sensitivity to other people, the structure of his
20 responses to the Rorschach Ink Blot, I found almost no
21 taste of violence anywhere in any of this material. What I
22 found was a tremendous amount of social sensitivity which
23 he also expressed throughout the interaction with him over
24 the course of seven hours. I saw a great deal of dignity
25 and compassion and concern, and identification with children
26 and family and church; and he just did not feel to me like

1 a person who would kill somebody in a deliberate fashion.

2 Q. Okay. So you are saying that Mr. Ismail isn't a
3 violent person, too?

4 A. He did not
impress me as a violent person.

5 Q. What about if I was to tell you that Mr. Ismail
6 spent two years in jail over in Iran for beating up a
7 government official violently, would that affect your
8 opinion?

9 MR. FESTARINO: Wait a minute --

10 THE COURT: Is there an objection?

11 MR. FESTARINO: I think this is something we
12 ought to take up, I don't know, seems to me we ought to go
13 in Chambers.

14 MR. ROBINSON: He is putting his character in
15 issue.

16 THE COURT: Well, there is no evidence on that
17 so far in the case.

18 MR. FESTARINO: It is a hypothetical question and
19 it may be legitimate, I don't know.

20 THE COURT: Let's do this, let's take our
21 morning recess. And I will ask the jury to disregard the
22 last question until I make a ruling on it. I would like, also,
23 to admonish the jury, as I will instruct you at the end of
24 the case, that questions are not evidence. Only the answers
25 are evidence. And you will keep in mind the admonition I
26 have given you before about not discussing the case. You may

1 step down. We will resume at 11:10, approximately. And the
2 defendant will be ordered to return.

3 (Whereupon the following proceedings took place
4 in Chambers out of the presence of the jury with counsel
5 and the defendant present:)

6 MR. PESTARINO: Would you ask Joe Hernandez to
7 come in, too, if you don't mind.

8 THE COURT: Let the record show that we are in
9 Chambers. The defendant is present with counsel, and the
10 district attorney is present. Mr. Hernandez is present.
11 Yes.

12 MR. PESTARINO: The last question that was asked
13 would it change your opinion if you knew that Mr. Ismail
14 spent some time in prison in Lebanon if the district
15 attorney has some information to that effect that can be
16 verified I would have no objection to the question. But if
17 the district attorney has used that question when he can't
18 prove the answer, then I have an objection. I think it is
19 highly prejudicial. And I think that the jury ought to be
20 reinstructed about it to disregard everything that was said
21 with regard to that question.

22 Now, as I understand it, and I am only the
23 attorney here, my client tells me and Mr. Hernandez has
24 checked it out, there has never been any record of my client
25 being in prison or having beaten anybody or harmed anybody
26 in his life.

1 MR. ROBINSON: My information comes from the
2 relatives of the Patriarch who are outside, indicating to
3 me in 1960 to 1962 Mr. Ismail was in prison in, it wasn't in
4 Lebanon, excuse me, it was Syria, and the reason for being
5 in prison is that he had beaten up a government official who
6 had clashed with his father.

7 THE COURT: Do you intend to call anybody to
8 establish that fact?

9 MR. ROBINSON: I intend to call the defendant
10 back on the witness stand and ask him about that fact. I
11 just discovered it yesterday afternoon.

12 MR. PESTARINO: Well, I think then this remark
13 would be highly prejudicial coming from a witness who may
14 have, maybe might have heard some rumor.

15 THE COURT: Well, if it is hearsay, of course,
16 then it would not be admissible. If they know of their own
17 knowledge by either having been present or having visited
18 him, or something like that, then it would be admissible.
19 I have asked the jury to disregard the question before the
20 recess. I should, also, point out that the way the question
21 was framed, it was not in the form of a hypothetical
22 question but as a statement of fact. And if it is formed
23 in the -- if it is framed, rather, in the form of a
24 hypothetical question, then the instruction, which I assume
25 you will ask me to read, indicates that if a fact upon which
26 the hypothetical question is based has not been established,

1 then the answer is to be considered in that light. So that
2 if you are unable to establish this fact then there is no
3 prejudice. Now, I don't know what the facts are, and I don't
4 know how you are going to get it in or if it is true.

5 MR. PESTARINO: If he can establish that
6 somebody saw, saw this incident, then I would like to put
7 David back on the stand, probably in Chambers, and ask him
8 that question.

9 THE COURT: Well, we could do that now. There is
10 another --

11 MR. PESTARINO: The only trouble is I am running
12 out of time. I got Dr. Rappaport coming in here.

13 THE COURT: Another way, of course, to approach
14 this would be to inquire of the clinical psychologist in
15 taking the history whether anything like this was ever
16 stated to him, any action of previous violence. Then again
17 you would have the question of his opinion based upon the
18 facts given to him.

19 MR. ROBINSON: Right.

20 THE COURT: All right. Now, I have one other
21 thing. As long as Mr. Ismail is here and we are out of the
22 presence of the jury, I have been thinking that although
23 you have had an Assyrian interpreter and Doctor Nidever
24 testified that he had an interpreter present at part of his
25 examination, in view of the question of the jurors and the
26 statement made by Mr. Ismail on the stand yesterday, I

1 wonder if it would not be wise, if you are going to recall
2 him, to have an interpreter to handle that part of it so
3 there is no question that he fully comprehends the questions
4 and the answers.

5 MR. PESTARINO: I don't think that it is
6 necessary really. Maybe it is necessary for a psychologist
7 to have an interpreter because they have to be awfully
8 specific in the things that they talk about. I don't know.

9 THE COURT: Well, my only concern is this, Mr.
10 Pestarino, should he be convicted by this jury there is an
11 automatic appeal, as you know.

12 MR. PESTARINO: No, there isn't.

13 THE COURT: On first degree?

14 MR. PESTARINO: No, it is only when you have the
15 death penalty.

16 THE COURT: Well, should there be an appeal --

17 MR. PESTARINO: Probably will be. I won't handle
18 it.

19 THE COURT: That is the point exactly. A lawyer
20 probably would be appointed or one hired, and in looking for
21 something on which to hang a reversal, one of the grounds
22 might be that the defendant was not afforded complete due
23 process in that he did not totally comprehend questions of
24 the English language, or whatever. And I want to make
25 absolutely certain that --

26 MR. PESTARINO: What are you proposing, Your

1 Honor? That we have an interpreter to ask him if he has
2 ever been in any trouble in Lebanon or whatever?

3 THE COURT: No, not necessarily, because I think
4 Mr. Ismail understands English generally and is able to
5 express himself. But he said yesterday on the stand that he
6 did not understand certain words or perhaps connotations,
7 and I just wanted to know whether or not he felt, and I will
8 ask him directly: Mr. Ismail, would you like someone who
9 speaks Assyrian to translate and interpret what you are
10 saying in Assyrian to the jury in English so that you can
11 have everything that you have wanted to say come out?

12 DEFENDANT ISMAIL: I be glad.

13 THE COURT: You would like that?

14 DEFENDANT ISMAIL: Yes.

15 THE COURT: I think you ought to have an interpreter
16 then and put him back on the stand.

17 MR. PESTARINO: You mean go over the testimony
18 again?

19 THE COURT: Not necessarily all of the
20 testimony. It seemed to me that he was, the crucial part of
21 the testimony that he was unable to go into were the events
22 that occurred at the home of the Patriarch. I think up to
23 that time there didn't appear to be any question of his
24 ability to understand and comprehend. Is that right, Mr.
25 Ismail?

26 DEFENDANT ISMAIL: What's that again?

1 THE COURT: That up to the time that you went to
2 the home of the Patriarch you were able to explain to the
3 attorneys and the jury what you thought, what you did?

4 DEFENDANT ISMAIL: Yeah.

5 THE COURT: And so forth; is that right?

6 DEFENDANT ISMAIL: Yeah.

7 THE COURT: All right. But that what happened
8 at the home of the Patriarch you seem to have some
9 difficulty in expressing in English?

10 DEFENDANT ISMAIL: Just when he said on the
11 floor.

12 THE COURT: Would you like an interpreter to
13 translate that into English, to interpret that into
14 English?

15 DEFENDANT ISMAIL: I don't think that, no.

16 MR. PESTARINO: Let me talk to him a minute.

17 You understand all of the things that happened,
18 when you went to the door, and after that, when you
19 testified that you went in and all of the things that
20 happened after that, you remember you understood the
21 questions and you gave the answers didn't you?

22 DEFENDANT ISMAIL: Yeah. The problem was on the
23 floor, but he explained for me. When I say "floor" it
24 wasn't like you kneel or something.

25 MR. PESTARINO: Kneel down or when the judge
26 explained.

1 THE COURT: Just the one question, when you were
2 on the floor, meaning flat on the floor?

3 DEFENDANT ISMAIL: I understand when he explain
4 for me.

5 THE COURT: So you dont feel that you need an
6 interpreter now?

7 DEFENDANT ISMAIL: No.

8 THE COURT: I just want that clear.

9 MR. PESTARINO: I was convinced of it myself,
10 Your Honor, because I dealt with this man for - -

11 THE COURT: I never ran into this problem before
12 and I just want to make certain.

13 MR. ROBINSON: Thank you, Your Honor.

14 (Short recess taken.)

15 (Whereupon, Court convened in the presence of
16 the jury and the following proceedings were had:)

17 THE COURT: Please be seated. Let the record
18 show that the jury is present in the courtroom. Defendant
19 and counsel are present. I am sorry that we took so long
20 but we had a matter to discuss.

21 CROSS-EXAMINATION (Resumed)

22 BY MR. ROBINSON:

23 Q. Now, Doctor, are there different schools of thought
24 in psychology? A. Sure, many.

25 Q. Okay. And can you give us some of the schools of
26 thought, please? A. In learning theory

1 there are probably half a dozen schools. In the field in
2 the practice of psychotherapy there is behavior modification,
3 primal therapy, Jeungian therapy, Freudian psychoanalysis,
4 Rogerian, non-direct counseling.

5 Q. So would it be fair to say that psychologists'
6 opinion regarding certain data might vary from the different
7 schools of thought that they belong to?

8 A. Mostly what they would do with the data, yeah.

9 Q. And in terms of the schools of thought which one do
10 you belong to?

11 A. I am a Jeungian
analyst.

12 Q. I'm sorry?
13 A. I am a Jeungian
analyst, Karl Jeung.

14 Q. Was his school of thought, did that branch off from
15 the school of thought of Sigmund Freud?

16 A. Yes, it did.

17 Q. And he developed his own school of thought?

18 A. Yes.

19 Q. And have there been branches of Mr. Jeung's school
20 of thought that have branched off, too?

21 A. There have been some splinters but mostly it is one
22 piece.

23 Q. So we have Mr. Sigmund Freud and then Mr. Karl Jeung.
24 What other schools of thought do we have in psychology?

25 A. In psychotherapy, you mean? Psychology is very broad.
26 There are so many different things in psychology.

1 Q. Let's talk about psychotherapy then. What other
2 schools? A. In psychotherapy the
3 depth analysts, besides Jung and Freud included Adler and
4 Wrong and Wright.

5 Q. And all of these people are intelligent people to get
6 where they got, I take it? A. They
7 certainly were creative, yes.

8 Q. And they all had their followers?

9 A. Of course.

10 Q. And their interpretation of data might be different,
11 might vary from, depending on the school of thought they
12 belonged to, correct? A. Surely.

13 Q. Now, getting back to the examination of Mr. Ismail --

14 A. Um-hum.

15 Q. -- this was conducted on March the 11th, March the 13th,
16 and March the 14th? A. That is correct.

17 Q. Okay. And this examination was conducted in the
18 county jail? A. Um-hum.

19 Q. Now, did you know when the trial of the case of the
20 People vs. David Ismail started?

21 A. My understanding was that it had begun just before I
22 made my first examination.

23 Q. Okay. It started on March the 8th, correct? Or would
24 you know that? A. I didn't know the
25 exact date.

26 Q. But you know that the trial had begun prior to your

1 examining Mr. Ismail? A. I think I was
2 contacted when the jury had been selected.

3 Q. That was my next question. When were you contacted?

4 A. Well, I don't know the exact day from memory. I
5 believe it was the 9th of March.

6 Q. Okay.

7 MR. ROBINSON: And, Your Honor, would the Court
8 take judicial notice that this trial started on March the
9 8th?

10 THE COURT: Yes. So ordered.

11 Q. (By Mr. Robinson) Who contacted you?

12 A. Mr. Hernandez.

13 Q. Had you ever met Mr. Hernandez before?

14 A. No, I hadn't.

15 Q. Had you ever done any work with Mr. Hernandez before?

16 A. No, I had not.

17 Q. And when Mr. Hernandez contacted you he asked you to
18 interview David Ismail? A. He asked me if
19 I would evaluate David Ismail, yes.

20 Q. And asked you to evaluate him regarding what?

21 A. I don't know that I can reconstruct the exact
22 conversation. I had been referred to him by Dr. Clausen.
23 He asked me if I had ever worked in any criminal cases. I
24 said I had in a couple. He said would I evaluate Mr. Ismail.
25 He gave me no instructions. He indicated that Dr. Rapaport,
26 Walter Rapaport, had done an evaluation and had requested a

1 psychologist to do an examination of Mr. Ismail.

2 Q. And did you contact Dr. Rapaport?

3 A. I spoke to him on the phone.

4 Q. Was that prior to conducting your interview with Mr.
5 Ismail?

6 A. I think it was before the
7 first interview, yes.

8 Q. And did you discuss Dr. Rapaport's findings prior to
9 your interviewing Mr. Ismail?

10 A. Dr.
11 Rapaport told me his impressions and asked that I go ahead
12 and evaluate the man, see what I thought.

13 Q. Now, do you think that the findings that you have
14 given us, do they relate or correspond in any manner to your
15 personal feelings and opinions?

16 A. I can't
17 divorce myself from the situation.

18 Q. We are all human beings, right?

19 A. Yes.

20 Q. And although we try and be as objective as possible,
21 hopefully a lot of subjectivity goes in an interview such as
22 this?

23 A. As I say, I think the
24 process is totally subjective in a sense.

25 Q. Okay.

26 A. You try to use all of the
27 resources that you can so as not to simply be unrelated to
28 reality.

29 Q. And along that same vein if another psychologist were
30 to interview Mr. Ismail he might come up with totally
31 different data; is that correct?

32 A. Or the

1 same, sure.

2 Q. We don't know? A. We'd have to have
3 another psychologist do it.

4 Q. Okay. And have you followed the leading trials lately,
5 the Patty Hearst case, for example?

6 A. I have read something about the Patty Hearst case,
7 yes.

8 Q. And the case of William Kemper?

9 A. Yes.

10 Q. Okay. The case of Sirhan Sirhan?

11 A. I don't recall I followed that very closely.

12 Q. But in most of those cases what you basically had was
13 psychiatrists interviewing the man, saying one thing, and
14 psychologists; and psychiatrists and psychologists inter-
15 viewing the man and saying something entirely different?

16 A. Psychologists and psychologists differ.

17 Q. Have you ever heard the expression used in hospitals
18 and clinics that some staff members soon become easily
19 identifiable as health see-ers and some sick see-ers?

20 A. It is not something that I am accustomed to.

21 Q. Would that be a fair statement?

22 A. Say the words again, please.

23 Q. Yes. Some people that work in the hospital,
24 psychiatrists, psychologists, look at somebody and they
25 become identified as a health see-er, say, "Hey, I see that
26 person, I recognize the healthy qualities about him."

1 Whereas another group see the same person and say, "I
2 recognize the sickly qualities about him." Just depends how
3 you view it?

4 A. That is something I
5 haven't heard before. We have kind of an AB psychotherapist,
6 one psychotherapist tends to tell the client what to do and
7 it is authoritative and manages the person as a patient.
8 The other classification is one who tries to create an
9 understanding, and the work then is a function of the two
10 of them. And it is felt that the second type that I
11 mentioned is more successful in particular with psychotic
12 people.

13 Q. But once again we get back to the basic premise that
14 is an individual type opinion?

15 A. What is
16 an individual type opinion?

17 Q. The opinion of the psychologist, for example?

18 A. You have lost me. I am not trying to evade you.

19 Q. Is it a subjective type opinion?

20 A. Is what a subjective type opinion?

21 Q. How the psychologist views data or how a psychologist
22 views an individual?

23 A. Inevitably. I
24 think in all professions.

25 Q. So, for example, like if we were dealing with --
26 would you call psychology a science?

A. It is both scientific and it is an art form and
science.

Q. It is not a pure science, is it?

A. Well,

1 it is hard to say about that. Is an atomic physicist a
2 scientist? I am not really trying to evade your point.
3 There are such funny things that go together, like people who
4 are nuclear physicists and psychotherapists tend to be
5 closely allied in that the nuclear physicist is one of the
6 highest type thinkers and yet he pushes out the boundaries
7 of understanding to a point where he gets in close sympathy
8 to psychotherapists who is also pushing out boundaries for
9 understanding.

10 Q. Let me ask you this, isn't it true in the pure form
11 of science, no matter what school of science you belong to,
12 if you had two and then you had plus two, that would always
13 equal four no matter how the individual viewed that? It
14 would be two and two equals four?

15 A. I think your point is well taken. There are people who
16 respond only to facts. But other scientists are very
17 intuitive and they leap through facts to great discoveries.

18 Q. My question is, -- see, you have to answer yes or no
19 for the record, they you can explain. Okay?

20 A. All right.

21 Q. All right. So in the pure science such as
22 engineering or mathematics, something like that, no matter
23 what the data is -- okay -- if the data remains the same
24 like two plus two equals four, no matter what school of
25 thought you belong to, you are always going to get four,
26 correct?

A. Well, two plus two should

1 equal four unless it is in a different number system.
2 Mathematics -- look, I just can't answer your question
3 because it doesn't make sense. For example, mathematics is
4 not a science.

5 Q. Mathematics is not a science?

6 A. No, it is not a science. A science is, usually that
7 is a term we reserve to investigation, to empirical work,
8 to research. Scientists are people who check out their
9 idea by doing experiments.

10 Q. They check out their ideas? A. By doing
11 experiments. A mathematician might be such a pure
12 mathematician that he would never do that, he would simply
13 do high level logic.

14 Q. The reason that scientists check out their ideas by
15 doing experiments is to see if their ideas are valid?

16 A. Yes, sure.

17 Q. If they are reliable? A. Sure.

18 Q. So once again we get back into validity and reliability?

19 A. The scientific method, yes, is basic to all
20 scientists.

21 Q. Is psychotherapy -- psychology, is that a scientific
22 method? A. Yes.

23 Q. So you get your reliable data?

24 A. We collect data and attempt to verify it, yes.

25 Q. And in order to verify it you check out validity?

26 A. We start hopefully with validity, then check out the

1 reliability.

2 Q. You start with validity and then check out
3 reliability?

75
4 A. Yes. You have to be able
5 to measure something if you are going to do -- this work
6 requires that you first have a valid measure, something that
7 really does measure what you think it measures. Then
8 having arrived at that you try to establish whether the
9 ruler, the measure that you are using is elastic or not, or
10 whether it always measures the same thing. If it always
11 measures the same thing it is reliable.

12 Q. So, for example, getting back to something that I can
13 understand, if A equals B -- okay -- the ruler is always
14 twelve inches long, right? A. All right.

15 Q. Okay. That would be, you start out with that and
16 you'd say that is valid, then you would want to check back
17 to see if it is reliable, if A always equals B, if the ruler
18 is always twelve inches long, or whether it can stretch or
19 bend, or something like that, is that fair?

20 A. That is fair.

21 Q. Now, you told us that you were familiar with Sarason?

22 A. I have read him sometime in the past.

23 Q. Okay. And have you read his book The Clinical
24 Interaction?

25 A. No, I think I said I
26 hadn't.

27 Q. Okay. Would this be a fair statement? Sarason --

MR. PESTARINO: Excuse me, if he hasn't read the

1 book and if his opinion is not based upon that, whether it
2 is a fair statement or not would be irrelevant.

3 THE COURT: Well, if it is attributed to the
4 author and he is not familiar with it, then it would be an
5 improper question. Ask him whether he agrees with or
6 disagrees with it.

7 MR. ROBINSON: Right. That is what I am going to
8 do.

9 Q. (By Mr. Robinson) Is this a fair statement with which
10 you can agree or disagree with? Sarason cites abundant
11 research evidence that the following have an effect, and he
12 is talking about the type of examination, the clinican
13 examination, "The nature of the instructions given to the
14 subject." A. Okay.

15 Q. Would that have an effect? A. Certainly.

16 Q. "The actual purpose of, the actual purposes of the
17 clinical interaction." A. Um-hum.

18 Q. "What the examiner is there for and what sort of
19 information he wishes to elicit from the examinee,"
20 correct? A. Yeah, you need to talk
21 about both sides.

22 Q. For example, if you are there to find out about a
23 murder or if you are there to find out how somebody gets
24 along with his wife, that is important, isn't it, in the
25 data that you receive? A. Sure. Sure, the
26 rapport between the two people is what is significant.

1 Q. "The purposes of the interaction as perceived by the
2 subject"?

A. Yes, absolutely.

3 Q. Okay. So if the subject thinks that, the subject
4 being the examinee, thinks that he can say something that is
5 going to help him out, that would be relevant in terms of
6 data that comes out, correct?

A. Sure.

7 Q. If on the other hand he is going to say something that
8 is going to hurt him, that would also be relevant in terms
9 of data?

A. Surely.

10 Q. "The place of the examination"?

11 A. I quibble with that some, but, of course, it has some
12 effect.

13 Q. "The time of the examination"?

14 A. Yeah, within limits.

15 Q. Okay. And "The race, social class and sex of the
16 examiner"?

A. Certainly has an effect.

17 Q. All of those things do? A. Always.

18 Q. Sure. Okay. Now, these things are subject, because
19 they all have different effects on different people, they
20 are all subject to different variations, correct?

21 A. They are all subject to different variations.

22 Q. Because of the way that you gather your data you
23 cannot scientifically say that A always equals B because of
24 these different variations? You are not always going to
25 get the ruler that is twelve inches long, you are going to
26 get the one that bends and flexes and stretches, correct?

1 A. You always have to be aware of that.

2 Q. Now, you told us that you were familiar with the
3 Stanford-Binet I.Q. variations?

4 A. Talking about the Stanford-Binet I.Q. test?

5 Q. Yes, sir. A. Yes.

6 Q. Are you familiar with the research that has been done
7 in the field regarding that test?

8 A. I haven't paid much attention to it for some time. I
9 don't use it.

10 Q. You don't use it? A. No.

11 Q. Had you used it in the past? A. When I
12 was in graduate school.

13 Q. Okay. And has it been your experience with that test
14 that the results of the I.Q. test depends on who is giving
15 the examination and how he interprets it?

16 A. The result of any test always depends on the skill of
17 the examiner.

18 Q. And the interpretation of the examiner on the test?

19 A. Sure.

20 Q. And that in the Stanford-Binet test sometimes the
21 differences because of the different examiners testing the
22 same individual in terms of I.Q. are as large as thirty to
23 forty points; is that correct? A. I don't
24 know that for a fact. That is a pretty large difference.

25 Q. Well, does it seem reasonable to you?

26 A. No.

1 Q. That doesn't seem reasonable?

2 A. No, that is too much.

3 Q. Have you ever read the article by Catel on Society In
4 School dealing with the Stanford-Binet variations?

5 A. No, I haven't. You understand that some of those
6 examinations are given person to person as I do it and some
7 of them are paper and pencil when they are done in a group.
8 There is much more variation when they are done in a group.

9 Q. Let me ask you this, is there any way of knowing whether
10 you have received valid data from the person that you interview?

11 A. I think that is a combination of all of your experience
12 and skills, you know, it is your aim.

13 Q. And did you believe what Mr. Ismail told you when you
14 interviewed him?

15 A. My interview was not
16 so substantial to my evaluation of the man as my
17 examination. So to ask a man directly, you know, where are
18 you, is helpful in terms of all of the moods and tone, and
19 the flavor of the personality. Just as my teacher Karl
20 Jeung was the first to develop the lie-detector test, which
21 I am quite familiar with or was familiar with once, it is
22 important to try to detect differences in the tone of voice,
23 the manner of response, blocking, the time it takes for a
24 response. There are a lot of cues you look for just in the
25 verbal back and forth, but we really try to look for tests.

26 Q. You are looking for the truth?

A. That is correct.

1 Q. And is there any way for you to tell whether or not
2 Mr. Ismail told you the truth about his involvement with the
3 Patriarch that night? A. Only my clinical
4 judgment.

5 Q. And your clinical judgment was what, that he told you
6 the truth? A. When he told me that
7 he didn't remember anything from the time of an insult from
8 the Patriarch to roughly, really until he was in the jail,
9 I think I believed that, yes.

10 Q. And you, also, believed him as to how he acquired the
11 gun? A. I accepted what he told me. I
12 had no basis to really argue with him about that.

13 Q. And you accepted what he told you about not
14 remembering anything from the time the Patriarch called his
15 father a name until he ended up in jail?

16 A. That was important to me.

17 Q. And you accepted his explanation as to why he came
18 down here from Canada? A. I work at
19 different levels. Consciously I accept what he says that
20 his conscious intention was to come down to visit, to look
21 for the possibility of employment. You know, these things
22 I can accept at a conscious level. I am sure that he
23 believed them. That he might have some other motivation as
24 well that he didn't know about, that would be something I
25 would also believe.

26 Q. So it is just as believable that he came down here to

1 kill the Patriarch as he came down here to look for
2 employment?

3 A. I don't think so. But I
4 suppose that it is possible that somewhere at a deeper level
5 he might have had that intention. I think I am more
6 inclined to believe that he came down and danced around the
7 need to confront the Patriarch, which I think was really
8 probably the basic underlying purpose in his coming.

9 Q. Danced around the need to confront the Patriarch?

10 A. Well, it is -- to say to a spiritual leader that you
11 do not wish to support him is a very heavy thing. And I
12 believe in my understanding of Mr. Ismail that was pretty
13 basic to his coming down here.

14 Q. Did you ask him why he didn't call the Patriarch or
15 write him a letter?

16 A. I believe he had
17 talked to him on the telephone.

18 Q. And when did he talk to him on the telephone?

19 A. I don't know the exact date. Sometime in the last
20 two years.

21 Q. Okay. And did you ask him why he couldn't talk to him
22 on the telephone again and tell him of his decision not to
23 support him?

24 A. As I say, it was not my
25 intention to try to really interrogate Mr. Ismail. I
26 wanted to get a feeling for everything that he remembered and
experienced as clearly as I could and try to make an
evaluation of how, how truthfully I thought he was giving
me this information. But more fundamental to my work with

1 Mr. Ismail was to attempt to evaluate him through tests
2 because I, as you, am aware that just interviewing is just
3 not all that substantial. One requires something more.

4 Q. So you are saying if in fact you hadn't given Mr. Ismail
5 any tests you couldn't have had a valid basis to form an
6 opinion just on an interview?

7 A. I think my basis for opinion would have been somewhat
8 worthwhile, but I would have been far less satisfied with it.

9 Q. Let me question you on that, if I might. If you had
10 not given Mr. Ismail any test you told us that your basis
11 for opinion would be somewhat worthwhile, okay?

12 A. Um-hum.

13 Q. And the only thing then that you would have to base
14 your opinion on would be the statement of Mr. Ismail,
15 correct?

16 A. No, my impression of Mr.
17 Ismail and all of the other variables that I described to
18 you, just as I talked to you, I looked at everything you say
19 and do, how you move, what the tone of your voice is, what
20 your eyes are doing, what your mouth is doing, what all of
21 the muscles in your body are doing. And I look at all of
22 this data all of the time.

23 Q. And you have seen me, without giving me any tests, I
24 take it for longer than you saw Mr. Ismail, if you exclude
25 all of the tests, correct? A. I don't
26 understand you.

Q. Yeah. You told us that you saw Mr. Ismail for, well,

1 only spoke to him regarding personal background, reasons
2 regarding the crime, things like that for about forty-five
3 minutes? A. Maybe an hour all told.

4 Q. And the rest of the time was involved with tests?

5 A. Correct.

6 Q. Now, you just told us that you could have given this
7 opinion, given us an opinion, could give us a clear idea if
8 you hadn't given him any tests?

9 A. Well, I could give you an opinion if I had an hours
10 interview.

11 Q. Okay. And let's, if I might, for the purposes of a
12 hypothetical question, exclude those tests, okay? So now
13 all I am asking you to do is to give us your opinion on
14 whether or not -- strike that -- to give your opinion on
15 Mr. Ismail excluding those tests. And what is it?

16 A. Well, I guess I can't really do that because I did
17 do seven hours of work with him and I can't go back and sort
18 out one little piece and say this is the way it would be.

19 Q. Is it a fair statement to say if you hadn't given
20 those tests you couldn't give an opinion on him?

21 A. No, that isn't so.

22 Q. You just told me that you are always analyzing people,
23 watching how they talk, move, how their eyes are, everything.
24 You have had a chance to look at myself. Am I a cold
25 premeditated killer?

26 MR. PESTARINO: I don't know if I ought to object,

1 but I think I ought to say something. I don't think, first
2 of all, he didn't pay the expert and to get an opinion from
3 him, that's wrong. And secondly, we are not talking about
4 Mr. Robinson. We are talking about Mr. Ismail.

5 THE COURT: No, I think I'd better sustain the
6 objection because of the fact that it would require --

7 MR. ROBINSON: It goes to his credibility.

8 THE COURT: Well, he hasn't interviewed you as
9 such.

10 THE WITNESS: No, I haven't.

11 THE COURT: And also I am afraid that --

12 THE WITNESS: I would like the opportunity.

13 THE COURT: I think you are treading in dangerous
14 water. The objection will be sustained.

15 MR. ROBINSON: Thank you, Your Honor.

16 Q. (By Mr. Robinson) So you have to say then that you
17 based your opinion on the combination of the tests and the
18 interview? A. Yes, I do.

19 Q. Okay. Without referring to any police reports or
20 contacting any victims or eyewitnesses in the case?

21 A. I didn't think that was my function. That I was --

22 Q. Well, I guess maybe this is where we are hung up,
23 Doctor. Your function you told us is to determine truth?

24 A. Um-hum.

25 Q. Okay. And how do you determine truth without looking
26 at both sides of the question? A. Well, I

1 readily acknowledge that if I had every piece of data about
2 David Ismail throughout his life and every circumstance
3 here in the recent weeks or months, I probably could be more
4 exact in my description of him. But it does not follow that
5 I have no exactness because I do not know everything about
6 him.

7 Q. So what you are saying is, you gave us your best shot
8 based upon the evidence that you had before you?

9 A. Based on seven hours contact.

10 Q. And would a jury be in a position to give their
11 opinion as to whether or not Mr. Ismail is the type of
12 person that could commit this crime hearing all of the
13 evidence in the case?

14 MR. PESTARINO: Objection, if Your Honor please.

15 THE COURT: What is the basis of the
16 objection?

17 MR. PESTARINO: Calling for the opinion of what
18 a jury would be able to do and what it can't do is a matter
19 of law for the ultimate finder of fact, and it is an
20 improper question to ask for that type of opinion. The
21 jury hasn't been examined. There is no foundation.

22 MR. ROBINSON: I haven't heard a legal objection
23 yet.

24 THE COURT: The ultimate decision, of course,
25 will be that of the jury. The question asked of the doctor
26 is whether or not in his opinion a jury could make a

1 similar decision?

2 MR. ROBINSON: Having heard all of the evidence.

3 THE COURT: Well, it isn't that --

4 MR. ROBINSON: Strike that. I'll save that for
5 argument.

6 THE COURT: It is obvious that is their obli-
7 gation.

8 MR. ROBINSON: I wanted to know what the doctor
9 felt about that.

10 MR. PESTARINO: Go ahead and ask him.

11 THE WITNESS: I'll answer it if you want.

12 Q. (By Mr. Robinson) You used the term cold premeditated
13 killer? A. Yes.

14 Q. All right. Where did you come up with the word
15 "cold"? A. To me it is the antithesis
16 of empathic kind of warmth, and identification with another
17 person. Cold to me means behavior in which you consider
18 only your own feelings and wishes and do not identify with
19 the person you are interacting with. So to be cold is to
20 use another person and not care. The warmer empathic type
21 human being would be hurt if he hurt another person. If
22 I really deliberately hurt you and I am really empathic, I
23 will feel your pain quite vividly. Just as if a client comes
24 into my office I can frequently sense their symptomatology,
25 even like if they have an upset stomach, and they feel
26 nauseous I may suddenly ask them, because I feel this in me,

1 "Do you feel nauseous?"

2 Q. Let me ask you this, is it your opinion that all
3 people who commit murder are cold people?

4 A. No, I don't think that is true because some people
5 kill out of passion, out of wild emotion.

6 Q. So you are saying that if you don't kill out of
7 passion then you would be a cold person?

8 A. I think if your passionlessness fits a situation
9 where you are in a thinking frame, and you arrange to dispose
10 of somebody without identifying with that human being or
11 what you were doing, I would consider that cold.

12 Q. And I take it you have done and read numerous things
13 in the field that deals with this particular concept?

14 A. I spent three years in Zurich going over these kind
15 of concepts.

16 Q. Cold killers? A. No, coldness
17 versus empathy.

18 Q. How many years have you spent going over the murder
19 and coldness regarding murders, the different personalities
20 of murderers. Have you spent any time at all?

21 A. I haven't made a study of the personality of murderers.

22 Q. Well, there hasn't ever been a study made, has there?

23 A. There have been some studies of individual cases.

24 Q. Sure. Because the reason there has never been a
25 general study made is because you can't classify people like
26 that, isn't that the truth? A. It is difficult

1 to classify people. Psychologists continually try to do it.

2 Q. Just like you have tried to do in this case?

3 A. Surely.

4 Q. Okay. Now, was the Wexler Adult Intelligence scale,
5 that is one of the tests that you gave Mr. Ismail?

6 A. Yes.

7 Q. Was that test designed -- well, I'll ask you this,
8 why was that test designed?

9 A. It is a general test of -- a test of general
10 intelligence.

11 Q. Was it primarily designed to decide legal issues in
12 the courtroom? A. I can't understand
13 your question.

14 Q. Was the purpose of the person who designed that test,
15 was his purpose in designing the test to decide legal issues
16 in the courtroom? A. No, they designed a
17 test of general intelligence.

18 Q. The full range vocabulary Form A test, was this test
19 primarily, was its purpose to decide legal issues in the
20 courtroom? A. No.

21 Q. It was designed for another purpose?

22 A. Again, a form of intelligence.

23 Q. The wide range achievement test, "RAT," was this
24 test primarily designed in its purpose to decide legal
25 issues in the courtroom? A. No, it wasn't.

26 Q. Grays Oral Reading Test, was this test primarily

1 designed in its purpose to decide legal issues in the
2 courtroom? A. No. No, it wasn't.

3 Q. I'm having trouble with this one.

4 A. Dvorine.

5 Q. Dvorine Iso-chromatic Plates, was this, and I'm using
6 the word test, I'm going to substitute for the word
7 technique, is that a fair substitution?

8 A. I think you better stick with test.

9 Q. What is the difference between a test and technique?

10 A. Well, a technique has got no necessary reliability or
11 validity demonstrated. It is like something I can do.

12 Q. And do these tests have any necessary reliability and
13 validity in compared to legal issues in a courtroom?

14 A. They have all been tested, they have all been used to
15 establish validity and reliability for their purposes.

16 Q. In a courtroom for legal purposes?

17 A. For their purposes, you know, whatever their purposes
18 were.

19 Q. And what about the Knox Cue Test, was this test
20 primarily designed in its purpose to establish legal issues
21 in a courtroom? A. That is closer to

22 legal issues because it had to do with immigration, but not
23 specifically to Court.

24 Q. The Knox Cue Test is a memory test?

25 A. It is essentially a scale of intelligence using
26 memory.

1 Q. Memory for design, this test, was its purpose and
2 reason it was designed to decide legal issues in a
3 courtroom?

4 A. Again we are
5 getting a little closer. This is a scale that is frequently
6 used to determine the degree of mental impairment or
7 organic impairment if it was really a serious organic
8 impairment so the person needed a conservator you might use
9 it in a courtroom. Its essential use is to try to define
10 whether there is organic impairment.

11 Q. Your answer would be no? A. It is not
12 primarily designed for a courtroom.

13 Q. Its purpose wasn't for use in a courtroom when it was
14 designed? A. No.

15 Q. Bender-Gestalt background interference procedure, was
16 the purpose for this test and the reason it was designed to
17 be used in a courtroom? A. No. No.

18 Q. Hooper visual organization? A. No.

19 Q. House tree person drawings? A. No.

20 Q. Rorschach ink blots? A. This test is
21 frequently used in Courts to establish fantasy.

22 Q. Was its purpose when it was designed to be used in
23 a courtroom? A. No. No, it is not
24 specifically designed for courtroom.

25 Q. Thematic apperception test? A. No.

26 Q. Are there any tests that psychologists have designed
whose purpose and design was to be used in a courtroom?

1 A. Not to my knowledge.

2 Q. Now, does that tell you something? Strike that.

3 Okay. Now you told us that when you interviewed
4 Mr. Ismail you did some reading on the church, the Assyrian
5 people, right? A. That is correct.

6 Q. Okay. You did some outside reading on this. You
7 didn't rely on Mr. Ismail for this information?

8 A. I just looked it up in the Encyclopedia Britanica.

9 Q. And you included that in your report, right, that
10 information you looked up? A. Sure.

11 Q. Why? A. I thought it was
12 substantial.

13 Q. Well, you had to go to an outside source to get this
14 information. Why didn't you ask Mr. Ismail about it?

15 A. We did talk about the church. He had difficulty
16 explaining it to me. We had a language barrier.

17 Q. I see. He had difficulty explaining the church to you
18 at that time? A. Well, his term for it
19 isn't the same term as is frequently used in English.

20 Q. So you went to an outside source?

21 A. I went to the encyclopedia, yes.

22 Q. Did Mr. Ismail have difficulty explaining to you what
23 happened the night of the killing?

24 A. He told me what he remembered, yes.

25 Q. And did you have difficulty understanding that?

26 A. Some difficulty, yes.

1 Q. Did you go to an outside source for that?

2 A. I asked an Arabic interpreter to come with me.

3 Q. Could you answer my question, please. Did you go to
4 an outside source?

5 A. I am not trying to
6 avoid your question. How can I go to an outside source ?

7 Q. Did you go to police reports and contact the district
8 attorney?

9 A. The only thing I did was
10 look up the newspaper article which originally described his
11 arrest.

12 Q. So you went to the newspaper ? A. Yes.

13 Q. Do you consider the newspaper a reliable source of
14 information?

15 A. In the main, yes.

16 Q. Do you believe everything that you read in the news-
17 paper?

18 A. No, I don't believe
19 everything that I read in the newspaper.

20 Q. Did you believe what you read in the newspaper
21 regarding Mr. Ismail's arrest?

22 A. I really
23 went to the newspaper article for background.

24 Q. Can you answer my question? A. I guess
25 not. I just simply read something and I put a probability
26 figure alongside of it. I don't say yes or no. I say
maybe.

Q. Let's talk about, you deal with, you talked about
reliability and validity, right?

A. Um-hum.

THE COURT: Excuse me, counsel, I know we are
not going to get through and counsel will also want to

1 reexamine. Perhaps you ought to approach the bench for
2 just a moment.

3 (Discussion off the record.)

4 THE COURT: All right. We will take the recess
5 over the noon hour and we will resume a little after one
6 thirty. And you will keep in mind the admonition I have
7 given you before and not discuss the case among yourselves
8 or with any other person. We will see you around that time.
9 The defendant will be ordered to return, also, as well as
10 any subpoenaed witnesses.

11 (Whereupon, Court adjourned for the luncheon
12 recess.)

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AFTERNOON SESSION

March 24, 1976. 1:30 o'clock p.m.

(Pursuant to adjournment, Court convened, and the following proceedings were had:)

THE COURT: Please be seated. Let the record show that the jury is present, the defendant is present with counsel. You may proceed.

MR. ROBINSON: Good afternoon, Doctor.

THE WITNESS: Good afternoon.

JACK NIDEVER,

the witness on the stand at the time of the adjournment, resumed the stand and testified further as follows:

CROSS-EXAMINATION (Resumed)

BY MR. ROBINSON:

Q Doctor, I have a few more questions for you, if I might.

Okay? A Go ahead.

Q Thank you. Now, we were talking about your examination of Mr. Ismail in the jail. A True.

Q Okay. And would one of the factors that might invalidate your data be the fact that Mr. Ismail was upset or worried at the time he gave this examination?

A Well, I think that is part of the thing we wanted to explore. I don't see that was invalidating the examination.

Q Well, if somebody is given a battery of tests --

A Yes.

Q -- and he has other things on his mind would that affect

2
1 the results of those tests? A. Sure. You have to get
2 their attention.

3 Q And there is substantial literature in the field of
4 psychology to support that proposition, isn't there?

5 A You surely have to establish rapport.

6 Q Could you answer my question? A I am agreeing with
7 you, yes, it is a difficulty and you recognize it and you
8 attempt to overcome it.

9 Q And then there is some substantial literature in the
10 field that supports the position that various outside
11 influences might affect an individual on his testing?

12 A Sure.

13 Q Okay. And would some of those outside influences be
14 concern over standing trial for murder? A Surely.

15 Q Concern over the outcome of the trial? A Yes.

16 Q The fact that a man is in custody in jail?

17 A All of these things are factors.

18 Q All of these things are factors that can influence the
19 outcome of the test and the results? A They can
20 influence the tests.

21 Q As a matter of fact, are you familiar with the studies
22 that have been done that test children in, say, grammar school
23 and the studies that have shown that various factors, such as
24 weather, a child is used to sitting at a desk with an arm on
25 it as opposed to a desk without an arm on it, might affect
26 that person's ability on an I.Q. test and how he does?

3
1 A I haven't read that study. It is interesting.

2 Q Would you agree with that study that that factor could
3 influence the child and his ability on the I.Q. test?

4 A Sure. Many factors affect testing.

5 Q Okay. That's fair. Also, you also told us that you
6 rely to some extent on your experience in making these
7 evaluations; is that correct? A Yes.

8 Q And concerning your experience doesn't the weight of
9 scientific research show that more experienced examiners,
10 psychiatrists and psychologists, are not appreciably more
11 accurate in their evaluations than the less experienced
12 examiners? A Less experienced psychiatrists are

13 not any better than more experienced psychiatrists?

14 Q That is correct. Doesn't the weight of research show
15 that? A I am not familiar with research that shows

16 that. I imagine it could be so, young psychiatrists are
17 often better than older ones about some things.

18 Q So experience in and of itself, the fact that you have
19 been in the business 10 years really doesn't tell us much?

20 A I hope it does.

21 Q Isn't there substantial research and writing in the
22 field to the effect that experience plays, is no factor
23 whatsoever in somebody's ability to give an opinion to
24 diagnose a case? A I just can't accept that.

25 Q Are you familiar with the study done by Plott, Erica &
26 Cromwell entitled The Ability Of Clinical Psychologists To

4
1 Discriminate Between Drawings By Deteriorated Schizophrenics
2 And Normal Subjects In Psychological Reports?

3 A I think I have heard the title but I haven't read it.

4 Q And are you familiar, would you agree with this proposi-
5 tion, that it was found that college students and non-
6 clinical faculty members were approximately as good as
7 experienced psychologists in discriminating drawings by
8 deteriorated schizophrenics and normal subjects?

9 A I don't accept it.

10 Q You don't accept it? A No.

11 Q Okay. Are you familiar with the article by Goldberg,
12 The Effectiveness of Clinicians' Judgments in the Journal of
13 Consultant Psychology? A Well, I don't remember

14 that title. I haven't read it.

15 Q Would you accept -- are you familiar with Goldberg?

16 A Well, there are many Goldbergs.

17 Q Okay. With L. R. Goldberg? A No, I don't
18 think that I know him.

19 Q Isn't he an authority in the field?

20 A I don't think that just everybody who publishes is an
21 authority.

22 Q Okay. Would you agree with what Goldberg has to say,
23 where he says in his experiments Goldberg had experienced
24 psychologists, psychological trainees and non-psychologists,
25 for example, hospital secretaries use the Bender-Gestalt test
26 in the attempt to distinguish 14 brain damaged psychiatric

1 patients. There were no differences among any of the groups
2 with the staff psychologists ranging from 60 to 70 per cent,
3 the trainees from 60-77 per cent, and the secretaries from
4 57 to 73 per cent. A And what are you asking me?

5 Q I am asking you if you agree with that.

6 A Well, it is a finding. I can't disagree with the
7 finding. Whether it is true in general and outside of that
8 particular small facility I don't know.

9 Q Are you familiar with the article by Walker & Linden in
10 the Journal of Clinical Psychology, entitled Varying Degrees
11 Of Psychological Sophistication In the Interpretation Of
12 Sentence Completion Data? A No, I don't know the
13 article.

14 Q Okay. In that article Walker & Linden found no
15 practical difference between experienced psychologists,
16 undergraduate psychology students and undergraduate engineer-
17 ing students in making assessments from sentence completion
18 data. Would you disagree with that? A I would like
19 to comment on it if you would care to listen to me. There
20 is a very strong movement in academic psychology to discredit
21 clinical psychology. There have been a number of studies
22 that establish that housewives or almost anybody can do
23 psychotherapy, that psychotherapists do nothing, whether they
24 are psychiatrists, social workers, housewives or psychologists.
25 The backbone of experimental psychology is dismayed by our
26 use of idiosyncratic methods instead of the nomothetic methods,

1 and they continue to attack us and many of the articles you
2 are citing there could come from this position. And I am not
3 very interested in them.

4 Q Now, let's, if we can, progress to the tests that you
5 gave Mr. Ismail? A Sure.

6 Q Okay. And once again, I believe, so it is clear in my
7 own mind, we have established that none of these tests that
8 you gave Mr. Ismail were designed for the purpose of deciding
9 the legal issue in court; is that correct?

10 A I don't believe any of them were designed for courtroom,
11 no.

12 Q Okay. Now, let's talk about the Wexler Adult Intelli-
13 gence Scale. Did you bring that test with you?

14 A Wexler?

15 Q Wexler. A Wexler.

16 MR. PESTARINO: Can we use the board?

17 THE COURT: Yes. Do you want to open it?

18 Q (By Mr. Robinson) First of all, Doctor, I would like
19 for you, if you would, please, to give us -- you saw the
20 defendant, Mr. Ismail, on March 11th which was a Thursday?

21 A Mm-hmm.

22 Q March 13th, which was a Saturday? A Yes.

23 Q And March the 14th which was a Sunday?

24 A That is correct.

25 Q And you told us that there are various factors, any little
26 thing can influence the outcome of a particular test?

7
1 A No, I didn't say that. You did. I agreed that many
2 factors influence tests. I didn't say little factors can
3 alter the outcome of tests. I really did agree with you that
4 there are many factors that influence the outcome of tests.

5 Q Okay. Are you familiar with what the busiest days in
6 the jail are? A I have no awareness of that.

7 Q You told us that you were familiar with the jail.

8 A I have been in and out of the jail. I haven't made a
9 study of frequency there.

10 Q Do you know when they have visiting days in the jail?

11 A I presume it is on the week-ends.

12 Q And using your common sense, on the week-end, if some-
13 body was to receive a visitor would they be more excited
14 than they would normally when they weren't to receive a
15 visitor during the week? A If you are talking about
16 any subject who is in the jail, sure, if he is expecting
17 company he might be more excited.

18 Q Would this excitement, would this be one of the factors
19 that could influence the outcome of the test?

20 A I don't believe so.

21 Q Excitement has nothing to do with the outcome of a test?

22 A You are asking me to generalize as from anybody in the
23 jail expecting a visitor and me having made an arrangement
24 to visit Mr. Ismail on these two days, we had planned it to
25 be at the lowest activity level within the jail between the
26 hours of 12:00 and something, and he was expecting me at that

8
1 time.

2 Q You had planned it to be at the lowest activity level
3 within the jail? A Well, in the sense of the internal
4 affairs of the jail, that is, after lunch and before dinner.

5 Q Okay. But my question is, do factors like excitement,
6 anxiety affect the outcome of the test? A Surely
7 anxiety is one of the things that we like to measure with
8 our test, so we are looking for these kind of factors. Are
9 you asking does it degrade the outcome of a test? Potentially,
10 if you don't pay any attention to it.

11 Q Okay. And the tests that you gave were on the Saturday
12 and the Sunday, the 13th, the 14th, and 11th, which was a
13 Thursday? A I gave the tests on the 13th and
14 the 14th, Saturday and Sunday.

15 Q Okay. You gave the tests on the 13th and the 14th?

16 A That is correct.

17 Q Now, let's talk about -- what did you do on the 11th
18 when you first met with Mr. Ismail? A I talked to Mr.
19 Ismail.

20 Q Okay. And how long did you meet with him at that time?

21 A I think around 45 minutes.

22 Q And what did you discuss? A First I had to get
23 Mr. Ismail to be willing to talk to me. And as a matter of
24 fact I suppose my preliminary visit was to assure that when I
25 did ask him on Saturday and Sunday we could go ahead with the
26 testing and we wouldn't have an impasse in terms of whether

9
1 he would be willing to work with me. So my visit on
2 Thursday was to see whether in fact we could function together
3 emotionally and linguistically.

4 Q And that is an important consideration?

5 A It certainly is.

6 Q Because the emotions, the stability, the mental condition
7 of both the examinee and examiner are critical in the outcome
8 of the tests, aren't they? A They are very important
9 on some tests, less important on others, but they certainly
10 are significant, yes.

11 Q Now, when you talked with Mr. Ismail on the 11th, which
12 was the Thursday, did you have any trouble understanding him?

13 A I had some difficulty, yes.

14 Q Okay. And what sort of difficulty did you have?

15 A I think it was in his use of words. He would be trying
16 to explain something to me and I find it somewhat hard to
17 follow his track of thinking. We would keep going over it,
18 and eventually I would get a kind of a pretty, somewhat hazy,
19 but pretty clear perception of what he was trying to tell me.
20 And he had more emotion on that day than he did on Saturday
21 and Sunday. It was easier to understand him on Saturday.

22 Q He was more emotional on the 11th? A I was a
23 stranger, yes, he had to decide whether I was trustworthy or
24 who I was, what I was there for.

25 Q So do you feel that when somebody in Mr. Ismail's
26 position meets with a stranger he tends to be more emotional

10

1 than if he knew the person? A. He is going to be more
2 defensive initially, sure.

3 Q And if you had administered any tests on the 11th that
4 emotional instability would have affected the outcome of the
5 test? A. I think it would have showed itself, yes.

6 Q Now, I take it no tests were administered on the 11th?

7 A. That is correct.

8 Q Now, on the 13th, the Saturday -- A. Mm-hmm.

9 Q -- you met with Mr. Ismail in the jail? A. Yes.

10 Q And at this time you administered some tests?

11 A. Yes.

12 Q Could you tell us which test you administered first?

13 Do you have the order? A. I don't remember the exact
14 order. I think I started with a full-range picture vocabulary.

15 Q Let me interrupt just for a second, if I might, please.

16 Did you take notes when you interviewed Mr. Ismail on the 13th?

17 A. I don't believe I did. I didn't want to appear as if
18 I were writing down all kind of things about him. I wanted
19 to relate to him so we could feel like we could try to do
20 what I set out to do.

21 Q Did you take any notes on the 11th when you interviewed
22 him? A. Perhaps a few notes in the periphery of my
23 test material.

24 Q On the 11th you were trying to relate to him more so
25 than the 13th? A. On the 11th I was trying to give him
26 the feeling that he could trust me enough to allow me to

11

1 evaluate him.

2 Q Okay. So you took notes on the 11th but not on the

3 13th? A I did not really take notes on the 11th.

4 Q Okay. So everything that is contained in your report
5 regarding what he said you had memorized, then subsequently
6 put it on the report? A I took some notes on the 13th

7 and 14th and, of course --

8 Q I'm sorry, I thought you just told us you didn't take
9 notes on the 13th? A I said I took some notes. You
10 know, it was not my thinking to be writing down all kind of
11 words that he was saying. I was giving him tests, while I
12 was giving him a test I might write down a little note here
13 or there in one of the test corners, but primarily was testing
14 him on Saturday.

15 Q And you didn't write down the order in which you gave
16 the tests? A Not that I recollect, no.

17 Q Does that have any significance? A Not to me.

18 Q So you can give these tests in any order you want?

19 A I give the order as a function of the person I am with.
20 As a matter of fact, I don't think that I started with full
21 range picture. What I usually start with as an ice breaker
22 are things like the Bender-Gestalt which is pretty simple and
23 non-verbal, and you just have to copy some design. Those
24 are pretty non-threatening. Then we get going; after I get
25 him opened up, I'll try something else.

26 Q Do you recall what you did in this particular case or are

12

1 you testifying from what you usually do?

2 A I think I'm testifying from what I usually do. The
3 order of the testing is not usually so significant to me
4 because I am not absolutely sure of which test I am going to
5 use. This develops as I go along.

6 Q I see. Sort of a take-it-as-you-can sort of thing,
7 whatever you feel you need? A No, you see what you
8 discover and if you come to a point here, and you go that way
9 you give one set of tests, and another way you give another
10 test. You can see the performance on any individual test
11 kind of determines how you go.

12 Q Do you usually go in to meet someone with a preconceived
13 idea of what sort of test you are going to administer him or
14 go in without any preconceived idea? A I take in a
15 range of tests that I think will cover the situation.

16 Q Now, why don't you tell us as best you can recall what
17 tests you did give him on the 13th? A On the 13th I
18 gave him the Bender-Gestalt twice. The second time with a
19 background interference procedure. I gave him the house-tree-
20 person drawings; the Devorine Colorblindness Test, the Knox
21 Cube Test, the Memory For Designs Test, the Hooper Vision
22 Organization Test, the wide-range achievement test, reading
23 and arithmetic, Grey's Oral Reading, and the Wexler Performance
24 Scale.

25 Q So you gave him approximately 10 tests on that day?

26 A If that is what it counts.

13

1 Q Okay. Now, is that usual or unusual to give that many
2 tests in a limited time period? A A little more than
3 usual, not too much.

4 Q A little more than usual or unusual?

5 A A little more than I would usually do. I generally
6 test in about a 2-hour sequence. This was a 3-hour sequence.

B

7 Q Does mental fatigue have anything to do with the
8 subject's ability to perform on these tests?

9 A Well, we keep checking on it, sure, if he got exhausted
10 it would not be efficient. I kept checking with Mr. Ismail.
11 We moved around a little bit. We were in the dining hall
12 doing the testing. We had a lot of room.

13 Q How did you check to see he was tired mentally?

14 A The first place, I asked him. I looked at him, speed
15 of response, and in general he seemed to be functioning all
16 right. And then I have myself, I am there, I have to do
17 the same thing he does. So if I am making it, maybe he is,
18 too.

19 Q When you say you have to do the same thing he does,
20 could you explain that for us? A Well, we are both

21 working, we are both active. I am trying to examine him and
22 he is being examined. If I become exhausted then it occurs
23 to me inasmuch as, you know, I don't have an infinite amount
24 of energy, what I am trying to say, I begin to get tired I
25 can assume he is getting tired. I may break for myself, not
26 just for him.

14

1 Q Okay. That is fair. And on the 14th what test did
2 you give Mr. Ismail? A We did the Rorschach and TAT.

3 Q All right.

4 MR. ROBINSON: Let me have this marked as People's
5 next in order for identification, Your Honor.

6 THE COURT: It will be 33. What is it, please?

7 MR. ROBINSON: It is a letter from this witness to
8 Judge Duvaras.

9 (Whereupon, the above-mentioned document, being a
10 letter, was marked as People's Exhibit No. 33 for identifica-
11 tion.)

12 MR. PESTARINO: May I see it?

13 MR. ROBINSON: Certainly.

14 MR. PESTARINO: Thank you.

15 MR. ROBINSON: May I approach the witness?

16 THE COURT: Surely.

17 Q (By Mr. Robinson) Sir, showing you this letter, do you
18 recognize that? A Sure.

19 Q Okay. Is that your signature? A Surely is.

20 Q Your letter? A My letter. May I hold it just
21 for a second more? Okay.

22 Q Now, did you become more experienced interviewing people
23 in jail from July 15th, 1975, until you interviewed Mr.

24 Ismail on March of 1976? A Perhaps some. I have been
25 in and out of the jail, yes.

26 Q In this letter did you indicate to the judge, this is

15

1 regarding Mr. Ricardo Valdez who we already talked about?

2 A. Mm-hmm.

3 Q. "I would, also, like to test him in my office because I
4 believe my testing here will be substantially more
5 reliable and accurate than at the jail."

6 A. Mm-hmm.

7 Q. "I have worked with the Sheriff's Department for some
8 years as a consultant and I am familiar with the
9 jail's atmosphere."

10 A. Mm-hmm.

11 Q. Okay. So is it fair to say that your test that you gave
12 Mr. Ismail would be substantially more reliable if you had
13 given his test at the office as opposed to the jail?

14 A. I would have preferred to test at my office.

15 Q. For the reasons they would be substantially more reliable?

16 A. There is one condition that is different there, if you
17 will. With Mr. Valdez I had to work in a room about as big
18 as Your Honor's space there. With Mr. Ismail I had the
19 golden opportunity of getting out into the dining room where
20 it was a much better atmosphere.

21 Q. And you couldn't have brought Mr. Valdez out into the
22 dining room? A. I was not permitted.

23 Q. So it is the size of the room rather than the place
24 where the test is administered that would make it substantially
25 less or substantially more reliable? A. I think it is
26 quite a factor to be closed into a little tiny room where it

16

1 is very hot with dirty chairs and little table versus rather
2 nice dining room with decorated murals and more comfort and
3 feeling, with people moving around. It is a totally differ-
4 ent scene.

5 Q Were there other inmates in that dining room when you
6 were giving that test? A No, but there were people
7 moving in the hallways and two sheriff's deputies there. It
8 was just a different scene. I don't want to wriggle out of
9 what I said in the letter. I would have preferred to test
10 Mr. Ismail in my place for one particular reason, I have one
11 test that involves racks of miniatures, a whole wall is full
12 of miniature figures, people, animals, vehicles, and I also
13 have a sand tray there. There is no way that I can trans-
14 port that particular system to a jail. Now, this is one of
15 the better projective devices that I have, and I would very
16 much have liked to use it with Mr. Ismail just as I would
17 with Mr. Valdez. In neither case was I permitted to use it.
18 I never even asked for Mr. Ismail because I had already been
19 denied with Mr. Valdez. I assume inasmuch as Mr. Ismail had
20 a more serious charge there was no possibility of me taking
21 him to my office.

22 Q Okay. But although Mr. Ismail had a more serious charge
23 you were able to bring him out into the dining room, but you
24 couldn't do that with Mr. Valdez? A Well, it is very
25 curious --

26 Q Yes, it is. A I can tell you something that has

17

1 happened in between time, if you will, and it makes all of
2 the difference in the world, and you can judge it as you will.
3 Captain Tam who runs the jail happens to be a personal friend
4 with whom I have worked for 7 or 8 years. At the time I
5 worked with Mr. Valdez Mr. Tam was a lieutenant and he was
6 not in charge of the jail. And I was blocked several times
7 even though the attorney had arranged for my examination.
8 There were all kinds of snafus until I said the magic word,
9 "Would you please ask Captain Tam," and at that moment every-
10 thing changed and I think since I got such an open opportu-
11 nity with Mr. Ismail, Captain Tam backed me and said, "Let
12 Dr. Nidever do what he will."

13 Q Let's talk about some of these tests, if I can. Did
14 you bring, did you bring your originals, the ones that you
15 gave Mr. Ismail? A Yes, surely.

16 Q And can we look at your Wexler Adult Intelligence Test
17 for a minute?

18 MR. ROBINSON: Perhaps we can mark that, Your Honor?

19 THE COURT: People's Exhibit?

20 MR. ROBINSON: People's Exhibit will be fine.

21 THE COURT: It will be 34. It is a Wexler?

22 MR. ROBINSON: That is correct, Your Honor.

23 THE CLERK: Could I mark it, please?

24 (Whereupon, the above-mentioned document, being a
25 Wexler Adult Intelligence Test, was marked as People's Exhibit
26 No. 34 for identification.)

18

1 Q (By Mr. Robinson) Now, isn't there something more?

2 A That is the Wexler.

3 Q Where is -- these are just the answers, huh? Where is
4 the pictures and everything?

5 A Well, they are in my test kit.

6 Q Okay. Where is your test kit? A In my briefcase.

7 I mean, do you want that entered into evidence as well?

8 Q Sure. I want to see it. Sure. If you would, please?

9 A This is out of order (referring to test). If I can
10 have just a minute I would like to put them back in order.

11 Q Sure. No problem. A Okay. You have the raw
12 tests there from the Wexler.

13 Q Yes, sir. A And the items which are included
14 there are these. There, I think I have everything I use.

15 No, I didn't use those (indicating). That is it.

16 Q Okay. And could you, perhaps --

17 MR. ROBINSON: Is there any way that the doctor can
18 step down here so that the ladies and gentlemen of the jury
19 can see these test items, Your Honor?

20 THE COURT: Well, I'm sure that he could.

21 MR. ROBINSON: Would that inconvenience you at all,
22 Doctor?

23 THE COURT: I just wonder, counsel, are we going to
24 go through every question?

25 MR. ROBINSON: No, I just think that it is beneficial
26 to see the test items. I know I have never seen them before

19

1 and I am certain that a lot of people on the jury haven't.
2 It might be informative.

3 THE WITNESS: I'm happy to do whatever you wish.

4 THE COURT: Do you want to take the microphone along
5 with you or not?

6 THE WITNESS: I just as soon skip it.

7 These items are for the Wexler Performance
8 (indicating).

9 MR. ROBINSON: Could you show what they are?

10 THE WITNESS: The first one is, goes like this. It
11 is essentially a clerical task and you have the number here.

12 MR. PESTARINO: I want to see this, too. I haven't
13 seen it before.

14 THE WITNESS: Here are some numbers on the top row,
15 they run from 1 to 0 and below. There are different kinds
16 of secret signs, so it is kind of like a code, and you have
17 the person practice on the first 10 to see that he can code
18 these numbers with his particular sign. Then you go ahead
19 and give him a minute and a half, and you ask him to continue
20 sequentially and do as much as he can and call out the digit
21 symbol.

22 Q (By Mr. Robinson) And during this minute and a half that
23 the individual is doing this test, what are you doing?

24 A Keeping time.

25 Q Okay. You are watching your watch? A I have a
26 stop watch.

20

1 Q Okay. And you are not observing how he performs the
2 test? You are just keeping time, not observing his manner-
3 isms or anything like that? A Well, I am not trying
4 to press him by peering down his eyeballs. I want him to
5 feel like he is doing it on his own.

6 Q Do you feel that it makes an individual sort of nervous
7 if you sit there and keep looking at your watch, say, "You
8 have a minute and a half," then keep looking at your watch?

9 A I don't do that.

10 Q I thought you told us that you were keeping time?

11 A I keep time but I don't have to look at it every minute.

12 Q Okay. Can we see some of these things that you showed
13 him and what he did? A Well, now, this is another set
14 of tests. It simply is a series of pictures, 20 pictures in
15 which one object is missing. The first one here, the door-
16 knob is missing. And you flip over them and they get more
17 difficult. The second one is a pig, and he has no tail.
18 You get up here to about the last picture or close to the last
19 one, you are looking at a picture and a statement is, "What
20 is missing there?" And then, it is easy to overlook what
21 is missing, and you can tell me what you see missing.

22 A JUROR: Horn.

23 THE WITNESS: Many people don't see that.

24 Q (By Mr. Robinson) That is one of the tests? That was
25 the most difficult and the easiest was the doorknob, is that
26 the way it ran? A The doorknob is easiest and the last

21

1 one, which is considered the most difficult, is a woman's
2 head has something missing. Anybody see it? It is a long
3 ways from you, I appreciate.

4 A JUROR: Eyebrow.

5 THE WITNESS: That is correct. But it is not too
6 easy to see.

7 MR. PESTARINO: I didn't hear the answer. What was
8 missing?

9 THE WITNESS: It was supposed to be an eyebrow.

10 Q (By Mr. Robinson) A person has a minute and a half to
11 complete that? A. No, this is a second scale and there
12 is no great time limit on this, unless a person just simply
13 kind of blocks and can't do it, then you go on.

14 Q Has as much time as he wants? A. Not totally,
15 but there is no pressure on how much time to do it.

16 Q Okay. That basically along with other items like that
17 in the box would conclude the Wexler Test? A. We have
18 two more subject tests here.

19 Q Why don't you show us? A. The next subject test
20 is, I have some blocks here, children's blocks but you can
21 do kind of cute things with them. These blocks have red on
22 one side, white on the other, diagonal. What the person is
23 asked to do is create a design. Like here is a design with
24 a picture. It doesn't really show any lines so you demon-
25 strate to the subject that you want them to see if they can
26 do that. And that is pretty good. Then you go to the next

22

1 one, and it is a little more complicated. And at this
2 point you again demonstrate it to have them do it. Here you
3 have to use the diagonal, and so then here we have a picture.

4 Q Okay. A Now, I would just like to show the
5 last one here so that we can get it out completely. We go
6 through this one like this, and then we get to one like this,
7 and they are complicated and the last one looks like that.

8 Q Okay. Thank you. I don't believe I will ask any more
9 questions on that. That was just for my own experience. I
10 have never seen that. Thank you. I appreciate it.

11 What I would like to ask you though is --

12 MR. PESTARINO: May he resume his seat?

13 MR. ROBINSON: Sure.

14 THE WITNESS: Do you want this (referring to exhibit)?

15 THE CLERK: Unless the DA is going to use it.

16 Q (By Mr. Robinson) We talked earlier this morning about
17 base rates and we called it norms, okay? A Mm-hmm.

18 Q Is there any base rate or norm between, that you know
19 about in the field of psychology or any other literature or
20 anything that you ever heard or read about, about somebody's
21 ability to premeditate and deliberate and somebody's ability
22 to perform the Wexler Intelligence Test? A There is
23 no direct relationship I have never seen stated or studied.

24 Q Thank you. Now, you indicated on the Wexler Adult
25 Intelligence Test Mr. Ismail had an I.Q. of 91?

26 A Mm-hmm.

23

1 Q You said that was pretty close to normal, within normal
2 range? A It is, yeah, it is low normal.

3 Q Could you go to the board, please, and draw us this
4 range that we are talking about? A Surely.

5 THE COURT: You will find a clean sheet, turn one
6 more (referring to blackboard).

7 THE WITNESS: Looks like I have a blackboard.

8 MR. PESTARINO: I wonder, can't we number those 1, 2,
9 and 3?

10 THE COURT: We will do that later, counsel.

11 THE WITNESS: Okay. We have here what we call a
12 normal curve, something like that. That is about 100. Well,
13 let's see, we have what we call one standard deviation, and
14 this is 85. And then this is 70. This is 115, and this is
15 130. And if this is I.Q. down here on the bottom, and this
16 is frequency on the side. So that we go up we have more
17 and more people, you see that most people tend to get an I.Q.
18 of 100.

19 Q Let me ask you about that, Doctor, the United States
20 average is 100, correct? The average people?

21 A That is what is accepted to be the norm for the American
22 population.

23 Q Isn't it true between 85 and 100 and 100 and 115, that
24 can be broken down into 34 per cent on one side and 34 per
25 cent on the other side? A That is correct. It is 34
26 per cent of the population here and 34 per cent of the

24
1 population here (indicating).

2 Q So would it be safe to say 68 per cent of the people that
3 live in the United States, including us, would fall between
4 85 and 115? A That is correct.

5 Q And the defendant had 91? A The defendant had 91.
6 Like so (referring to graph).

7 Q Thank you. That is all I have on that.

8 Now, you told that as far as reading, you asked Mr.
9 Ismail to read English, I take it to get his reading ability?

10 A That is correct.

11 Q Okay. And you told us that he had a 6th grade ability
12 in reading? A Yes.

13 Q And a 5th grade ability in math? A That is correct.

14 Q Now, did you ask Mr. Ismail if when he went to school
15 that was as high as his grades went up to at that time?

16 A He told me that he stopped school relatively early.

17 Q Are you familiar with the fact that when Mr. Ismail was
18 in school that they only had up to the 5th or 6th grade, and
19 that was it, they didn't have any higher grades?

20 A Actually this level is not so much a function of what
21 grade school level you went to, it is a function of how much
22 you have learned. And you learn in school, but you also
23 learn outside of school.

24 Q My question was, did you ask Mr. Ismail?

25 A I asked him about his schooling. He told me after he
26 had injured his head at age 7 or 8 he attempted to continue

15
1 in school and was really unable to do so and eventually
2 stopped.

3 Q And you had no knowledge that at that time when he went
4 to school all children stopped at the 5th or 6th grade?

5 A He told me his father wanted him to go to the university
6 but it was not possible.

7 Q Okay. Now -- A I believe I would like to
8 correct that. My understanding was that it was a military
9 school.

10 Q Different from the university? A It is a
11 university but with a particular purpose.

12 Q Well, it was the army? A Well, West Point is the
13 army, too, but it is also a university.

14 Q Okay. Touche. Now, has there ever been any studies
15 done, base rate norms -- okay? A Norm?

16 Q That is what we have to compare things on, right?

17 A Yes.

18 Q -- to see if there is any significance between somebody
19 with an ability of a 6th grade reading and 5th grade math to
20 be able to form the intent to kill somebody?

21 A There are no known scientific studies. I am not aware
22 of any in this line.

23 Q Now, the Knox Test is what? The blocks, the cubes?

24 A Yes. Looks like this (indicating).

25 Q Okay. All right. And what you do is, you take your
26 pen or whatever you use and hit on them and he follows?

1 A Yeah. He is doing it from the other side and he just
2 tries to duplicate the pattern that you make.

3 Q And he did quite well on that? A Yeah, he did
4 pretty well on that.

5 Q And are there any known studies done between the ability
6 to either perform or not perform the Knox Cube Test and
7 somebody's ability to premeditate and deliberate and commit
8 murder? A No, none that I know of now.

9 Q Now, the Rorschach Test -- A Rorschach.

10 Q Rorschach? A Rorschach, yeah.

11 Q Those are the ink blots? A That is true.

12 Q And when you administered the Rorschach Test to Mr.

13 Ismail you had an interpreter there? A Yes. I took
14 his initial impressions in English, and the interpreter helped
15 me with what we call the inquiry. We go back and review every-
16 thing that has been seen.

17 Q And if you feel that -- did Mr. Ismail know this inter-
18 preter before he was introduced? A No, he did not.

19 Q Did you feel that this bringing in an outsider would
20 create any sort of apprehension on the part of Mr. Ismail so
21 the test results might not be valid? A I had asked him
22 before if it would be all right if I brought somebody that
23 could speak another language. I asked him French, Arabic,
24 we arrived at a language that he could use because it was a
25 second language for him. I knew somebody, very personable
26 individual who had grown up in Egypt, so I had him come.

1 Q And the presence of a third person in your opinion didn't
2 affect the outcome of this test at all?

3 A My sense was that he was so relieved from the frustration
4 of trying to get to me in English his facility in going
5 through Arabic helped the whole situation.

6 Q You felt that he was frustrated on the 13th in trying
7 to relate to you in English? A Yes.

8 Q Would this frustration in somebody's mind influence the
9 outcome of the test on the 13th? A Mostly I was giving
10 him non-verbal test on the 13th.

11 Q You did give him a verbal test? A Well, I take it
12 back. They don't require much interaction. You see, I am
13 trying to use as much things as don't require much language
14 from him. If I give him a sheet and he has to read off a
15 sequence of words, the instruction is to read off a sequence
16 of words, pretty easy. There is no confusion there. If I
17 ask him to read a paragraph for me, again, there is a low level
18 of confusion. But I start going back and forth with him in
19 material where I want content and feelings, and this sort of
20 thing, we immediately get blocked.

21 Q I guess the thing that is confusing me, I thought you
22 told me the other day it is easier to speak in a foreign
23 language than it is easier to read in a foreign language?

24 A It is easiest, it depends on your experience. I think
25 it comes easiest to listen, then to read. It is hardest to
26 write.

28

1 Q And you had him read in a foreign language on the 13th?

2 A That is correct.

3 Q Okay. And that was more difficult for him than speaking
4 to him? A Well, with Mr. Ismail I don't think that is

5 really so. He is deaf in one ear and I think that actually
6 from the testing he has more skill in reading in English than
7 he does in speaking. He can recognize more words visually
8 than he can by using his ears.

9 Q Okay. Now, could we see these ink blots, please? Show
10 us how you do that test. A You realize that these are
11 secrets of the trade?

12 MR. PESTARINO: I'm paying for them.

13 THE WITNESS: They are priceless. Here are the --

14 MR. PESTARINO: Charge the District Attorney.

15 MR. ROBINSON: Okay. Can we have, just for the
16 purposes of the record, well, I'll just do them in numerical
17 order.

18 Q (By Mr. Robinson) They are numbered on the back?

19 A Yeah, there are 10.

20 Q Here is No. 1. Okay? A Yes.

21 Q I will show No. 1 to the jury. A Mm-hmm.

22 Q What did you do with these? A The instructions are:
23 Please look at this, see if it reminds you of anything. Is
24 there anything you see in it? Could it look like anything?
25 Tell me all that you see.

26 Q What did Mr. Ismail do in relation to this one?

29

1 A He tried to communicate to me in English that it was a
2 bat. At first he used the words "night flight," and I
3 thought he was trying to tell me that it had to do with look-
4 ing outside an airplane while flying at night, because I was
5 looking at the light spaces there and assuming that he was
6 seeing those as windows. So I asked him about that.

7 Q Wait a minute. He told you something, you looked at it
8 and made an assumption? A I questioned him in trying
9 to clarify what it was that he meant.

10 Q Okay. And then did he explain it to you?

11 A We required the services of the interpreter to establish
12 that it was indeed a bat.

13 Q And what does that look like to you?

14 THE WITNESS: Is this something that is required of
15 me, Judge?

16 THE COURT: Well, I am afraid that we are getting
17 into the area of interpretation of Rorschach which is a whole
18 field of study itself, and what it is like to the doctor or
19 you or --

20 MR. ROBINSON: Exactly my point.

21 THE COURT: -- requires professional interpretation.

22 MR. ROBINSON: Exactly my point. One thing to one
23 individual and another to another.

24 THE COURT: I think you are invading the doctor's
25 privacy.

26 MR. ROBINSON: I wouldn't want to do that. Excuse

30
1 me.

2 THE WITNESS: I'll match you card for card.

3 MR. ROBINSON: Well, I don't know, Judge, it seems
4 to me if I was getting \$650, Judge, I'd put my privacy on the
5 line, too.

6 Q (By Mr. Robinson) Doctor, showing you No. 2, what did
7 Mr. Ismail say about No. 2? A He looked at it and said
8 it was a child's top.

9 Q A what? A A child's top, something that you spin.
10 If you turn it upside down and look at the wide space, the
11 inside wide space looks something like a child's top that you
12 would spin with a string.

13 Q Can an individual when he looks at these things, can he
14 turn it any way he wants? A He can indeed.

15 Q No. 3? A He saw two children picking up water at
16 a river.

17 Q Sound reasonable, huh? Okay. No. 4?

18 A He saw a fat person from the back, an X-ray picture.

19 MR. PESTARINO: Let me see it, too, will you, counsel?

20 Q (By Mr. Robinson) No. 5. A Mm-hmm. He saw
21 a butterfly flying from flower to flower.

22 Q No. 6? A Mm-hmm, that is a violin that has been
23 run over by a truck.

24 Q Let me ask you one thing, too, I have been showing these
25 to the members of the jury face on, not upside down or
26 anything, is that the way Mr. Ismail was viewing these?

31

1 A They are always presented right side up.

2 Q And you didn't turn them around or anything like that?

3 A No.

4 Q No. 6 is what now? A It is a violin that has
5 been run over.

6 Q By a truck? A Or a vehicle. I have forgotten
7 whether it is a truck.

8 Q No. 7? A No. 7 is two stuffed animals. They
9 are made in the shape of puppies. They are something that
10 children would play with and one of them is a girl and one
11 of them is a boy.

12 Q No. 8? A No. 8 is two bears climbing up fruit
13 trees.

14 Q No. 9? A No. 9 is another X-ray. It is a person
15 who is large, and the X-ray is taken from the front.

16 Q Okay. And finally No. 10? A No. 10 is the
17 pieces of a guitar somewhat scattered. A heavy weight fell
18 on the guitar.

19 Q A heavy weight? A (Nods affirmative.) Something
20 heavy fell on the guitar.

21 Q Now, when you are showing the individual these things
22 you told us before that on the night flight of the bat you
23 questioned him on that. Do you just show it to him and he
24 gives you his immediate response? Or do you question him
25 on those responses? A Ordinarily I would just simply
26 ask and then wait to hear what was said.