

1 back?

2 my knees.

A. I don't know. I think on

3 Q. Your knees?

4 yeah.

A. I think so,

5 Q. Okay, and then did he come over at you and spit right
6 in your face or did he have to bend down to spit in your
7 face?

8 A. I don't know exactly. I
know he spit in my face.

9 Q. Spit in your face?

10 two bad words my father.

A. Yeah, and used

11 Q. Then he called your father a couple bad words?

12 A. Yeah.

13 Q. And what did he call your father?

14 A. Call bad words in Assyrian.

15 Q. What did he say?

16 A. I don't want to say.
I could write it for you, but I don't want to say it.

17 Q. Well, you are going to have to say it. What did he
18 say?

19 MR. FESTARINO: Well, if Your Honor please --

20 THE WITNESS: I don't want to say these words
21 again. I just don't want to say it. If you want me I could
22 write it for you but I don't want to say it.

23 MR. ROBINSON: That is not acceptable.

24 THE COURT: Pardon me, may I intervene? Why don't
25 you want to say it?

26 THE WITNESS: It's very bad word, and it was for

1 my father, so I don't want to mention again these words. I
2 could write it but I don't want to say it by myself. He
3 should say it that's all right, but I don't want to say it.

4 THE COURT: The reason you don't want to say it
5 is because you don't want to say words against your father
6 or because --

7 THE WITNESS: Yeah, because it was against my
8 father. I hear these words against my father, so I don't
9 want to say it.

10 THE COURT: In other words, you don't want to say
11 the same words against your father?

12 THE WITNESS: That's right.

13 THE COURT: Okay. All right.

14 MR. ROBINSON: Well, he is not saying it, Your
15 Honor, according to him it is the Patriarch saying it.

16 THE COURT: That is why -- if you will give me a
17 chance -- what the lawyer is asking you is to tell everybody
18 what the Patriarch said, see? So even if you repeat what
19 the Patriarch said you are not saying it of your own words.
20 You are telling us what he said. You understand?

21 THE WITNESS: I understand, Your Honor.

22 THE COURT: All right. So why can't you say the
23 words?

24 THE WITNESS: Well --

25 THE COURT: You will not offend the jury or any
26 of us by use of the words whatever they are.

1 THE WITNESS: Yeah. Well, after he spit in my
2 face said two bad words to my father, which says, "Razel
3 brona drazel kopa brona dkopa."

4 THE REPORTER: Could he spell it now?

5 THE COURT: Well, did you get it phonetically at
6 all?

7 THE REPORTER: Would you say it once more?

8 THE WITNESS: No, I don't.

9 MR. FESTARINO: We'll have him write it out.

10 THE COURT: Could you write it out?

11 MR. FESTARINO: I'll have him do that.

12 THE COURT: Can you write it in English?

13 THE WITNESS: I can write it. I don't know makes
14 sense or not.

15 THE COURT: Write it first in Assyrian. Can you
16 write that? And then can you write that in English, the
17 best you can.

18 THE WITNESS: (Writing.)

19 THE COURT: And we will mark this as an exhibit
20 for the prosecution. Be number 32. Thank you.

21 MR. ROBINSON: Okay.

22 (Whereupon, the above-mentioned document, being
23 a writing by the witness, was marked as Plaintiff's Exhibit
24 No. 32 for identification and entered into evidence.)

25 THE COURT: Could you perhaps translate those,
26 also?

1 THE WITNESS: No, it is hard for me to translate.

2 THE COURT: He has written, for the record, in
3 Aramaic or -- what's the language?

4 THE WITNESS: Assyrian.

5 THE COURT: Then the translation or the phonetic
6 spelling is, "Razel brona drazel kopa brona dkopa," is that
7 right?

8 THE WITNESS: Yeah.

9 Q. (By Mr. Robinson) Okay. And you remember that is
10 what the Patriarch said?

A. Yeah.

11 Q. No doubt in your mind?

A. No.

12 Q. So your memory is good up to that point?

13 A. Yeah.

14 Q. What happened next?

A. I don't know.

15 Q. Well, you mean all of a sudden you don't remember
16 anything after that point?

17 A. Well, what
18 do you want me to say? I'll say it. Just tell me what you
19 want me to say, I'll say it. But I don't remember what
20 happened exactly. When I heard these words I don't know
21 what happened. You want me to say something, just tell me,
22 I will.

23 Q. Well, sir, I don't want you to say anything. I just
24 want to get to the truth of this matter. You understand
25 I have a client to represent in the proceeding, too, don't
26 you?

MR. PESTARINO : Excuse me --

1 THE WITNESS: I don't know.

2 MR. PESTARINO: I don't think we ought to argue.
3 I think the witness ought to be instructed to answer the
4 questions and counsel ask the question.

5 THE COURT: All right. Mr. Ismail, if Mr.
6 Robinson is going too fast or if you don't understand what he
7 is asking, just say so. He does not want you to say anything
8 that isn't true. He wants you to tell what you remember in
9 the way he is asking the questions. Then your attorney will
10 have a chance to ask other questions.

11 THE WITNESS: Okay.

12 Q. (By Mr. Robinson) After he said these words about your
13 father you don't remember anything that happened?

14 A. No.

15 Q. Okay. And the next time you remember something is in
16 the pizza parlor? A. I don't know was in
17 pizza parlor or someplace else, my hands on the wall.

18 Q. And at the time that the Patriarch, according to your
19 testimony, uttered these words against your father, this was
20 after he spit in your face? A. Yeah.

21 Q. And at this time were you still down on the ground?

22 A. I don't -- I don't remember exactly I went down the
23 ground or not. I can't clear that.

24 Q. Now, you don't remember if you went down on the ground
25 or not? A. Not clearly.

26 THE COURT: Excuse me, I think there may be a lack

1 of communication. You say, "Down on the ground" I don't
2 know whether you mean completely on the floor or, as he has
3 said, on one knee down. Maybe that ought to be clarified.

4 Q. (By Mr. Robinson) Any time I say down on the ground,
5 I mean down on one knee. A. Okay.

6 Q. I didn't mean to confuse you. I'm sorry.

7 When you were down on one knee did the Patriarch
8 spit in your face? A. I believe so, when
9 I was down I think so.

10 Q. And when you were down on one knee is this when he
11 uttered those words against your father?

12 A. Yeah.

13 Q. Now, when -- did you ask the Patriarch when you went
14 to his house how his wife was? A. No, I don't
15 think so.

16 Q. Did you hear his wife in the house? Did you know she
17 was there? A. I don't know.

18 Q. All right. Did the Patriarch say anything like, "
19 Kmanaa, look who's here, it's David Ismail from Chicago --
20 from Canada. Come down and see him," anything like that?

21 A. I don't think so. I don't know exactly. I don't
22 think so.

23 Q. Mr. Ismail, isn't it a fact that you went to the
24 Patriarch's house with the intention to kill the Patriarch?

25 A. What's that?

26 Q. Isn't it a fact, sir, that you went to the Patriarch's

1 house that Thursday night with the gun with the intention to
2 kill the Patriarch? A. What's a fact?

3 Q. Isn't that what happened? A. You mean I
4 went there for kill him?

5 Q. Yes, sir. A. No.

6 Q. Isn't it a fact, sir, that the minute he opened the
7 door you had that gun there, you pointed it at him, he
8 screamed for his wife, two times, "Emama, Emama, " and you
9 shot him? A. No.

10 Q. That didn't happen? A. No, sir.

11 MR. ROBINSON: I have no further questions.

12 REDIRECT EXAMINATION

13 BY MR. PESTARINO:

14 Q. Let me ask you this, Mr. Ismail, a little while ago
15 you testified that you felt ashamed ?

16 A. Yeah.

17 Q. Do you want to explain that a little bit more?

18 A. I can't remember very clearly, but I remember just I
19 want to get out of, feel very ashamed. I don't want, maybe
20 somebody in the house could have seen him, you know, slap
21 me, and I wasn't thinking that he was do that for me, I was
22 thinking just as a member of the family, not a stranger from
23 him. So I was thinking, think, I was very ashamed, I should
24 get out early, his wife come in or somebody else there.

25 Q. When you went into the house or went up to the house
26 did you feel nervous, upset, kind of frightened?

1 A. I don't remember exactly but I remember I was a little
2 upset, a little bit to see the, you know, I didn't call him,
3 I should call him something like that.

4 Q. So you felt kind of shameful? A. I don't
5 know how I was feeling at that time, but --

6 Q. Do you think, do you think that the amount of liquor
7 that you had to drink had anything to do with the way you
8 felt? A. I believe one thing, I'm
9 sure if I was having no any drink, not even, I can handle
10 it.

11 THE COURT: Would you read that answer back?

12 (Answer read by the reporter.)

13 Q. (By Mr. Pestarino) You mean if you hadn't had anything
14 to drink and he did these things --

15 A. I just handle it, and get out quick as I can.

16 Q. Quick as you can? A. I believe so.

17 Q. Were you trying to get out of there that night?

18 A. I was trying to, but I get very upset when I heard
19 these words against my father, which was just like his
20 brother, you know, he was.

21 Q. You mean your father and the Patriarch were very close?

22 A. Very very close.

23 Q. And you knew that? A. Yeah, I
24 know that.

25 Q. And was it going through your mind that, the things
26 that your father had done for the Patriarch?

1 MR. ROBINSON: Objection, leading question.

2 THE WITNESS: Very much.

3 THE COURT: Just a moment. The objection is
4 sustained.

5 Q. (By Mr. Pestarino) You testified before that your
6 father was very disappointed when the Patriarch got
7 married? A. Yeah.

8 Q. And there was certain people in Iran or Iraq --

9 A. Um-hum.

10 Q. -- That before the Patriarch got married were against
11 the Patriarch?

12 MR. ROBINSON: I'm going to object, once again,

13 --

14 THE WITNESS: Yeah.

15 MR. ROBINSON: -- if counsel wants to testify
16 let's put him on the stand. These are leading questions.

17 MR. PESTARINO: I'm reviewing.

18 THE COURT: Yes. He is reviewing and it is
19 preliminary. It is nothing new.

20 Q. (By Mr. Pestarino) Did you testify to that?

21 A. Yeah.

22 Q. And were you aware of a lot of things that your
23 father had done as far as the Patriarch is concerned?

24 A. Well, I know my father he did a lot of thing for, for
25 Patriarch. He was very close to him. Otherwise he have,
26 too, I guess.

1 Q. And did your father do a lot of things for you, too?

2 A. Yes, he did.

3 Q. Were some of these things going through your mind when
4 the Patriarch said these words about your father?

5 MR. ROBINSON: Objection, leading question.

6 The proper question is, "What was going through your mind."

7 THE COURT: The objection is sustained.

8 THE WITNESS: Well, when he said these --

9 Q. (By Mr. Pestarino) What was going through your mind?

10 A. I don't know exactly what was going my mind, but when
11 I heard these and I know how my father be, he was close to
12 him, and I know what he did for him for years and years and
13 years, and I was just, I don't know, I don't know what to say,
14 I don't know what to do at that time. I just --

15 Q. Let me ask you this, to spit in someone's face even,
16 you work with people that are not Assyrians?

17 A. Um-hum.

18 Q. Huh? A. Yeah.

19 Q. Did you ever see anybody spit in somebody's face
20 before? A. Well, it is very bad.

21 It look very bad, Assyrian, if somebody spit in another
22 person's face.

23 MR. ROBINSON: I'm going to make a motion to
24 strike as nonresponsive. The question was, "Did you ever
25 see anybody spit in anybody's face?"

26 MR. PESTARINO: I agree.

1 THE COURT: It may be stricken.

2 Q. (By Mr. Pestarino) Did you ever see anybody spit in
3 somebody's face? A. Not very often.

4 Q. Not very often? A. No.

5 Q. Do you feel or did you feel -- what did you feel when
6 the Patriarch spit in your face? What were your feelings?

7 A. I feel that time, I don't remember, I can't clear it
8 exactly, but I was feeling, I think, very ashamed and I want
9 to get out of there, and why I didn't call him, I should
10 call him or I should come next day early morning, or early
11 in the noon, and that's all that I can clear to, and what
12 I heard says about my father.

13 Q. Now, let me ask you this, had you yourself ever seen
14 an Assyrian, as the Patriarch, spit in somebody's face?

15 A. No.

16 Q. Had you ever seen, heard him scream at somebody?

17 A. I didn't see him. I heard but I didn't see him.

18 Q. I don't understand your answer. You said that you
19 heard but you don't, you didn't see him?

20 A. Yeah, I heard that he is nervous.

21 MR. ROBINSON: I'm going to object.

22 THE COURT: Excuse me. Just a moment, Mr. Ismail,
23 it appears what he is saying, that it is hearsay that he
24 heard.

25 MR. PESTARINO: I'm not asking him for the
26 conversation. I am asking him if he heard him scream.

1 THE COURT: Did you understand that? Were you
2 ever present when the Patriarch screamed or yelled at
3 somebody?

4 THE WITNESS: No.

5 MR. PESTARINO: All right. Fine.

6 Q. (By Mr. Pestarino) You indicated that you had, or the
7 District Attorney indicated that you had made a conscious
8 decision --

9 MR. ROBINSON: I'm going to object. I didn't
10 indicate that. I asked him the question and he agreed.

11 MR. PESTARINO: I think if you can go back to the
12 record the District Attorney paraphrased his words by saying
13 that you made a conscious --

14 MR. ROBINSON: That was my question.

15 THE COURT: What is your question?

16 MR. PESTARINO: Well, this is just preliminary.

17 THE COURT: Well, I can't make any ruling until
18 the question is asked.

19 MR. PESTARINO: All I'm asking is that the
20 District Attorney indicated to you that you had made a
21 conscious decision to go to see the Patriarch.

22 THE COURT: All right. The objection is overruled
23 to this point. Now, let's hear the rest of the question.

24 MR. PESTARINO: It's preliminary.

25 Q. (By Mr. Pestarino) Now, you indicated too, that you
26 had been, you made that decision when you went outside the

1 pizza parlor when you were feeling somewhat ill?

2 MR. ROBINSON: I'm going to object to this. If
3 counsel wants to testify, boy, let me have a shot at him on
4 cross-examination.

5 THE COURT: Let's not quibble.

6 MR. ROBINSON: He is trying to put words in the
7 witness' mouth. It is plain as day. That is the purpose
8 for no leading questions to your own witness.

9 THE COURT: I understand and it is leading.

10 MR. PESTARINO: May I be heard on that?

11 THE COURT: What you are doing is by restating
12 the testimony setting up the answer which, in essence, is
13 leading, because a leading question suggests.

14 MR. PESTARINO: I'm just trying to bring him back
15 to a time and a place where he made a decision, that's all,
16 by a question. And I don't see anything leading about that,
17 or suggestive or anything wrong with it.

18 MR. ROBINSON: Perhaps I could provide counsel a
19 copy of my evidence code which defines leading questions,
20 Your Honor?

21 MR. PESTARINO: I know what a leading question is.

22 THE COURT: It is a leading question the way it
23 is phrased. Now, you may rephrase it.

24 MR. PESTARINO: All right.

25 Q. (By Mr. Pestarino) When did you make a conscious
26 decision to go to the Patriarch's house, when you were in

1 the pizza parlor or outside the pizza parlor?

2 A. I don't know exactly. I have that pizza, I went out-
3 side for fresh air, and I think I was feeling okay, and I
4 just walked there or taxi, or I don't know, I think I walked
5 there, I guess, and decide, I don't remember why or how I
6 made that decision, but I was thinking Friday, Saturday, go.

7 Q. Let me ask you this, you were thinking, did the
8 alcohol have any effect on you at that time?

9 A. Well, I don't know. Probably.

10 Q. You don't know?

A. I don't know.

11 Q. You indicated yesterday how much you had had to drink?

12 A. Yes, sir.

13 Q. Yes?

A. Yes.

14 Q. And did you feel any of the effects, any effects of
15 what you drank?

A. I don't know exactly.

16 Q. Let me ask you this, did five or six drinks, or four
17 or five drinks within the period that you testified to --

18 A. Um-hum.

19 Q. -- didn't you feel those drinks at all?

20 A. I could feel them myself, I was haby (heavy), but --

21 Q. Huh?

A. I was feeling myself I
22 was a little haby (heavy).

23 Q. A little happy?

A. Haby (heavy),
24 you know, like a little drunk.

25 Q. Sorry, I didn't hear that. A little heavy?

26 A. Um-hum.

1 Q. A little, in other words, thick?

2 A. Yeah, you know, but I wasn't think there was, I was
3 drunk.

4 Q. Okay. A. I don't think so.

5 Q. Was it at that time that you were feeling a little
6 heavy? A. Um-hum.

7 Q. That you decided to visit the Patriarch?

8 A. I guess so.

9 Q. And was that after you ate the pizza?

10 A. Yeah.

11 Q. Was that after you felt sick? A. Yes.

12 THE COURT: Counsel, let's take our morning
13 recess at this time. We will take our fifteen minute break,
14 ladies and gentlemen. You will keep in mind the admonition
15 I have previously given to you. We will resume at 11:10.
16 And you can step down, also, Mr. Ismail. You are ordered to
17 return at that time.

18 (Short recess taken.)

19 (Whereupon, the following proceedings took place
20 in Chambers out of the presence of the jury:)

21 THE COURT: During the recess the bailiff told me
22 that he had been approached by three members of the jury.

23 THE BAILIFF: Three of the male members, the men.

24 THE COURT: Would you explain to counsel what
25 they stated.

26 THE BAILIFF: They stated they are minorities and

1 they know how hard it is to testify in another language, and
2 they would request, if possible, to have the defendant
3 testify in his language with an interpreter to explain what
4 he is trying to say since they know how hard it is to
5 testify in another language when you are not familiar with
6 it.

7 MR. PESTARINO: Well --

8 THE COURT: My feeling is that inasmuch as he
9 seems to comprehend and understand basic English, and that
10 it has been only a few times where his accent was the
11 problem, that he is perfectly capable of comprehending and
12 testifying. On the other hand, if there are things that he
13 cannot completely explain in response to questions posed in
14 English, I would have no objection to an interpreter if one
15 is available and suitable to both sides.

16 MR. PESTARINO: We are faced with this situation,
17 we are practically both through with the examination of the
18 witness, and I think we ought to consider that.

19 THE COURT: Would you have any objection?

20 MR. PESTARINO: I was just going to suggest that
21 you talk to David Ismail yourself and see what his feelings
22 are because he has expressed, sometimes he says, "I don't
23 understand what you mean." And like during the recess he
24 says, "I really don't understand what you mean," when I
25 asked him a question about how did he feel and he says
26 heavy.

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THE COURT: All right. Let's ask Mr. Ismail if he would like an interpreter for the remaining portion or to go over any portion of further examination. And in the event that he wouldn't want one or is satisfied, then I thought that I would explain to the jury that he was willing to testify in English and seemed to be at this point able to communicate with his attorney, and an interpreter was available or is available to him.

MR. PESTARINO: Well, I'm going to have one of the doctors testify that his language is a barrier as far as some examination is concerned because, something to the effect that there is not precise language for some examinations.

Now, I don't know what bearing that will have with these jurors, but that is probably what the doctor will testify to.

THE COURT: I was going to explain to them because we have run into this in other cases where we have had interpreters, where the interpreter would say, "There is no precise English word for this, and, therefore, the nearest is such and such." How do you feel about it?

MR. ROBINSON: I agree with Your Honor's explanation to the jury that Mr. Pestarino obviously felt that this man was able to communicate and understand English, that the police officer who interviewed Mr. Ismail felt that same way. There has been nobody that has testified in this whole proceeding that Mr. Ismail doesn't understand

1 English. He has been in Canada where he speaks English
2 since 1960, '68 or '60, he appears to be able to
3 communicate on the witness stand.
4

5 MR. PESTARINO: I can shortcut the whole thing.
6 Why don't you have him come in here, I think he will tell
7 you that. Maybe that will resolve the whole problem. I
8 don't want another fiery cross-examination.

9 MR. ROBINSON: I'm not going to ask any questions.

10 THE COURT: I'll do the examining of Mr. Ismail.

11 (Whereupon, the defendant, David Malek Ismail,
12 was brought into Chambers and the following proceedings
13 took place in his presence:)

14 THE COURT: Please sit down, Mr. Ismail.

15 Mr. Ismail, you have been answering questions
16 which have been asked of you in English, and you have been
17 answering in English although sometimes you have had a little
18 difficulty understanding; is that right?

19 THE DEFENDANT: Yeah.

20 THE COURT: All right. Now, in order to be
21 absolutely fair to you we would like to know whether or not
22 you would want an interpreter so that you could speak in
23 Assyrian and have the interpreter translate what you want
24 to say into English for the benefit of the jury? Or whether
25 you feel that you are getting along well enough with your
26 attorney and with the people who are helping him so that you
don't need an interpreter? How do you feel about that?

1 A. I be glad if anybody, anybody else could speak English
2 and Assyrian.

3 THE COURT: The question is this, Mr. Ismail, I
4 feel that you have been able to express and state, you know,
5 what has happened, and what you did, what conversation you
6 had, but if there is something that you feel you cannot
7 express yourself in English --

8 THE DEFENDANT: What's "express"?

9 THE COURT: Well, talk or explain, like, for
10 example, the statement about your father that you did not
11 want to say in English. Now, I don't know whether that was
12 because of a personal feeling of yourself or because of the
13 fact that there was no English translation of that.

14 THE DEFENDANT: I don't know if there is an
15 English translate but it is personal feeling.

16 THE COURT: Personal. All right. Mr. Robinson
17 has indicated that -- both he and Mr. Pestarino have
18 indicated that, both of them are almost through with the
19 questioning of you.

20 THE DEFENDANT: Yeah.

21 THE COURT: Do you feel that you would be happier
22 if there was somebody that you could answer questions in
23 Assyrian and, in other words, if they could be put to you in
24 Assyrian and you could answer them in Assyrian?

25 THE DEFENDANT: Be better. Be better for me.

26 THE COURT: It would be?

1 THE DEFENDANT: Yeah. I could explain more.

2 MR. PESTARINO: Could I say something? You're
3 finished; I'm finished. Do you have any recross?

4 MR. ROBINSON: No.

5 THE COURT: Could I ask you what areas, Mr. Ismail,
6 what parts of your testimony you would like to have explained
7 in Assyrian?

8 THE DEFENDANT: Well, if they have more questions?

9 THE COURT: No, they have no more, apparently.

10 THE DEFENDANT: Well --

11 THE COURT: Then you are satisfied?

12 THE DEFENDANT: Yeah.

13 THE COURT: All right. Okay. Are you both
14 through then?

15 MR. PESTARINO: I'm through. You're through?

16 MR. ROBINSON: Yeah.

17 THE COURT: Also with regard to what other
18 people say, other witnesses who have testified, have you
19 been able to understand what they have said or has Mr.
20 Pestarino and his investigator explained to you what other
21 people have said on the witness stand?

22 THE DEFENDANT: You mean?

23 THE COURT: Other witnesses.

24 THE DEFENDANT: Other witnesses, last week, week
25 before?

26 THE COURT: Yes.

1 THE DEFENDANT: I think I understand them.

2 THE COURT: That is the main thing I want to
3 make sure, that you do understand what other people have
4 testified.

5 THE DEFENDANT: I understand that.

6 THE COURT: Thank you. Then I see no need for a
7 translator or interpreter. I was just going to say, with
8 regard to the statement which he has written, it would not
9 be of any meaning to the jury unless it was translated.
10 So, perhaps, you could have someone --

11 MR. PESTARINO: I intend to have, hope to have a
12 translator, if we can get copies of those letters.

13 THE CLERK: I gave them to your investigator
14 yesterday.

15 THE COURT: Also the statement that he wrote in
16 his own handwriting.

17 MR. PESTARINO: Can you make a copy of that?

18 THE COURT: Sure. We can make a Xerox.

19 MR. PESTARINO: We will try to qualify an
20 interpreter.

21 THE COURT: Well, maybe you can stipulate.

22 MR. PESTARINO: I'll bring the interpreter in and
23 ask him.

24 MR. ROBINSON: I think perhaps we should, also,
25 give the benefit of our collective thinking back to the
26 jury and indicate to them that Mr. Ismail feels, and along

1 with counsel, myself, and the Court, that he understands
2 everything, that he is able to answer the questions.

3 THE COURT: We will do that.

4 MR. PESTARINO: Can you give us a few more
5 minutes now? I had to spend this in conference.

6 THE COURT: We will start about 11:30.

7 MR. PESTARINO: I only have one witness. I am
8 going to run out of witnesses for this morning.

9 THE COURT: Is your witness here?

10 (Off the record discussion.)

11 (Whereupon, pursuant to the recess, Court
12 convened in the presence of the jury and the following
13 proceedings were had:)

14 THE COURT: Please be seated. I am sorry for
15 the long delay, ladies and gentlemen, but for the record a
16 few of the jurors had indicated to the bailiff some concern
17 over the fact that Mr. Ismail was not able to express
18 himself fluently in English and perhaps an interpreter
19 should be used. We had Mr. Ismail in chambers with counsel,
20 and we asked him those questions as to whether or not he
21 felt an interpreter was necessary. It was brought out that
22 Mr. Ismail had lived in Canada for a number of years where
23 he spoke English, and that, as you heard from the stand here,
24 he apparently communicated well in English, and although
25 he had some difficulty with some words and an accent, he
26 indicated that he comprehended what other witnesses had

1 testified to. Also, Mr. Pestarino, his attorney, stated
2 that he had the services of an interpreter available during
3 the pretrial and trial period. And possibly an interpreter
4 would be here to read the letters which were written in
5 Assyrian and the item which was written by Mr. Ismail this
6 morning. So Mr. Ismail felt as long as there was to be no
7 more questions, and that is what counsel had indicated of
8 him that he didn't require an interpreter. So I just want
9 you to know that.

10 MR. ROBINSON: Might the record indicate that
11 His Honor, along with Mr. Pestarino and myself, agree that
12 Mr. Ismail understands the questions that were asked him and
13 responded understanding those questions? That is an
14 agreement?

15 MR. PESTARINO: As Your Honor indicated, the
16 trouble with lawyers is they always talk. As Your Honor
17 indicated, there are certain words that he doesn't understand.
18 I think the jury gets the import of that as well as we do
19 because when he doesn't understand a word he says, "What does
20 that mean? What do you mean?" I am satisfied that he
21 understands.

22 THE COURT: Yes. Mr. Pestarino just has indicated
23 he is satisfied; and Mr. Ismail is satisfied that he
24 understood the things that were not clear, he would ask
25 about, and we would rephrase or restate, and he comprehends
26 all that is going on. He is through as a witness and ,

1 therefore, there is no need for an interpreter unless
2 something else develops. But one is available. You may
3 proceed.

4 MR. PESTARINO: I have no further questions of
5 Mr. Ismail.

6 THE COURT: All right.

7 MR. ROBINSON: I have no further questions.

8 (Witness excused.)

9 MR. PESTARINO: I would like to call Robert Vola,
10 V-o-l-a.

11 THE COURT: You want to come forward, sir, and
12 raise your right hand.

13 ROBERT VOLA,

14 called as a witness on behalf of the defendant, being first
15 duly sworn, was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. PESTARINO:

18 Q. Mr. Vola, would you be good enough to state your name,
19 give your address and your occupation?

20 A. My name is Robert Vola, address is 1951 Emerald Street
21 in Concord, and I am employed by Union Oil Company as
22 resident manager in our San Jose sales office.

23 Q. At one time did you work for Union Oil?

24 A. I still do.

25 Q. You still do?

26 A. Yes, I am the
resident manager with Union Oil here in San Jose.

1 Q. I wasn't paying attention. That's the problem. He
2 speaks well enough.

3 You don't need an interpreter, do you?

4 A. I hope not.

5 Q. Did you know a person by the name of Lazar?

6 A. Yes, I did.

7 Q. Do you know a person by the name of Meyers?

8 A. Yes.

9 Q. Did you know of a service station in Oakland on Mac
10 Arthur Boulevard that belonged to Union Oil?

11 A. Yes.

12 Q. Were you a representative of that at that time dealing
13 with individual sales or leases for Union Oil?

14 A. Yes, I was what they call a retail representative at
15 the time, and my area covered from Broadway and MacArthur in
16 Oakland to Cutting Boulevard in Richmond.

17 Q. Now, you do commercial work? A. Yes, sir.

18 Q. Now, did you handle a sale that involved these two
19 people? A. Yes, I did.

20 Q. Tell me a little bit about what your capacity was in
21 arranging a sale? You were a representative? What did you
22 have to do with sales? A. Well, at the

23 time I was the representative of the company. It was my
24 responsibility to maintain a number of units, that particular
25 time I believe it was twenty-three units in the field, and
26 as a representative you are responsible for the entire

1 operation of the units and any dealer changes. If you lose
2 a dealer you go out and recruit to try and find another
3 dealer to replace the lost one, and you just handle everything
4 that has to do with those twenty-three units.

5 Q. All right. Now, let me show you some of these exhibits
6 maybe to refresh your recollection. You have no records --

7 A. No.

8 Q. -- on this sale, do you? A. No.

9 Q. And the records are where? A. Well, they
10 could be in any of four different places because we have had
11 some reorganization in the company since the time of this
12 transaction, which was back in 1970, and our records have
13 been transferred, I mean, so I actually don't know exactly
14 where they are at.

15 Q. So what you are doing now is testifying from memory as
16 best you can? A. That is correct.

17 Q. All right. Let me show you Defendant's Exhibit No. D-4
18 and I have here D-5 and D-6, and ask you to look at those for
19 just a moment and see if that will help you.

20 Can I ask you a question, first, did Unico Oil
21 sell this station to a person by the name of Yule Lazar?

22 A. We don't sell a service station in that manner. We
23 lease a service station. The property and buildings remain
24 the property of the company, and we work a lease where we
25 lease the business and the individual becomes a private
26 independent businessman leasing those facilities from the

1 company. But there is no sale of the building or property
2 involved.

3 Q. But you do sell the inventory?

4 A. That is correct.

5 Q. And that includes gas and the underground tanks?

6 A. Well, at that time the gasoline is on what we call a
7 purchase and storage agreement, so there was actually no
8 cash transaction involving the sale of the fuel because the
9 dealer does not pay for this fuel until at such time it has
10 been sold.

11 Q. Okay. Now, you leased this piece of property on
12 MacArthur Boulevard to a Yule Lazar, did you not?

13 A. That is correct.

14 Q. In relation to the papers you have then, can you kind
15 of give us some idea of what date this transaction took
16 place?

17 A. Well, we leased this unit
18 to Mr. Lazar on October 17th, according to the papers in
19 front of me, and it was done through an escrow with Nor Cal
20 Escrow Company in which he purchased the unit through escrow,
the former dealer, Mr. Jules Moore.

21 Q. Now, later on did Yle Lazar contact you and tell you
22 he wanted to sell, or sell his interest, whatever it is or
23 what it was in the service station?

24 A. Um-hum, that is correct.

25 Q. Can you give us some idea when he contacted you?

26 A. Well, not by the exact day, but the normal procedure

1 when any service station dealer wishes to break his lease
2 with the Union Oil Company he merely gives us a letter in
3 writing stating that he would like ninety days to be on
4 notice, that ninety days from that point in time he wishes
5 to terminate his lease with Union Oil Company, and this is,
6 I believe, from memory what Mr. Lazar had done at that time.

7 Q. All right. Now, how did you first meet with Ron
8 Meyers? Do you remember?

9 the exact date --

A. If you mean

10 Q. No, not the exact date. Approximately?

11 A. Well, at the time Mr. Lazar gave ninety days notice,
12 normally we ran an ad in the paper and we let other dealers
13 in the area know I am going to have a unit come up for
14 lease and that I am interested in finding a new prospect, and
15 if my memory serves me correct I believe I received a phone
16 call, several phone calls, which one of them was Mr. Ron
17 Meyers.

18 Q. Did you meet with Ron Meyers?

A. Yes.

19 Yes, several times.

20 Q. Did you meet at his home?

A. Yes.

21 Q. Did you meet with he and his wife?

22 A. Yes.

23 Q. And did you talk then about the service station?

24 A. Um-hum, definitely. We go through the -- what I try
25 and what I did anyway at the time as a rep is that you try
26 to brief the individual thoroughly as possible because dealer

1 changes are expensive. They are not profitable to the
2 company. They are not profitab to the independent
3 businessman. You are trying to find someone that is going to
4 match that business, that is going to be able to grow, make
5 a good living for himself, and so that you don't have to
6 continue making dealer changes all of the time. And the only
7 way to do this, you try and go through the complete operation
8 of a unit with a dealer. If he is married you certainly try
9 to involve his wife to let her know what he is going to be
10 up against and it is time consuming, and what the demand is
11 that is going to be placed upon their relationship involved
12 in going into any business, in particular a service station.

13 Q. So is it true then that Ron Meyers contacted you?

14 A. To the best of my memory, let's put it that way,
15 yes. Most of my dealer prospects eventually call me
16 because, like I said, I put the word out, put ads in the
17 papers, and I would go to other people and ask them, and
18 they in turn would either contact individuals or individuals
19 would read the ad and they would phone in. And then we
20 screen the applicant and pick which one we felt was the best
21 to operate the unit.

22 Q. Did Mr. Meyers have any experience in running service
23 stations at that time? A. I don't believe

24 he was ever a manager of a unit. I know he drove truck for
25 Mobil Oil Company at the time. He had experience with oil
26 companies. He had mentioned to me, if I am not mistaken,

1 that he had worked, you know, as a mechanic, or part-time
2 in service stations. I don't believe he was ever a
3 manager or had leased one before.

4 Q. All right. And so, is there a school that you have to
5 send people to before they take over one of these leases?

6 A. Yes, that is correct. The company requires, here again,
7 as part of the training and background. In fact, we pay the
8 individual to attend a four-week dealer training school.

9 Q. And so Ron Meyers did attend a four-week training
10 school at your request?

A. That is correct.

11 Q. And then did the sale take place or the transfer take
12 place? I keep calling it a sale, but the sale of an
13 inventory? A. Yes. We get a little
14 bit different situation here. Under the circumstances there
15 was no escrow. Back during those times there was two ways
16 that you could do a dealer change. You either put it in an
17 escrow through an escrow company or in a case where a dealer
18 gave you a ninety day notice in some instances we would take
19 what we call the till, which is a term in limited
20 settlement, and we merely purchased back, Union Oil Company
21 purchased back the entire inventory of which this
22 documentation is in front of me.

23 Q. Would you read the note on the back of it, Defendant's
24 Exhibit what? A. This is number
25 61669, exchange number. D-4.

26 Q. D-4. That is what I am talking about. Okay. Thank

1 you. That D-4 represents what?

2 A. D-4 represents a till, and it states right on the front
3 of it, this was service station number 3538, dated 2-6-1970
4 from Yule Lazar, 411 West MacArthur, as the seller. The forms
5 were all prepared by me. They are all in my handwriting
6 except for the peoples' signatures, and it was sold to Union
7 Oil Company, San Francisco.

8 Q. By Yule Lazar? A. It was sold from
9 Yule Lazar to Union Oil Company.

10 Q. And not to Ron Meyers? A. No, sir.

11 Q. Then how did Ron Meyers get in the picture here?

12 A. Well, the day this change was done, the three of us
13 were together all day long, Mr. Lazar, Mr. Meyers, and myself,
14 and two separate inventories were taken, one transferring all
15 of this back to Union Oil Company, another one transferring it
16 from Union Oil Company back to Mr. Ron Meyers.

17 Q. And is Ron Meyers' name on any of those documents?

18 A. No, sir. Not these copies here. These was all Mr.
19 Lazar's copy. They are all signed and initialed by Mr.
20 Lazar, noting sale back to Union Oil Company of service
21 station inventory.

22 Q. And your testimony is that Union Oil then sold the
23 inventory to Ron Meyers? A. That is correct.

24 Q. What did he pay for it? A. Well, now
25 here I am going to go off my memory again, I believe at the
26 time Mr. Meyers was not financially able to purchase the

1 entire amount of this inventory, which was \$4400, and we had
2 two ways at this time of doing a change where the dealer did
3 not have the entire amount in actual cash to take over the
4 inventory. And I believe in this particular case we put the
5 oil in what we call a thirty-day account, which was
6 approximately \$179, and the remainder of the merchandise,
7 which was what we classified as TBA, then that refers to
8 tires, batteries, and accessory items and equipment was put
9 on a note, and normal procedure on a note is that the
10 incoming party pays twenty percent down plus the tax.
11 And then the balance is put on a thirty-six month note,
12 thirty-six equal monthly payments.

13 Q. All right. So any note that would be made out for
14 the inventory or anything regarding the service station
15 would be done by you people, wouldn't it?

16 A. Yes, that is correct.

17 Q. And do you recall what kind of a down payment --
18 first of all, what was the selling price, the total selling
19 price was what?

20 A. Now, here again I
21 have Mr. Lazar's copy in front of me here, going from this,
22 the total price was forty-four ten thirty. That included
23 equipment, tires, batteries, lube oil and loose items.

24 Q. And let me ask you this, to sell that inventory for
25 \$600, what would that be in your mind?

26 A. What? This inventory?

Q. Yeah. A. You couldn't sell

1 this inventory for \$600. It is forty-four ten thirty.

2 Q. Okay. So you made out a promissory note for Ren
3 Meyers or your company? A. Well, the

4 company, yes. Like I said, if my memory serves me
5 correctly, could have been done either that way or in
6 another manner. The TBA could have been put on what we call
7 the revolving account and within thirty days one third of
8 it would have been due. However, I doubt if we did it that
9 way at the time because the question was money to start with.
10 As far as one third of \$4400, would have been a lot larger
11 than the twenty percent down payment plus the tax, then the
12 thirty - six equal monthly payments. This gave him reserve
13 cash to operate that station rather than draining all of
14 his cash off, you know, and then not having cash flow for
15 the running of the unit.

16 Q. Anyway, he made a substantial down payment?

17 A. That is correct.

18 Q. More than \$600?

19 A. Well, twenty
20 percent of this particular inventory here plus the taxes
would have probably come close to about a thousand dollars.

21 Q. All right. Now you were the representative of Union
22 Oil that took the inventory? A. That is

23 correct.

24 Q. And you did that, first of all, with both people
25 present? A. Yes.

26 Q. And did you cover every item of inventory?

1 A. To my knowledge we inventoried the whole station.

2 Q. Okay. A. There may have
3 been a couple small items which was left to the dealers'
4 option. I'm not, I just, this would have been the bulk of
5 it.

6 Q. Let me ask you again, both parties were present when
7 you took the inventory? A. That is correct.

8 Q. One signed off, did they? A. Um-hum.

9 Q. The other one signed on? A. Right,
10 separate papers.

11 Q. With you? A. That's right.

12 Q. And was this deal fair? A. Absolutely.

13 It was the same prices essentially that was originally
14 purchased from Mr. Moore by Mr. Lazar. We never try and sell
15 a station as far as the merchandise in it. We will sell it
16 at exact same price from each dealer because it, it would be
17 against fair trade practice. You can't make a profit on
18 inventory when you are merely selling out your inventory to
19 an incoming dealer because he is going to take that
20 merchandise and resell it.

21 Q. Did Ron Meyers express any dissatisfaction at this time
22 with either you or Yule Lazar? A. Not to my
23 recollection, no.

24 Q. And let me ask you another question, how long did Ron
25 Meyers have the service station? A. I believe
26 it was about, I'm going to guess because we are going back

1 seven years, but it was a short time, around four months, I
2 would say, four, maybe five.

3 Q. Did you get the service station back?

4 A. Yes, sir. It was a little unusual circumstances. One
5 of my dealers phoned me up and told me that the unit was
6 closed one day, and I went down and I couldn't find Mr. Meyers
7 and we have what we call an abandonment clause, if a unit is
8 left abandoned for forty-eight hours the company can regain
9 the unit back. And the unit was definitely left unattended,
10 locked up for a period of two days or more, and eventually
11 I was finally able to reach Mr. Meyers, and we did eventually
12 sign a mutual cancellation agreement. But at the time I had
13 taken steps to get the unit back on an abandonment clause
14 because it had been left closed for longer than forty-eight
15 hours.

16 Q. Now, to your knowledge had that service station been
17 burglarized during the time that Ron Meyers had it?

18 A. It is possible because the unit had been burglarized,
19 breaking and entering, that I can remember, I don't remember,
20 I can't remember how many times, but it had been broken and
21 entered into more than once. And it is very possible that,
22 well, I'm almost positive that it had been broken into. In
23 fact, when both gentlemen had operated it, it had been
24 broken into at least once under both operators.

25 Q. You are pretty familiar with the Oakland area, are you
26 not? A. Well, yes sir, I was

1 raised in Richmond. I went to High School in Berkeley.
2 And I grew up in the Bay Area. Then I worked there for Union
3 Oil for two and a half years in that field, went through there,
4 so I'm pretty familiar with the entire Bay Area.

5 Q. Do you know a gun store, a sport shop by the name of
6 Siegle's?

7 A. Yes, sir it is
8 located on the corner of San Pablo and MacArthur Boulevard in
9 Oakland.

10 Q. How far is that from the service station?

11 A. About a mile, I would say. The station is located up
12 about one block from Kaiser Hospital on the corner of
13 Broadway and MacArthur.

14 Q. Okay.

15 MR. FESTARINO: I think that is all that I have.
16 Thank you very much.

17 MR. ROBINSON: I just have a couple quick questions.

18 CROSS-EXAMINATION

19 BY MR. ROBINSON:

20 Q. Mr. Vola, is there anything in the transaction of this
21 service station that you told us about that would prohibit
22 Ron Meyers from making a promissory note to Yule Lazar such
23 as for good name of the business and things like that?

24 A. There is nothing in here that would prohibit that, no.

25 Q. Secondly, when did Mr. Lazar buy that station, lesse
26 it?

A. According to the records
right here in front of me it would have been October 17th,

1 1969.

2 Q. Okay. And I take it that Mr. Lazar was screened by
3 your people to see if he could run a service station?

4 A. Well, that is correct, by me.

5 Q. Okay. And Mr. Lazar was also given this four weeks of
6 training?

A. That is correct.

7 Q. Okay. And Mr. Lazar then gave you ninety days notice?

8 A. That is correct.

9 Q. Okay. When did he sell the station?

10 A. February 6th.

11 Q. Of 19 --

A. ' 70

12 Q. Okay. So how long was Mr. Lazar in the station?

13 A. Let's see, November, December, four months.

14 Q. Same amount of time as Mr. Meyers?

15 A. That is correct.

16 Q. Now, did Mr. Lazar lose a lot of money selling this
17 station?

A. No, he didn't.

18 Q. Okay.

A. To my knowledge.

19 Q. Okay. What about things like, do the attendants in
20 the Union 76 station, do they wear uniforms?

21 A. Yes, sir.

22 Q. Who pays for those?

A. Well, the

23 dealer.

24 Q. The dealer?

A. Unless the dealer

25 has -- each dealer has a different option on that. Some of
26 the dealers charge the employees, some of the dealers pick

1 up half of it, some of the dealers pick up all of it.

2 Q. It is up to the individual dealer?

3 A. Right.

4 Q. And that individual dealer contracts out, I take it,
5 with various cleaning services to clean the uniforms?

6 A. That is correct .

7 Q. You don't have anything to do with that?

8 A. No.

9 Q. What about things like, oh, say coke machines, vending
10 machines in the service station area, is that up to the
11 individual dealer, also? A. Here again

12 that depends. In most cases they are leased by the dealer
13 from the particular coke company, whatever it may be. And in
14 some cases the coke machine is owned by a dealer in which
15 case he might keep it or he might sell it as part of the
16 inventory.

17 Q. Okay. Sell it to the person who is buying his station?

18 A. That's right.

19 Q. Okay. I just want to get one thing clear in my mind.

20 This service station that we are talking about is located
21 at 411 MacArthur Boulevard? A. Yes, that's

22 right, West MacArthur.

23 Q. And Siegle's Sportsman Supply is it 508 West
24 MacArthur Boulevard? A. I'm not sure of

25 the exact address. I know it is on the corner, just off the
26 corner of Cutting and San Pablo -- excuse me, MacArthur

1 Boulevard and San Pablo.

2 Q. Okay. And if the owner of Siegle's were to testify
3 that it was at 508 West MacArthur, would you believe that?

4 A. Certainly.

5 Q. Okay.

6 MR. ROBINSON: Thank you. I have nothing
7 further.

8 REDIRECT EXAMINATION

9 BY MR. FESTARINO

10 Q. Is 508 right next to the service station?

11 A. No.

12 Q. Still a mile away? A. I would say yes.

13 Q. Let me ask you this, you took the inventory of that
14 service station, was there a coke machine there at that time?

15 A. May I look at the --

16 Q. Of course you can. A. There was
17 a coke machine at the service station, but I don't see it
18 on this inventory list.

19 Q. What does that mean, you don't see it?

20 A. Well, that could be that the machine is owned by the
21 particular company, Coca Cola Company, and I am not sure that,
22 I cannot remember. May I check this other list to see if it
23 was on there?

24 It isn't listed on the equipment here. So I don't
25 know who the ownership of the coke machine belonged to.

26 Q. Okay. Let me ask you this, the good name of the

1 business, if a man ran that for a month, would he have a
2 good name to sell?

3 MR. ROBINSON: Objection, calls for speculation.

4 THE COURT: The objection is sustained. It calls
5 for an opinion.

6 Q. (By Mr. Pestarino) All right. Does it take a while
7 to build up good name or what we call goodwill?

8 MR. ROBINSON: Objection, calls for speculation.

9 MR. PESTARINO: He is a representative. He is an
10 expert in the field.

11 MR. ROBINSON: Some people can build it up over-
12 night by giving free gas.

13 THE COURT: No. Overruled. You can answer that
14 Mr. Vola, if you can.

15 THE WITNESS: Would you repeat the question?

16 MR. PESTARINO: Yes.

17 Q. (By Mr. Pestarino) Can you build up the good name ,
18 does it take some time to build up the good name or goodwill
19 of a business, service station?

20 MR. ROBINSON: Objection, the question is vague
21 and ambiguous, "some time."

22 Q. (By Mr. Pestarino) What period of time does it take
23 generally to build goodwill or good name in a service
24 station? A. Well, I don't know, to
25 build a good name, I would say, it is hard to put a time
26 limit on it. A person has to meet the public, he has to

1 get to know his customers. He has to get the trust and
2 confidence of his customers, and he has to get the repeat
3 business.

4 Q. Let me ask you this, did Lazar do that?

5 A. I believe he attempted to do that.

6 Q. Did he?

7 A. Well, he wasn't there
long enough.

8 Q. Well, tell us a little bit about his business, how
9 he ran his business?

10 A. Mr. Lazar?

11 MR. ROBINSON: I'm going to object. This is
beyond the scope of cross-examination.

12 MR. PESTARINO: The reasons for his opinion.

13 MR. ROBINSON: Still beyond the scope of cross.

14 THE COURT: No, overruled.

15 THE WITNESS: Well, Mr. Lazar, if I remember
16 correctly, was an accountant by trade, very neat gentleman,
17 very presentable. I believe he put in a good effort at
18 attempting to do this, and normally we look for someone who
19 has a good business background. And at the time I figured
20 that Mr. Lazar would be ideal for this unit because of his
21 accounting knowledge. And you, also, look for a good
22 manager. You try to find a manager. It takes more than a
23 mechanic to run a unit. And part of the problem though I
24 believe was the language barrier and the sense of knowing
25 the customs and knowing the people. I don't believe Mr.
26 Lazar had been here long enough, and I believe he had

1 trouble with trying to lead the people working for him, and
2 I think this was one of his biggest problems, and probably
3 a little bit in general with the public, too, understanding
4 people, in that sense. And I think this was the greatest
5 thing that eventually he came and said, "I want out. It is
6 not my cup of tea."

7 Q. So what is your opinion about his good name, as far as
8 the service station was concerned? Did he have it?

9 A. Oh, I think that the people that came in there
10 probably liked him. I just don't think that he ever, he just
11 didn't give it enough time or he couldn't give it enough
12 time, let me put it that way.

13 Q. Okay.

14 MR. PESTARINO: Thank you very much.

15 MR. ROBINSON: I just have one other question
16 now, one other question.

17 RECROSS-EXAMINATION

18 BY MR. ROBINSON:

19 Q. Would you say that Mr. Lazar was a shrewd businessman?

20 A. He was a shrewd businessman? What do you mean by
21 that term?

22 Q. What I am trying to say is, do you think that Mr.
23 Lazar is going to go into something and end up taking a
24 huge loss on it?

25 A. Well, nobody intends to
26 do that. Anybody that goes into business doesn't intend
doing that, no.

1 Q. Let me ask you this, in terms of -- I take it the same
2 things that you have told us about Mr. Lazar apply to Mr.
3 Meyers, too, look for the same qualities?

4 A. That is correct.

5 Q. And as to the type of, the type of businessman they
6 were, as far as, oh, being able to get money out of a
7 business directly and indirectly, would you put them both
8 in the same plane or would you put one ahead of the other in
9 terms of background and things like that?

10 A. All right. In terms of educational background, is that
11 what you are referring? I would say Mr. Lazar had a better
12 educational background than Mr. Meyers, but Mr. Meyers had
13 the willingness to learn and he had the aptitude to learn.

14 MR. ROBINSON: Thank you. I have nothing further.

15 THE COURT: May I ask you just one question for
16 clarification? When you mentioned the word "inventory,"
17 does that embrace only gas, oil and things of that sort, or
18 does it include, also, such things as hand tools, tire
19 changing tools, the usual accouterments of a gas station?

20 A. Yes, sir. In the particular case, Page 1 lists the
21 equipment, and if I may, the equipment, for instance, was the
22 gear oil, visatrum, chassis air lube, swing spouts, gas
23 hoses, air and water hoses, signal bells, impact guns,
24 rotor stamp machine, battery charger, battery tester, and all
25 of the equipment of that nature. Probably the only thing it
26 would not involve would be hand tools. Most dealers either

1 take their hand tools with them or, perhaps, they sell them
2 off.

3 THE COURT: Thank you, sir.

4 THE WITNESS: You are welcome.

5 THE COURT: Any other questions?

6 You are excused.

7 (Witness excused.)

8 THE COURT: All right, ladies and gentlemen,
9 we will take our noon recess at this time. Due to a
10 witness scheduling we will not resume until 2:00 o'clock.
11 So that will give you an extra half hour to wander around
12 and do some things on your own. We will see you at
13 2:00 o'clock. You will keep in mind the admonition I have
14 given you before. The defendant will be ordered to return
15 at that time, also.

16 (Whereupon, Court adjourned for the luncheon
17 recess.)

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AFTERNOON SESSION

March 23, 1976. 2:00 o'clock p.m.

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

THE COURT: Please be seated, ladies and gentlemen. Let the record show that the jury is present, defendant and counsel are present. All right, sir.

MR. PESTARINO: Thank you, sir. Call Dr. Nidever. I know I mispronounced that name. That is Nidever.

JACK NIDEVER,

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PESTARINO:

Q Would you kindly state your name and spell your last name?

A My name is Jack Nidever, last name is N-i-d-e-v-e-r.

Q And your address, Doctor? A 160 Saratoga, Suite 38, Santa Clara.

Q And what is your occupation? A I am a clinical psychologist.

Q Do you have to be licensed to be a clinical psychologist?

A Yes, I do.

Q By whom? A State of California, Board of Medical Examiners.

Q Are you licensed? A Yes.

Q Will you tell us what your qualifications are, starting

1 with your university training, all of the way up to the
2 present time? A Started in Fresno State College, went
3 there a couple of years.

4 Q What year? A 19 -- right after the war, right
5 after World War II, '46 to '48. Then went to Pomona College
6 where I graduated with a Bachelor's. Then I went to the
7 University of Pennsylvania in Philadelphia from 1950 to '52.

8 Q Psychologists are not afraid of mikes? (Referring to
9 microphone.) A Well, I'll try not to be. I had a
10 Master's Degree then from the University of Pennsylvania.

11 Q What year was that? A That is 1952. I then
12 transferred to the University of California at Los Angeles,
13 and took a Ph.D. there, working while I was doing it, so it
14 was rather extended. I got my degree in 1959. Then I went
15 out and worked for awhile and went to an analytical institute
16 in Zurich, Switzerland, in 1962 and graduated there in 1965.

17 Q What kind of an institute did you graduate from?

18 A This is an institute of analytical psychology. It is
19 the work of Carl Jung, of Jung, Freud, and Adler.

20 Q And you have been in private practice since?

21 A About ten years.

22 Q Ten years. Well, let me ask you this, do you belong to
23 any particular boards? A I have been active in the
24 State Association for a number of years. I am not right now.
25 I have edited a newsletter, was on the Board of Directors of
26 the State Association and their division in clinical

1 psychology and was on the Board of Directors of California
2 Psychological Health Plan, prepaid mental health plan for two
3 years.

4 Q Now, are you a Diplomate -- A Yes.

5 Q -- of any institutions? A I am a Boarded
6 psychologist, American Board of Professional Psychology.

7 Q What does that mean? What do you have to do to become
8 a Diplomate? A After you have five years of practice

9 you can be examined to see if you qualify as a Boarded
10 psychologist. It was a matter of two days of examinations,
11 much of it in an oral base, and what I really did was to go
12 down to Los Angeles and interview some patients there and
13 report on my diagnosis, and things that I saw in these people.
14 And then the people who examined me then said that they were
15 happy to have me as a member of the American Board.

16 Q Do you belong to any professional associations?

17 A Currently the American Psychological Association.

18 Q And had you done any teaching in this particular field?

19 A I have done a little bit of teaching at Sonoma State
20 College, at the California School of Professional Psychology
21 in San Francisco, and some extension work for the University
22 of California, Berkeley.

23 Q Would you tell us what a psychologist is, and then maybe
24 what a clinical psychologist is? A Well, a psychologist
25 is, there are about 40 divisions of psychology ranging from
26 the study of development in children through the aging process

1 through very rigorous --,

2 Q Let's not get into the aging process.

3 A I have that problem, too.

4 Q All right. A Psychologists are trained
5 essentially to do research. Their training is aimed at
6 producing new information, finding different ways of under-
7 standing people, behavior, explaining the way your senses
8 work, how the aging process proceeds, how the developmental
9 picture comes along, how it truly develops. The clinical
10 psychologist is, he is more inclined to do the clinical work
11 which is to attempt to apply a lot of these findings so he has
12 to be qualified in research, and then he is attempting to do
13 psychotherapy, diagnoses.

14 Q What is psychotherapy? A What is psychotherapy?

15 Q Yeah. Psychotherapy diagnosis?

16 A Diagnosis is separate from psychotherapy. Psychotherapy
17 is a variety of means of trying to make a person, allow a
18 person to become aware of what they are doing because most of
19 us are far less aware of what happens to us and what we do
20 than we truly, we ever truly know.

21 Q Well, in a general sense, Doctor, are you -- it is really
22 a study of human behavior, isn't it? Generally speaking or
23 generically speaking? A All of psychology could be

24 sub-assumed under that, yes.

25 Q What does a clinical psychologist do?

26 A Practical matter he sees clients in an office frequently

5
1 or in an institution.

2 MR. PESTARINO: Well, anyway, are there any
3 questions about his qualifications?

4 MR. ROBINSON: Your Honor, I am going to reserve
5 any questions I have of the doctor since Mr. Pestarino didn't
6 tell me which witness he is going to call. I am unfamiliar
7 with this particular doctor, so I am going to reserve these
8 questions, if I might.

9 THE COURT: But at the moment with regard to
10 qualifications do you have any questions?

11 MR. ROBINSON: No questions at the moment subject to,
12 of course, later on.

13 THE COURT: Sure.

14 Q (By Mr. Pestarino) Now, Doctor, you know David Ismail,
15 the defendant here? A Yes, I met David.

16 Q And at my request you went to see him?

17 A Yes, I did.

18 Q When did you see him? A Is it all right if I look
19 at my report here?

20 THE COURT: Sure. You may look at your notes.

21 MR. PESTARINO: The D.A. wants to look at your notes.

22 THE WITNESS: Anybody is welcome to look at them.

23 THE COURT: All right. You look at them and if
24 counsel needs to --

25 THE WITNESS: Okay. Let's see, I went to see David
26 at the jail on the 11th of March, the 13th of March, and the

6
1 14th of March.

2 Q (By Mr. Pestarino) And did you go to see him alone?

3 A The first two times I went alone. The third time I took
4 an interpreter who could speak Arabic.

5 Q And what was the purpose of your seeing Mr. Ismail?

6 A My purpose, as I understood it, was to evaluate him, to
7 offer any explanations or information that I could about what
8 led to his actions.

9 Q Okay. And a total of how many hours did you spend with
10 him? Can you give me some rough idea?

11 A About seven-and-a-half hours, somewhat short of eight
12 hours, somewhere between seven and eight.

13 Q At the jail? A At the jail.

14 Q And on these dates tell us chronologically what you did?

15 A The first day I simply spent a session with him talking.
16 I mean, I wanted to see, I wanted to be able to relate to him
17 and not bring a lot of strange things in on him right away.
18 So we sat and talked about 45 minutes about what had happened
19 to him. When I came the next time I brought a fair selection
20 of tests, and we started to work and we worked about three
21 hours going through as many tests as we could at that time.
22 We got to a kind of block place where I was having difficulty
23 going ahead because we had a language barrier between us.
24 And so I asked someone that I have known in the school system
25 who speaks Arabic very well to come with me and help me
26 interpret what David was saying. So we were speaking, they

1 were speaking in Arabic part of the time, and were kind of
2 exchanging, so it was English and Arabic.

3 Q All right. Now, did you administer any tests or give
4 any tests to David Ismail? A Yes, I did.

5 Q And how many tests did you give him?

6 A About 12.

7 Q About 12 tests? A Yes.

8 Q Tell me, are the tests that you gave him, are they
9 reliable tests? A Our psychologists think so. They
10 are standard tests.

11 Q And are they given throughout the country or the
12 countries by psychologists? A Well, the tests that I
13 am using here, not all of them are used abroad. Some of
14 them are. Some of them are developed abroad. Most of them
15 are tests that are used throughout the United States.

16 Q And I ask you, are those tests reliable?

17 A As reliable as we can make them.

18 Q So, can you tell us briefly what these tests were that
19 you gave him? And maybe you ought to describe a little bit.
20 First of all, maybe you ought to describe a little bit what
21 preparations you make to give these tests? Do you have any
22 particular paraphernalia, equipment, or what, in order to
23 give these tests? A I brought a boxful with me.

24 Q A what? A I brought two brief bags full, two
25 briefcases full when I came to test him. My preparation,
26 in part I went out and read something about the Assyrian

1 church, which wasn't too hard to find, and I made, I took a
2 look at the kind of language that he was accustomed to speak
3 in the course of my testing him.

4 Q In other words, Doctor, excuse me for interrupting you --

5 A Yes.

6 Q -- but I, if I don't speak now I will forget maybe.

7 But did you obtain a history of what happened from the

8 defendant, David Ismail? A I started by asking him to

9 tell me everything that he could remember about what had

10 happened to him, yes.

11 Q And did you talk to somebody else about what had happen-

12 ed? A I talked to Dr. Rappaport, Dr. Walter Rappaport.

13 We talked on the telephone for about 25 minutes.

14 Q Did you ever talk to me about what had happened?

15 A I can't remember talking to you very much about it.

16 Q Okay. All right. So you obtained a history as best

17 you could from David Ismail and from Dr. Rappaport?

18 A Yes. Your investigator, Mr. Hernandez, gave me a few

19 bits of information as well.

20 Q Fine. And then the next thing you did was to administer

21 some tests? A Yes.

22 Q All right. Now, tell us about the tests?

23 A All right. The first --

24 Q It might simplify things if you can, just write on the

25 blackboard or piece of paper the test. Wouldn't that be

26 agreeable?

1 THE COURT: No objection.

2 THE WITNESS: Whatever is convenient. I am just
3 as happy to talk it.

4 MR. PESTARINO: Whatever is easier for you and to
5 help us understand.

6 MR. ROBINSON: Perhaps we could have the doctor step
7 to the board and diagram his tests for us. I have no
8 objection to that.

9 MR. PESTARINO: All right.

10 THE COURT: I assume some of these are written tests,
11 oral tests?

12 THE WITNESS: I didn't --

13 THE COURT: Multiphasic?

14 THE WITNESS: I didn't use the multiphasic. About
15 all I can do really is put up there the names of the tests
16 that I used and the general kind of level of finding.

17 MR. PESTARINO: That is fine.

18 THE COURT: Perhaps you could do that.

19 MR. PESTARINO: Then we can talk about it more.

20 THE COURT: There is a microphone if you can hold it
21 and read at the same time.

22 MR. PESTARINO: You don't write like all doctors,
23 do you?

24 THE WITNESS: Is it all right if I print?

25 I think I will put these down the way that, the way
26 that I wrote them up rather than in the order that I gave them.

10
1 That is the structure that I have.

2 MR. PESTARINO: All right.

3 THE WITNESS: Actually maybe I better put the first
4 one up here. The first thing that disturbed me was, I gave
5 David what is called -- is that going to be readable?

6 MR. PESTARINO: No, not for me. I am blind. Can't
7 you use a black crayon? That is better.

8 THE WITNESS: The first thing I gave him is called
9 a full range vocabulary test. It is a vocabulary test, and
10 in talking to him I recognized that if I weren't very careful
11 we got a block and we didn't understand each other. So I
12 have had some experience with foreign language, so I started
13 trying to do the best I could to understand him. But I
14 thought I better scale him -- that is not right.

15 So this scale that says equal to or less than I.Q. of
16 40, this is no disrespect to David, this is just a scale
17 where I show a variety of pictures, there are 16 plates with
18 4 pictures each on them, and you give the person a word and
19 you say, "Pick me a plate. Pick me a picture." And you
20 start at rather straightforward level and maybe you have a
21 picture of a pair of, some athletes doing something, and 2
22 people sitting in a corner, and they look as if they might be,
23 as if they might be a woman, and the question might be, "Can
24 you pick which word is 'condolence'?"

25 MR. ROBINSON: Excuse me, Your Honor, I have had
26 psychologists before and I think it is beneficial to the jury,

11
1 and perhaps easier for the doctor, perhaps he would mark
2 those pictures that he showed the defendant and we can intro-
3 duce those into evidence so the jury can see the sort of
4 pictures we are talking about.

5 THE COURT: I would have no objection.

6 THE WITNESS: Be fine, except I didn't bring them.

7 MR. ROBINSON: We will get them.

8 THE COURT: That can be taken care of later.

9 THE WITNESS: Okay. Well, in any case, the problem
10 was at the base level with the least load on him in terms of
11 his language, how could I find out what his level of language
12 usage was? So I started using these simple pictures which
13 we can use on anybody from a 2-year-old to an adult, because
14 they don't require very much language. You start saying the
15 word and go up the scale in difficulty of the words, and you
16 keep asking the person which of the 4 pictures looks most like
17 that particular word. Now, David talks pretty well. There
18 isn't anything wrong with his general level of intelligence.
19 It may not be extraordinarily high, but he is not retarded in
20 any general sense that I can understand. But in using these
21 cards I discovered that his language usage is about between
22 an 8 and a 12-year-old child if it is English. He speaks
23 Arabic, and I can't touch Arabic, and that is his second
24 language, and that is the language that the interpreter and
25 he spoke. It was the second language for each of them. He
26 happened to be an Egyptian Greek. As far as I could see they

12

1 spoke very well in this language, and I was following them
2 as closely as I could with the hand motions and all that goes
3 with it and asking very short and precise questions. I
4 think we ought to bear in mind when you put down an I.Q. of
5 40 for someone on this kind of simple skill, and the normal
6 I.Q. is around 100, that we see David works through quite a
7 barrier when he tries to understand the language which we
8 are prone to use rather quickly, and as I say, any of us
9 would be hopelessly lost if we tried to talk Acadian, or if
10 we tried to talk Arabic because we can't, or at least I can't.
11 Anyway, that is a pretty low score, and when I looked at
12 that score I said to the attorney that it seemed to me that
13 it would be very important to use an interpreter, and I
14 thought perhaps he needed an interpreter in the courtroom
15 because one of the things that people that don't have
16 tremendous language usually do, those of you who speak more
17 than one language, you talk to someone who is trying to learn
18 the language, they listen better than they can speak it, and
19 they will kind of fake you out, and they'll go along like they
20 understand, and then you catch them and you realize they
21 don't know what you said. David was trying to tell me
22 something about a night flyer, and I couldn't understand that.
23 When we got the interpreter it turned out that a night flyer
24 was a bat.

25 Q (By Mr. Pestarino) A what? A A bat. That was
26 my problem. But the ease with which you can get confused in

13

1 language, and I see some of you nodding your heads, that is
2 the way it goes. So I tried to learn German and I remember
3 every so often they'd catch me when I thought I was being
4 clever. Then, of course, I didn't understand them at all.
5 This is one scale.

6 Now, by contrast I'll use here, "W.A.I.S.," to use
7 the Wexler Adult Intelligence Scale, and what I did here is,
8 I used the performance items which don't require too much
9 language. Then I can get another I.Q. And for this one
10 I got 91, which is, it is pretty close to within the normal
11 range.

65

12 Now, on this scale where there are things that you
13 are asked to do that don't require too much language usage,
14 ordinarily you would expect a person who has a lot of quick-
15 ness of mind to show it here, at least on one of the scales.
16 David didn't really do this, but then he was also under the
17 stress of and he was trying to do it as well as he could.
18 As far as I could see he was also under some stress. But as
19 I began to get these numbers, I began to feel that probably
20 David's basic ability level, as far as we would measure
21 aptitude in comparison to people of the same age, that it
22 was around average. There was nothing, he was not carrying
23 a very great aptitude to do scholastic or abstract thinking.

24 Now, I went on and I took the Wide Range Achievement
25 Test, and I checked his reading level and discovered that, of
26 course, that was pretty good. It is still about the same

14

1 level here. It is approximately equivalent to an I.Q. of
2 90, and it is about, it is somewhere in the 6th grade level,
3 which for an adult gives about that range of I.Q. In arith-
4 metic I am still trying to establish some of his ability
5 levels because it is important, his resources, intellectually
6 important to whatever is happening. Here he was less
7 capable. He dropped down to about 80, and here we are
8 working around 5th grade level. Now, when I checked his
9 reading level with this test I just used single words. So I
10 wanted to see what would happen if I gave him a real para-
11 graph to read and try to understand. So I gave him Grey's
12 Oral Reading, which doesn't require too much in the way of
13 comprehension, but you experience the person trying to
14 actually handle the language in a chunk instead of just single
15 words. Here he dropped down to an equivalent I.Q. of around
16 70. So however else we see David, he has got some problems
17 with the English language, that he just does.

18 I asked him if he read newspapers at home in Canada
19 because that is, of course, pretty good check. If you can
20 read a newspaper with the language of the day, that means that
21 you probably have pretty good language usage. And I got the
22 impression he reads part of the newspaper, but he didn't read
23 them through. Now, I may have misunderstood him. But that
24 is what I gathered from him. Because I wanted to use some
25 other scales that involve color, and I was concerned about the
26 possibility that he might have some brain damage from

15

1 something Dr. Rappaport had said, I did what is called, I
2 used the Devorin Pseudo-isochromatic Blocks, which just check
3 you for color blindness. And he is not color blind.

4 You can't read that, but you are going to remember
5 what I said maybe (referring to blackboard). So this is
6 color. And there is no problem with color. I then wanted
7 to know about sequencing activity. There was a lot of stuff
8 here about memory. So I started out with something called
9 the Knox Cube Test. It is something that was used at Ellis
10 Island in the early part of the century to screen people who
11 could not speak English. Here he did quite well. An equi-
12 valent mental age of around 16. And this is, simply there
13 are five essential blocks pinned to a board. And with a
14 pencil, both of you having pencils, Dave takes a pencil and
15 he tries to follow the pattern I trace, and I start out going,
16 "Do, do, do," and he can do that. When you get up to where
17 you are doing it 6 times it gets sort of complicated. But
18 it is a great screen in terms of how quickly or how well you
19 can remember sequence material. He did pretty well with
20 that, and a mental age of 16 in terms of kind of aptitude
21 things isn't too far from the adult range.

22 Now, I have now two or three other scales here that
23 have to do with David's ability to handle memory. One is a
24 simple memory for design. In this he did essentially all
25 right. So these two are essentially the norm. Then I did
26 a Bender-Gestalt. Now, the Bender-Gestalt was developed in

16

1 Europe. It's had a lot of progress since then. It is
2 non-geometric design, and the request is simply that you
3 copy them. And you can copy them while you look at them.
4 In this scale you look at 15 designs, but you only get to
5 look at them for 5 seconds, then you have to redraw them.
6 So you look at cards and the designs get more and more
7 complex. And then the question is, how good does your
8 memory work. His visual equipment works pretty well. So
9 he gets a norm here. With the Bender-Gestalt where you look
10 at the design and copy it you can always see possible brain
11 damage problems. We have another procedure we use here now, it
12 is called background interference. What we do, what we do
13 to make this scale more difficult, is on the page where you
14 are to do the design we simply put many, many wiggly lines
15 through it, and this is like noise, and then the request is,
16 now, you please copy these designs just as you did the first
17 time on a blank piece of paper. Now, copy them and try to
18 ignore these wiggly lines. What we have discovered in
19 psychology is, this is one of the most sensitive devices to
20 expose brain damage, brain disfunction. Central disfunction
21 tends to appear here more quickly, more reliable than it does
22 with almost any of our other scales. On this scale he did
23 indeed get a score which put him in the mild organic impair-
24 ment class, which means that, as he told me, that he had an
25 injury as a child.

26 Gee, I don't write very good.

17
1 And I'm going to say that his mild organic damage,
2 David told me that when he was 7 or 8 he ran into a telephone
3 pole full tilt, and he lost the hearing in one ear, and after
4 that time he didn't do very well in school and eventually he
5 dropped out. That is a long time ago. David is now, as I
6 recall, 40. He has had a lot of time to try to compensate
7 for whatever disturbance, whatever damage he experienced then.
8 You can't recover your hearing, but you can try to recover a
9 lot of other things. But nonetheless, this background inter-
10 ference procedure which we call, "BIP," it shows that he sure
11 enough has some organic damage in his head. He really,
12 really does.

13 The next scale is called Hooper Visual Organization.
14 This is another scale aimed at, aimed at exposing any problems,
15 any central nervous system problems. They are fragmented
16 objects, they are common objects. Anyone who would live 10
17 years in Canada would know all of these objects. They would
18 know them if they lived in Europe, whether it is a sailboat
19 or teapot. But you show a picture in which there are frag-
20 ments, but they all fit together like a jigsaw. They are
21 like a jigsaw puzzle except you don't have the pieces to fit
22 together. You must do it in your head. And the question
23 is, "What object is it?" And that is really the only
24 response necessary to give. Again, David falls at a level
25 of organic damage here. Now, this isn't a terribly severe
26 organic damage. He is functional. I had somewhat similar

18

1 thing happen to me as a child. I have some sympathy for
2 it. I had a skull fracture, after that I just couldn't hit
3 a baseball. I just couldn't hit a baseball. I used to hit
4 them over left field. I never could understand what had
5 happened. After awhile I realized I had lost my depth
6 perception. I didn't have the depth perception I had before.
7 These kind of things happen. He, David, might have got a
8 stouter hit than I did, or lesser one. I don't really know.

9 I then went on to what are projective scales. I
10 think I will just enumerate them and I can talk about them
11 better sitting down. One is the house-tree-person drawing;
12 another is the Rorschach, and this is a series of 10 ink blots,
13 developed in Europe, in Switzerland. Then the Thematic
14 Apperception Scale which I will abbreviate TAT, and these are
15 projective scales. They are aimed at personality dimensions.
16 And this one was developed in the United States by a man
17 named Murray, back in an eastern university. Is that
18 sufficient as an outline?

19 MR. PESTARINO: Yeah. Thank you.

20 MR. ROBINSON: Could you just, TAT, what does that
21 stand for?

22 THE WITNESS: Thematic, like theme, Thematic,
23 Thematic Apperception Test.

24 MR. PESTARINO: Apperception?

25 THE WITNESS: A-p-p-e-r.

26 Q (By Mr. Pestarino) Why don't you sit down, Doctor?

19

1 Now --

2 A I have three other tests I haven't talked about. I
3 can now or later.

4 Q Finish your tests. A The HTP Drawing, the
5 house-tree-person drawings, the request is simply that you
6 draw me a tree, and then that you draw me a house, then a
7 person. If you draw a person who is male, then I ask that
8 you draw a person who is female. And you can see a good
9 deal in an individual in terms of how they do these simple
10 things. Because they kind of say things about the human
11 being, their absorption with the home, house, will come
12 through in how they draw the picture of the house, the sense
13 of their own life energy seems to come out in a tree. If
14 you give a person a piece of paper and ask him to sketch you
15 a tree, and they draw you a tree with all broken off limbs,
16 and it looks like it's about ready to die, you are really
17 concerned because the sense is that that person perceives
18 themselves as not having much energy to go and do anything.
19 These things all psychologists kind of agree on. But we ac-
20 knowledge now this is an area in which we do a lot of inter-
21 pretation in terms of what we think it means. With the
22 figures drawings there is the same sort of thing, like a
23 person draws a figure and each of the fingers are as sharp as
24 daggers, you might conclude that there is hostility in that
25 person. You don't have to stretch very far to consider that
26 there is a sharpness in the way they see other people and

10
1 themselves. Well, we did this. I also gave him the 10
2 Rorschach blots, and I gave him the Thematic Apperception Test.
3 The last two I did with the assistance of the interpreter
4 because it was too difficult, we couldn't do it without, just
5 between the two of us.

6 Q Let me ask you, Doctor --

7 A It's not very good on David for me to talk about him
8 like he were a skeleton.

9 Q All right. That's all right. Is it possible, you know,
10 sometimes -- let me put it this way, sometimes lawyers handle
11 whiplash cases where somebody injures their cervical muscle --

12 A Cervical disk, yeah.

13 Q Yeah, or the disk, mostly the muscles where it doesn't
14 show particularly with X-rays. And sometimes people can
15 fake this kind of a condition because nothing shows on X-rays?

16 A Mm-hmm.

17 Q In giving these tests is there a possibility or a
18 probability, whichever, that David Ismail could fake these
19 tests in any way and get a result that is consistent with
20 his history?

21 A Well, I wouldn't want to say that I
22 have never been fooled but I think it is rather difficult.
23 I think it is almost impossible. Usually a person taking a
24 psychological test, it is so hard to understand what the
25 person wants from you, you give them a strange task to do,
26 and they may be insulted, they may think it is a child's
task, and they shouldn't have to do it. I just don't know

21

1 in the ordinary run of population, I rarely see anybody who
2 I think is really capable of outmaneuvering, somebody who is
3 using these very-carefully-thought-out procedures.

4 Q It always has disturbed me a little, Doctor, that
5 psychologists can give a Rorschach Test, which I understand
6 to be an ink-blot test, does that make any sense, you make
7 any sense out of ink blots? A Well, it is like putting
8 a vacuum cleaner to somebody's head.

9 Q A what? A Well, I say, it is somewhat like
10 putting a vacuum cleaner to somebody's head, they don't know
11 what it is that you are asking them to see. It is
12 unstructured. I give you an ink blot, and I say to you,
13 "Will you tell me what it can look like?" Well, remember,
14 there might be some things that you would hold back a little
15 bit or be a little sensitive about. You might not say
16 something about something that looks sexual to you, but in
17 the main the people get occupied with the things they see in
18 the blots, then kind of without realizing it they have given
19 you the pieces that are kind of arranged uppermost in their
20 mind and kind of at different levels. They just kind of
21 exposed a structure to you of where their emotions, their
22 feelings, their images, their goals are in terms of their
23 responses.

24 Q Well, I suppose that I was trying to ask you, isn't it
25 ridiculous to give a test involving ink blots? Can you learn
26 anything from that? A You're putting me on.

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1 Q Well, all right. That's what I'm doing.

2 A It seems to me it is a very valuable tool. I have used
3 it a great deal and I get a lot out of it. And it seems to
4 be effective. From what I -- my follow-ups, they seem to
5 show that it is rather accurate, what you perceive.

6 Q Now, was there anything else you did besides take the
7 history of David Ismail as it relates to this case, his
8 religion, and so forth, and give him these tests? Was
9 there anything else you did that we should know about?

10 A I don't think so.

11 Q All right. Now, what conclusions did you reach from
12 all of these tests? What findings?

13 A Working through all of the material I just could not see
14 David as a cold, premeditated murderer. It does not fit
15 any of my findings.

16 Q Why do you say that? A Well, in the projective
17 material and in all of the interactions between me and the
18 interpreter I saw a tremendous human sensitivity, a great
19 deal of empathy, a kind of a dignity. There were so many
20 interpersonal qualities that I found in my tests and in my
21 interactions with David that for me to imagine him to coldly
22 sit down and kill somebody, it would seem to me it would be
23 the same thing as he killed himself. It just does not fit
24 the material I obtained from him. But that is, of course,
25 an opinion. It is a professional opinion, but it is an
26 opinion.

23

1 Q This -- A I did, also, I did also consider --
2 perhaps I shouldn't interrupt you though?

3 Q Go ahead. A I was just going to say, the other
4 additional point that I thought was rather important, is that
5 if we consider that he has some central nervous system
6 disfunction, that means that he has less emotional control
7 than an ordinary individual. That is one of the character-
8 istics of having a kind of degraded nervous system. It is
9 not that controllable. It fires unexpectedly.

10 Q Did you find that condition with David Ismail?

11 A Well, I certainly found the organic impairment.

12 Q Which would be consistent? A Which is consistent
13 with that kind of behavior.

14 Q And you found that through the testing?

15 A I found that through the testing.

16 Q And you base that not only on the testings but do you
17 base it on the history given? A Well, we also know
18 that if you truly drink, and understand he had a point 0.8
19 alcohol content in his blood, if you drink you also are
20 degrading, you know, your impulse control. And when you put
21 those two pieces together, the impulse control being degraded
22 by the drinking and by the organic impairment, it means that
23 you really, it is not a very controllable system. It does
24 not compare with a normal human being in any way. I mean,
25 the actions then are not very predictable.

26 Q Did he indicate to you anything in the history that you

1 had taken from him that he was very close to his father?

2 A Well, he certainly did talk very much about him, yes.

3 It was clear that he had a very deep involvement in his
4 father, and a particular church which is combined with a
5 sense of his identity as a person, as an Assyrian. He had
6 very strong, had a very strong, a piece here, three pieces
7 that kind of fit together, the race, the church, and his
8 father. They just seem to have become one.

9 Q The race, his church, and his father. Did he tell you
10 that some words were used to describe or -- strike that.

11 Did he tell you that the Patriarch had used some
12 vile words with reference to his father?

13 A Yes, he did say so.

14 Q Would that alone be sufficient for a man like David, as
15 you know him through the tests, to become impulsive, so to

16 speak? A I think the rage resulting from that kind of
17 thing is predictably very large, yes, not control.

18 Q Okay. Is your opinion -- you talked about memory, and
19 memory for design, that test shows that David Ismail was
20 normal; is that right? A Yes, he is within normal
21 limits.

22 Q Did David Ismail tell you that at some time or another
23 after the Patriarch had said something about his father that
24 he didn't remember what happened for quite some time afterwards?

25 A He said to me that he really didn't clearly remember
26 anything until he was taking a shower in the jail, from that

25

1 time, from the words of the Patriarch until he was in the
2 jail in the shower, that is the first time he came back to
3 full awareness.

4 Q Suppose I told you this, that he could remember pretty
5 clearly, I think, everything that happened up to a certain
6 point, and then when the Patriarch said something about his
7 father he indicates that he could not remember very much of
8 what happened until he took a shower. A Mm-hmm.

9 Q Is that consistent with your diagnosis?

10 A Well, it is certainly not inconsistent.

11 Q Well, could -- is that likely to happen with a man such
12 as you know him here, involved in all of these tests?

13 A There is, I have seen, and I have observed, other people
14 have observed that under a particular emotional load there is
15 a thing called a fugue that occasionally occurs in which --

16 Q What is a fugue? A Well, it is a term to
17 describe a type of hysteria.

18 Q Is it something like somnambulism? Sleepwalking?

19 A Similar to, except that to the outward person, to the
20 outward observer it would appear that the person is awake,
21 not asleep.

22 Q Now, you started to say that it appeared what?

23 A Well, the person appears essentially normal, that is,
24 you can talk and they will respond. It is like being in a
25 hypnotic state. It is like I attempt to induce a hypnotic
26 state in someone, and then I get them to a nice level where

26
1 they are accepting me, and they will now accept the reality
2 as I provide it. Which is like, to help them stop smoking,
3 or, you know, lose some weight or remove some, rather, get
4 through some kind of painful experience that is bothering
5 them. At that time the person can talk to you, but sometime
6 later when they are awakened they have no memory of what has
7 happened. You usually facilitate this by suggesting that
8 they not remember, but it is a very common event, and when it
9 occurs spontaneously we call it a fugue. And in this fugue
10 state it is like you almost pop into another personality.
11 You have got integrated behavior, you may function but you
12 simply have no recall of what has happened. One of the
13 simplest things that you can experience that is contemporary,
14 you are driving down the freeway and you are thinking about
15 something, and five minutes later you wonder where you are
16 because you just come back to wakefulness. Now, that isn't
17 altogether a fugue, but it is very similar to it. You just
18 simply did not have your attention there. There is no great
19 stress in that situation. Perhaps I am confusing the Court.

20 Q And to reach that fugue state does the mild brain
21 impairment, does the alcohol, does the religion, does the
22 paternal instinct in his case, so to speak, do all of those
23 factors or circumstances combine? A All those factors
24 make it, do indeed make it possible and probable that he
25 could be pushed out of the pain of being where he is and in
26 the identity he is in, just kind of pushed out, you know, and

27

1 momentarily not be aware of anything, not really be aware of
2 what he is doing. There is that possibility.

3 Q Are you telling us then, Doctor, that all your testing,
4 the history that you have taken from David Ismail, and the
5 results of your testing, make him out this peculiar person,
6 is that what you are saying? A I am not trying to make
7 him peculiar. I am trying to say that he can be more
8 vulnerable to this kind of an event. You know, I have only
9 his own report but he has told me of two previous instances
10 in which he had essentially a blackout, and he didn't remem-
11 ber anything for the course of several hours, and the next day
12 couldn't, didn't know all of these things that had happened
13 which he had done, one of which was to break half the crockery
14 in the house.

15 Q So is it your opinion then that this particular person,
16 David Ismail -- what is your opinion as far as the events that
17 transpired on the night of November the 6th as he had given
18 them to you? A Well, I don't think that I am really
19 in the position to try to interpret whatever the total meaning
20 of that scene is. Like, that is a task for --

21 Q But give me your opinion as to whether or not it is
22 consistent with a person that could (snapping fingers) act
23 spontaneously, No. 1; No. 2, could act and forget or not
24 remember, and act like he remembered? A My sense of
25 this man in my examination of him is that he did get pushed
26 out of his ordinary consciousness and does not remember

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1 because he was just in a different state.

2 MR. PESTARINO: Okay. Thank you. That's all.

3 THE COURT: Do you want to recess?

4 MR. ROBINSON: No. I'm just going to have a few
5 questions for the Doctor, then I am going to ask him to come
6 back tomorrow, Your Honor, with the Court's permission.

7 THE COURT: Can you do that?

8 THE WITNESS: If you ask me to, I'll have to.

9 CROSS-EXAMINATION

10 BY MR. ROBINSON:

11 Q All of these various tests that you administered to the
12 defendant, I take it you brought them with you today so we
13 could look at them? A No, I didn't bring them.

14 Q Can you bring them so we can all see what they are
15 tomorrow? A Sure.

16 Q What I would like you to do is bring every test that you
17 put on the board. Okay? A If you wish.

18 Q Okay. Just a couple other quick questions now.

19 Have you testified as an expert witness in psychology
20 in the Superior Courts of the County of Santa Clara on prior
21 occasions? A Several times.

22 Q Okay. And how many would that be?

23 A I think I might have been in the Superior Court, maybe
24 with this, three times, maybe four times.

25 Q Maybe four times. And how long have you been
26 practicing in this area? A Ten years.

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1 Q And do you recall the names of the cases in which you
2 testified in the Superior Court these three or four times?

3 A One was a man named Valdez.

4 Q Valdez. Okay. Do you recall his first name?

5 A Ricardo, I think.

6 Q Okay. And what sort of a case was that? The charge?

7 A The man had been in a holdup in a 7-Eleven.

8 Q Okay. What other cases? A Well, I realize that
9 another one, I didn't testify, just simply did some work for
10 Mr. Adams who is with La Casa.

11 Q Mike Adams, the defense attorney? A Mm-hmm.

12 Q Did some work for him? A For another person,
13 name of Valardas.

14 Q But he never called you to testify? A No, he did
15 not.

16 Q And did the D.A. ever call you to testify in that case?

17 A No.

18 Q What other cases? A Well, it isn't in the
19 Superior Court, but in the Federal Court some several, about
20 four or five years ago I was asked to evaluate a man who had
21 been involved in robberies of banks, and he was sentenced to
22 five years, and there seemed to have been some problem in the
23 sense that my evaluation was somehow not given to the judge.
24 And he discovered this, and I then testified in the Federal
25 Court not too long ago, about last year, and they decided to
26 essentially, I think, put him on probation at that time and

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1 they ended his time at McNeill because he had made a rather
2 fine, he had become a counselor at McNeill Island.

3 Q So you never testified before a jury trial in the
4 Federal Court then as to guilt or innocence, you simply did
5 work like if somebody is convicted they go to the probation
6 department, they get psychiatric help, psychiatric counseling,
7 that is the sort of work you did then? A No, I
8 testified in the court. The judge called me to ask me to
9 testify.

10 Q Was this in front of a jury? A No, it was in front
11 of a judge.

12 Q Just in front of a judge? And this was after the man
13 had already been convicted? A Five years later.

14 Q Five years later. Okay. What other cases?

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15 A I think that is about it.

16 Q Okay.

17 MR. ROBINSON: Your Honor -- I hate to do this to
18 you, Doctor, but it is important in terms of bringing in your
19 material so that we could all review it together -- I would
20 request that I can reserve my cross-examination of the doctor
21 until tomorrow morning. If counsel had told me that he was
22 going to call this doctor I could have been ready for him.
23 He indicated that he was just calling Dr. Rappaport. He
24 hadn't told me any of the witnesses that he is calling.

25 THE COURT: Well, let's approach the bench for a
26 moment.

1 (Discussion off the record.)

2 THE COURT: Can you come back tomorrow morning,
3 Doctor?

4 THE WITNESS: What time do you want me to come back?

5 THE COURT: How about 9:30 or a quarter to ten, and
6 try to get you out before noon?

7 THE WITNESS: All right.

8 THE COURT: Which would be better for you?

9 THE WITNESS: What are the choices? Mine?

10 THE COURT: 9:30 or a quarter to ten.

11 MR. PESTARINO: Maybe we can work him in in the
12 afternoon?

13 THE COURT: Would you rather go in the afternoon?

14 THE WITNESS: I am going to have to juggle my
15 schedule. It doesn't matter too much, as I recall, which way
16 I juggle it.

17 THE COURT: I think counsel would prefer to have you
18 in the morning.

19 MR. ROBINSON: That is correct, while the testimony is
20 fresh in the jurors' minds.

21 THE COURT: Ladies and gentlemen, in view of the fact
22 that this witness has testified and given an opinion, and
23 the District Attorney has not had an opportunity to examine
24 the basis for the opinion, I am granting him the right to a
25 reservation of cross-examination until tomorrow morning.

26 MR. ROBINSON: Your Honor, might I also obtain a copy

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1 of the doctor's report which I haven't been given up until
2 this time?

3 MR. PESTARINO: I'll give you one.

4 THE COURT: We'll see that you get a copy or a copy
5 can be duplicated.

6 THE WITNESS: Is there a duplicating machine here?

7 THE COURT: There is one in the building.

8 MR. PESTARINO: I'll give him one.

9 THE COURT: All right. Now, ladies and gentlemen,
10 it is three o'clock, and because of the fact that it was
11 expected that Dr. Nidevere would be here all afternoon no
12 other witnesses were scheduled. So we are going to have to
13 give you the rest of the afternoon off, which I am sure is
14 going to make you very unhappy. I have been talking to
15 counsel about the time of the trial, and as I indicated to
16 you earlier when we first were questioning you about being a
17 prospective juror, we estimated the time about three to four
18 weeks. My record shows this is the 9th day, tomorrow will
19 be the 10th day. Friday will be the 11th, and we should be
20 finished next week, I would think somewhere towards the
21 middle of the next week. You will recall that you will have
22 Thursday off, but we will probably go to work Friday of this
23 week. Okay. You will keep in mind the admonition I have
24 given you before and we will see you tomorrow morning at 9:30,
25 and I will try to get through with my law and motion calendar
26 in time. And Doctor, you will be asked to return. And so

1 will the defendant, Mr. Ismail will be ordered back. Okay.
2 See you tomorrow.

3 (Whereupon, Court adjourned until 9:30 o'clock a.m.,
4 March 24, 1976.)

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TENTH DAY

March 24, 1976

9:30 o'clock a.m.

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

THE COURT: Good morning, ladies and gentlemen. Please be seated. Let the record show the defendant is present, defendant and counsel are present, the jury is present.

Do you want Dr. Nidever back on the stand?

MR. PESTARINO: Yes, Your Honor, I think so.

THE COURT: Doctor.

MR. PESTARINO: Come forward, please.

DR. JACK NIDEVER,

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

THE COURT: I believe you are on cross-examination. You are reminded that you are still under oath from yesterday.

MR. ROBINSON: Good morning.

THE WITNESS: Good morning.

CROSS-EXAMINATION

(Resumed)

BY MR. ROBINSON:

Q. What I would like to do, first of all, is ask you about some of your qualifications to give this opinion that you have given. Okay?

You have to answer out loud.

1 A. Surely, go ahead.

2 Q. You told us about your educational background?

3 A. Yes.

4 Q. And you told us about your work experience?

5 A. No, I didn't really tell you about my work experience.

6 Q. Okay. I will get into that. Now, in addition to your
7 educational background and your work experience I take it
8 you have read literature in the field of psychology?

9 A. Well, I hope so, yes.

10 Q. So do I. You are the only one that can tell me that.

11 A. I have certainly read some of the literature in
12 psychology.

13 Q. Then I take it you have read scientific journals?

14 A. Certainly.

15 Q. And have you published any articles?

16 A. Oh, a few.

17 Q. What articles have you published?

18 A. Well, my doctoral dissertation was on muscular
19 tension.

20 Q. What did that deal with? A. It was an
21 attempt to lay the groundwork for using a physical method
22 to assess subjective tension and anxiety.

23 Q. Can you explain that for us? A. Well,
24 the surface muscles of the body can be measured electrically,
25 and what I did was I measured about twenty-four muscle
26 groups and connected that with some autonomic nervous

1 system measurements and a variety of other measurements, in-
2 cluding the time of day and the ambient temperature and one
3 thing and another, with the hope of showing with factor
4 analytic procedures, these are fancy statistical procedures
5 to show that things go together. And my attempt was to
6 demonstrate that there was a factor of muscular tension,
7 which I did, which could be useful in the field of clinical
8 psychology.

9 Q. Were you successful in that attempt?

10 A. Yes, I was.

11 Q. And does everybody who receives their doctorate in
12 psychology have to do a doctoral dissertation?

13 A. That is the general principle, yes.

14 Q. Now, in addition to your doctoral dissertation have
15 you published any other articles in the field?

16 A. I did some work when I worked for IBM. I did about a
17 half dozen research studies, only one of which was published
18 for the corporation. The one that was published had to do
19 with the efficiency of a human being using codes and eye-
20 hand coding versus machine coding.

21 Q. Okay. And one of those was published?

22 A. Um-hum.

23 Q. And where was it published?

24 A. It was published in the IBM Journal.

25 Q. Okay. And that is a journal of people that work for
26 IBM?

A. It is a rather fancy

1 journal, yes.

2 Q. Is the IBM Journal read throughout the community of
3 psychologists? A. Well, the items
4 that I worked on were essentially confidential so this was
5 circulated throughout the IBM Corporation.

6 Q. And what other articles have you published?

7 A. I published an article on police work. I have been a
8 consultant to the Sheriff's Department here for seven or
9 eight years. And I work with the Sheriff's Department in
10 developing ways to let their deputies relate better to
11 different ethnic groups in the community and minority groups,
12 including colored students. So in the California State
13 Psychologist I published an article about riots and police
14 work.

15 Q. Okay. And any other articles?

16 A. No. I published a piece on -- didn't really publish
17 it but developed a thesis that you could learn extrasensory
18 perception, and I did that in Zurich. It was an
19 experimental piece.

20 Q. And that was not published? A. It is in
21 the archives of the Zurich Institute, but it is not
22 published otherwise.

23 Q. Any other published articles? A. There may
24 be a couple but they are not all that important.

25 Q. Have you written any books? A. No, I
26 haven't written any books.

1 Q. Now, you told us that you have read scientific
2 journals. And have you read any psychological journals?

3 A. It would stand to reason that I have, yes.

4 Q. Okay. And what psychological and scientific journals
5 have you read? A. Well, you want me to
6 give you a full list of the, you know, of all of the journals
7 in psychology?

8 Q. Why don't I ask you specific ones?

9 A. Sure. I have read in all of them.

10 Q. Have you read the Journal of Abnormal Psychology?
11 And you are familiar with that journal?

12 A. I certainly have read articles in the journal, yes.

13 Q. What about the Journal of Psychology and the Law?

14 A. No, I haven't really read that.

15 Q. You haven't read that. Is there any special reason why
16 you haven't read that? A. I presume it is
17 a psychiatric journal. I don't read all of the psychiatric
18 journals.

19 Q. It has to do with psychiatry and courtroom testimony?

20 A. I am not a psychiatrist. I am a psychologist.

21 Q. Have you read a Journal of Nervous and Mental Disease?

22 A. I certainly have read articles in there.

23 Q. And what about the American Psychologist?

24 A. Well, that is the standard publication.

25 Q. That is the standard publication?

26 A. For the American Psychological Association.

1 Q. And you would have read that?

2 A. I have read articles there.

3 Q. What about books that you have read? What about the
4 Clinical Interaction by S. P. Sarason? Have you read that?

5 A. No, I haven't.

6 Q. Okay. Is that a rather well-known book in the field
7 of clinical interaction? A. Not to my
8 knowledge, no.

9 Q. Never heard of it? A. Well, Sarason
10 is an author I have read, but I haven't read that particular
11 book.

12 Q. You are familiar with what Sarason has to say?

13 A. I know something about Sarason.

14 Q. What about Psychological Testing by Anastasi?

15 A. Well, that book came out after I graduated from
16 school. Myself, I have looked at it, I didn't purchase it.

17 Q. And that book has come out in more than one edition,
18 hasn't it? A. Probably.

19 Q. What about Fifth Mental Measurement Yearbook by Oscar
20 K. Burroughs? A. That is a reference
21 text.

22 Q. Are you familiar with that? A. Um-hum.

23 Q. And what about the Sixth Mental Measurement Yearbook
24 by Mr. Burroughs? A. I have used it.

25 Q. And Seventh? A. I don't recall that
26 there is a seventh.

1 Q. Well, there is. Would you accept -- if I told you
2 there was would you accept that?

3 A. It is simply a reference volume, sure.

4 Q. And this reference volume by Mr. Burroughs on Mental
5 Measurement Yearbook includes the most important source of
6 information regarding psychological tests, doesn't it?

7 A. He attempted to be comprehensive.

8 Q. He gets all of the important psychological tests that
9 come out every year and he gives data regarding those tests,
10 doesn't he?

11 A. He gives a very brief
12 review of each test he has in that particular year and
13 indicates, you know, he indicates some bibliography you can
14 read to read further about the item.

15 Q. And I take it in your field it would be incumbent upon
16 you to keep up with the latest psychological testing devices,
17 wouldn't it?

18 A. Well, it seems that
19 would be required, yes.

20 Q. And do you do that? A. Sure.

21 Q. And the book by Mr. Burroughs covers up to the present
22 edition all available psychological tests and gives a brief
23 critique on how they are used, how they should be used and
24 various data regarding them? A. He doesn't

25 include all of the tests, as I recall. Some tests may be
26 in previous years and may not be reviewed, you may be
referenced back to the original journal or original year in
which this review appeared.

1 Q. Sure. So at the time he writes the book, first of all,
2 the Fifth Mental Measurement Yearbook, he includes all of the
3 tests at that time; the Sixth he encompasses new tests, and
4 in the Seventh newer tests?

5 A. Sure.

6 Q. Did you rely to some extent on the named journals and
7 books that I have previously mentioned in reaching your
8 opinion and conclusion in this courtroom today?

9 A. No, I don't think so.

10 Q. You didn't rely on any of those?

11 A. Well, I have been ten years in the field so I rely on
12 my own experience, too.

13 Q. Well, okay. You rely on your own experience. And what
14 else do you rely on? A. Well, I use all
15 of the material that seems to me to be significant in terms
16 of my reading and psychological meetings that I go to, and
17 my colleagues who are, also, on the staff of local
18 universities.

19 Q. Okay. Well, is the book by Mr. Burroughs a
20 significant book? A. Sure.

21 Q. In your field? A. It costs so much
22 money I don't happen to have it.

23 Q. That leads me to another question. How much are you
24 getting paid to testify in this Court?

25 A. My regular fee.

26 Q. Well, how much is that? A. I charge

1 \$60 an hour.

2 Q. Okay. And how much have you received to testify?

3 A. Well, up to this point I'm not sure, I sent Mr.
4 Pestarino a bill for somewhat over \$600 including a fee for
5 my interpreter.

6 MR. PESTARINO: Did you get paid?

7 THE WITNESS: It's probably, it's about to come.

8 Q. (By Mr. Robinson) Okay. So right now so far you have
9 billed for services rendered to Mr. Pestarino \$600?

10 A. Six hundred and forty, I think, including the
11 interpreter.

12 Q. Now, you told us that you rely a lot on your experience.
13 What sort of experience -- well, strike that.

14 You told us yesterday that you have experience
15 testifying in Courts, you have testified as an expert
16 witness in Courts approximately three to four times?

17 A. You asked me if I had testified in the Superior Court,
18 and I said to my knowledge three or four times. Then when
19 we went over it it seemed to me it was maybe two or three
20 times.

21 Q. And have you ever testified before a jury regarding a
22 criminal matter in Superior Court?

23 A. No. No, I haven't.

24 Q. You told us that you testified one time in Federal
25 Court?

A. Um-hum.

26 Q. And this testimony was after a man had been convicted

1 of bank robbery? A. Um-hum.

2 Q. This man was incarcerated in Federal institution?

3 A. That's right.

4 Q. Had been incarcerated there for approximately five
5 years?

A. Um-hum.

6 Q. Okay. And then you did an interview with this man in
7 the Federal institution?

8 A. No. No, before
9 the man was tried originally I did an evaluation for, at
10 the request of his attorney and a referring psychiatrist.
11 They used some of the information from my evaluation, but at
12 the time that the man was to be sentenced, as I recall, they
13 didn't consider that he might require further psychiatric or
14 psychological evaluation, so this point was missed. He was
15 then sentenced. After he was in jail he corresponded with
16 me, and I provided him with a letter which was essentially
17 a summary of my report. And the judge who had tried the
18 case in reviewing this decided to review the matter once again
19 in Court, and at that time I did testify, and the judge felt
20 that there had been some abuse of the rights the man should
21 have had. And because he had made such a good effort to
22 become, as I said, a counselor and has now gone out to work
23 with people who leave the prison, they, at that time, I
24 believe put him on, they would have put him on parole at
25 that time, I assume, but he had left McNeill at that time
26 and he did not return.

Q. And he was in McNeill approximately five years?

1 A. I believe so.

2 Q. For the bank robbery? Now, do you know the standard
3 time that somebody serves in a Federal institution for bank
4 robbery?

5 MR. PESTARINO: This is irrelevant it seems to
6 me unless counsel is going to connect it up.

7 MR. ROBINSON: It goes to his qualifications and
8 experience, Your Honor.

9 MR. PESTARINO: How does that --

10 THE COURT: Well, it seems a little far-fetched
11 except that --

12 MR. PESTARINO: I'll withdraw the objection.
13 If you want to ask him go ahead.

14 Q. (By Mr. Robinson) Do you know?

15 A. Do I know what?

16 Q. The standard amount of time that somebody serves in
17 a Federal institution for bank robbery if they are convicted?

18 A. My recollection was this man could have served --

19 Q. Well, "could have," that is maximum. The standard
20 that they serve, the average? A. I'm not

21 familiar with the average they serve.

22 Q. Okay. And although you did do an interview with this
23 person, you did some test on this person at the request of
24 his attorney, you didn't testify in Court regarding the
25 guilt phase of the trial, did you? A. The man

26 had confessed to the charges.

1 Q. He confessed to the charges?

2 A. Yes.

3 Q. Okay. And you told us that you also did some work
4 with Ricardo Valdez? A. That is true.

5 Q. Did you testify in Court regarding that work?

6 A. Yes, I did.

7 Q. When was that done? A. Within the
8 last six months.

9 Q. Okay. And that was in Santa Clara County?

10 A. Yes, it was.

11 Q. Okay. And was that testimony given before a jury on
12 whether or not Mr. Valdez was guilty of robbing the seven
13 eleven?

14 MR. PESTARINO: Wait a minute. That is assuming

15 --

70 16 MR. ROBINSON: He told us yesterday Mr. Valdez
17 was a robber of seven eleven. Are those the facts of the
18 case?

19 THE COURT: Just a minute. What is the objection?

20 MR. PESTARINO: I may be wrong. Isn't that
21 assuming something not in evidence, or was that the
22 testimony yesterday?

23 THE COURT: I have a recollection that the
24 doctor testified that he was involved with a robbery. Now,
25 whether he actually confessed or did it --

26 MR. PESTARINO: -- or seven eleven?

1 THE COURT: I think he mentioned the seven
2 eleven.

3 MR. PESTARINO: Then I'll withdraw my objection.

4 Q. (By Mr. Robinson) Did the facts of the Valdez case
5 involve a robbery of a seven eleven?

6 A. Yeah, I believe so.

7 Q. And did you testify regarding -- did you testify in
8 front of a jury in that case? A. No, I don't
9 believe so.

10 Q. Okay. Once again you came into Court and gave your
11 opinion after a man was convicted?

12 MR. PESTARINO: Wait a minute --

13 THE WITNESS: No, I am not an ex --

14 MR. PESTARINO: Excuse me --

15 MR. ROBINSON: He wants to answer he is not an
16 expert. Let him.

17 MR. PESTARINO: Can I make an objection?

18 THE COURT: Certainly.

19 MR. PESTARINO: I don't recall anything about a
20 conviction. Isn't that assuming something not in evidence?

21 THE COURT: Well, it is cross-examination.

22 MR. PESTARINO: Yes. But counsel is assuming
23 that this man was convicted. Unless the witness testified
24 to that, and I don't recall that.

25 THE COURT: Well, we haven't given him an
26 opportunity. But it assumes facts not in evidence in this

1 case. But if it is for the purpose of qualification or
2 determining the doctor's ability or credibility in giving
3 an opinion, I think counsel should be given great leeway.
4 In the event that the man was not convicted it should come
5 out or --

6 MR. PESTARINO: Why don't he ask the question if
7 the man was convicted.

8 THE COURT: Well, my feeling is this, Mr. Pestarino,
9 that inasmuch as I gather from the doctor he didn't testify
10 during the guilt phase of the trial, we are going to a
11 different aspect of it. So --

12 MR. PESTARINO: I'm not even sure there are two
13 phases of the trial.

14 THE COURT: Why don't we let --

15 MR. PESTARINO: Why don't we ask the witness those
16 questions, they lay the foundation?

17 THE COURT: All right. Rephrase it.

18 Q. (By Mr. Robinson) Was Mr. Valdez when you interviewed
19 him, had he been found guilty of robbery of a seven eleven?

20 A. Well, now that - -

21 Q. Yes or no. A. Now that you
22 prompt my memory I believe I remember the conditions there,
23 he had been sent to Vacaville for an evaluation.

24 Q. Can you answer my question? Is somebody sent to
25 Vacaville if they are acquitted of seven eleven robbery?

26 A. I assumed that the man had been convicted at that time.

1 yes.

2 Q. Because he was sent to prison, right?

3 A. Well, I understood that he was at Vacaville for
4 evaluation, and I don't -- I assumed that he had been
5 convicted but the matter was to be decided in terms of what
6 then happened to him.

7 Q. Do you know what Vacaville is?

8 A. Well, I'm sure it has more than one function. It has
9 a medical facility there. And it is also a holding area
10 for, I think, newly convicted people.

11 Q. Do you know what Vacaville is?

12 A. I just said what I thought it was.

13 Q. Do you know it to be a prison?

14 A. I believe it is part of the prison system, yes.

15 Q. And do you know that anybody convicted of any felony
16 in the State of California that is sent to prison first goes
17 to Vacaville where they give them tests, then they decide
18 what penal institution to send the man to? Do you know
19 that?

20 A. I don't know these things for
a fact.

21 Q. You don't know that. Okay. Now, you told us that you
22 have been practicing in this area for approximately ten
23 years?

24 A. That's right.

25 Q. Okay. And what type of practice do you have?

26 A. It is a clinical practice.

Q. All right. And what sort of people do you see?

1 A. Most all types.

2 Q. Well, how much contact have you had with clients
3 accused of crimes? A. Maybe a dozen
4 cases.

5 Q. A dozen cases. So probably on the average of once a
6 year? A. Seems like I have had
7 more in the last five years than I did the first five.

8 Q. And how many clients have you examined that have been
9 accused of murder? A. I haven't .

10 Q. Never have? A. No.

11 Well, in the state -- in the state hospitals where I
12 have worked I have done some evaluation of people who have
13 been there by reason of insanity and they had committed
14 murder, but that isn't to testify in a Court.

15 Q. Okay. So you have never testified in Court regarding
16 a murder? A. No. No, I haven't.

17 Q. Now, you told us yesterday your conclusion based upon
18 your test was that you can't see David as a cold premeditated
19 murderer? A. That's right.

20 Q. He doesn't fit any of your findings?

21 A. No, he doesn't.

22 Q. How many cold premeditated murderers have you
23 examined? A. Well, it's a good question.

24 To my knowledge I really haven't examined any cold blooded
25 murderers.

26 Q. All right. How many books have you read regarding

1 cold blooded murderers, as you put it?

2 A. I have looked into some of them. I have really, it is
3 not an interest of mine to examine cold blooded murderers.

4 Q. Okay. Now, can you define murder for me, the legal
5 definition.

6 A. Well, if some act of
7 yours results in the death of another person, I would assume
8 that falls in the class of murder.

9 Q. So if I am driving down the freeway and I have a heart
10 attack and my car crashes into a pedestrian under your
11 definition that would be murder? And kills the pedestrian.

12 A. You certainly have cost somebody their life.

13 Q. And under your definition that would be murder?

14 A. Well, I am not a legal expert, if that is what you are
15 trying to establish.

16 Q. Well, I'll stipulate to that.

17 A. Well, then why are we doing this?

18 Q. Counsel called you, sir.

19 Okay. The definition of murder is the unlawful
20 killing of another human being with malice aforethought.

21 Now, it is your understanding of malice
22 aforethought that it requires the defendant to have some
23 ill will or hatred toward the person he kills?

24 A. It sounds like he would wish the person dead, yes.

25 Q. Okay. So he must have some ill will or hatred toward
26 him, right?

A. From your definition,
yes.

1 Q. Sir, if I was to tell you that the law says that
2 malice aforethought requires no ill will or hatred toward the
3 person killed -- strike that.

4 We will get to that when we instruct the jury.
5 Okay.

6 You said that Mr. Ismail wasn't a cold premeditated
7 murderer. Describe the legal definition of premeditate.

8 A. Well, to premeditate is to think out ahead of time
9 that you are going to do something.

10 Q. Consider beforehand, right? A. Yes.

11 Q. Okay. Was Mr. Ismail capable of considering something
12 beforehand? A. He certainly is capable
13 of planning ahead, yes.

14 Q. Okay. Now, assume, although there is no factual basis
15 before this jury, assume that Mr. Ismail had killed five
16 people before he had come into contact with you. Okay.
17 Would your opinion regarding him change?

18 A. I guess it would depend how he killed the people.

19 Q. How he killed the people? A. Um-hum.

20 Q. Now, let's talk about the field of psychology and
21 data collection and observation. I take it that is part of
22 your clinical training, correct?

23 A. Um-hum.

24 Q. Okay. How do you define the term, "reliability"?

25 A. Reliability refers to the possibility of reproducing
26 the same result given the same stimulant under the same

1 condition.

2 Q. I differ with you on one ground. Is it the possibility
3 or probability of producing the same result given the same
4 stimulus?

5 A. Well, possibility is just a subclass of probability.

6 Q. Well, if you want to say something is reliable, sir,
7 do you say it is possible or probable?

8 A. You establish a probability figure. You know, it is
9 highly probable or it is less probable.

10 Q. And so is it fair to say reliability, using my working
11 definition, is the probability of the existence of a fact?
12 Is that one fair way to do it?

13 A. It doesn't have much meaning to me.

14 Q. Okay. What about this, "reliability is, given the same
15 circumstances, the observer who perceives the
16 fact will perceive it again"?

17 A. That sounds closer.

18 Q. So for an example of reliability for myself to
19 understand, because I am not a psychologist, for example,
20 suppose we had an intelligence test administered to a ten-
21 year old boy at 9:00 o'clock in the morning, okay?

22 A. Um-hum.

23 Q. And this was on Monday morning, okay? All right.
24 So we have intelligence test, ten-year old boy, administered
25 9:00 o'clock on Monday morning, and this boy achieves an
26 I.Q. on that test of one hundred ten. Then if we gave him

1 the same test at 10:00 o'clock in the morning on Tuesday
2 morning, if the test is reliable at all, the I.Q. test that
3 was given him on Monday or Tuesday, he should receive a score
4 of one hundred ten on his I.Q., right?

5 A. Well, I don't think so. If I give somebody the same
6 test on two days I would expect them to have learned quite a
7 little bit how to take that test in the meantime. I would
8 expect them to score higher.

9 Q. You would? A. Sure.

10 Q. If you gave somebody a test on Monday, an I.Q. test,
11 and he gave you answers, right?

12 A. Um-hum.

13 Q. Then if you gave him the same test on Tuesday, and
14 he gave you answers, you would expect him to score higher on
15 Tuesday than on Monday? A. Yes, I think so.

16 Q. All right. Without having given him the answers on
17 Monday? A. Um-hum.

18 Q. Why do you say that? A. Well,
19 because he gets all of that time in between to subconsciously
20 think through the questions. He has much more, therefore
21 much more computing time to kind of arrive at an answer
22 without you having given him a whole lot of information.
23 Then he always does get some information from the examiner,
24 whether it is in the expression of the face or whatever,
25 there is an interaction going on there. For this reason we
26 develop alternate forms of tests if we are going to check

1 reliability and we are going to test across short intervals
2 of time.

3 Q. So then if this same individual was given this test
4 on Wednesday, what would you expect?

5 A. Well, it is still too short an interval to avoid the
6 learning that has taken place.

7 Q. Let me ask you this, suppose this individual was given
8 the test on Monday, a ten-year old boy given the test, okay?
9 And he received a score of one hundred ten, was given the
10 same test on Tuesday, and he received a score of seventy-
11 two, same test on Wednesday and he received a score of one
12 hundred eighty, same test on Thursday, and he received a score
13 of one hundred forty-three, would you say this was a reliable
14 test or unreliable test? A. The test
15 sounds unrelated to his behavior.

16 Q. Can you answer the question, please?

17 MR. PESTARINO: He has answered it.

18 THE WITNESS: I just answered it. It has
19 nothing to do with reliability. Reliability is not done on
20 single individuals. It is done on groups of people.

21 Q. (By Mr. Robinson) Reliability isn't done on single
22 individuals? A. No, it is not.

23 In order to check out something like that you take a group
24 of people and you do them, you do different things with them,
25 then you see which proportion of them do thus, and so, then
26 you establish a probability figure in terms of reliability

1 of the test.

2 Q. So it is impossible to do a reliability, have
3 reliability based upon one individual?

4 A. Ordinarily one does not use one individual.

5 Q. How many Assyrians who live in Canada who are charged
6 with murder have you ever interviewed?

7 A. I think I have interviewed one Assyrian living in
8 Canada accused of murder.

9 Q. And that was Mr. Ismail? A. I believe
10 so.

11 Q. How many Assyrians living in Canada have you ever given
12 tests to, I.Q. tests? A. I have given one.

13 Q. To who? A. To Mr. Ismail.

14 Q. Would you say that the tests you gave to Mr. Ismail
15 were reliable? A. Sure.

16 Q. Now, let's talk about reliability in terms of
17 courtroom testimony, okay? If a witness tells three
18 different stories on three different occasions would he be
19 reliable? A. He doesn't sound too
20 reliable.

21 Q. And once again, our definition of reliability, that we
22 will get back to is: Given the same circumstances the
23 observer who perceives the fact will perceive it again?

24 A. It is also a subject of the heads that are listening
25 to the information.

26 Q. I see. So the person who elicits this information

1 from the person plays a big factor?

2 A. I think that is clearly true.

3 Q. So, all right. Let's talk about validity.. Are you
4 familiar with that term? A. It is a term

5 I am familiar with.

6 Q. And it is a psychological term used in your
7 profession? A. It is a term used in
8 psychology.

9 Q. What is your definition of validity?

10 A. Validity implies that you are measuring what you think
11 that you are measuring.

12 Q. Put in basic English, it means that if you have X you
13 can assume Y? A. That doesn't mean
14 anything to me. What I just said is meaningful to me.

15 Q. It might not be meaningful to us, sir. Is validity
16 the relationship between one factor, one variable to
17 another? A. Well, if you make one
18 variable and measure, and you say that you want to establish
19 that you can measure the other variable then that is
20 validity.

21 Q. Validity means what a fact means, huh? If somebody
22 says, you know, I have an I.Q. of one hundred ten, okay?
23 And assuming for the purposes of this discussion that that is
24 reliable, validity means what's that one hundred ten I.Q.
25 mean, right? A. No, validity means am

26 I measuring intelligence because that is what I am assuming.