

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,) Case No. A98-0158-CR (JKS)
)
Plaintiff,)
) Anchorage, Alaska
vs.) Wednesday, February 24, 1999
) 9:04 o'clock a.m.
CONSTANCE M. WALKER,)
)
Defendant.)
)
_____)

CONTINUED EVIDENTIARY HEARING ON DEFENDANT'S MOTION IN LIMINE
TO PRECLUDE ADMISSION OF DEFENDANT'S POLYGRAPH EXAMINATION

VOLUME 2

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOHN D. ROBERTS
UNITED STATES MAGISTRATE JUDGE

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ANCHORAGE, ALASKA - WEDNESDAY, FEBRUARY 24, 1999

(Call to Order of the Court at 9:04 a.m.)

(Defendant present)

THE CLERK: All rise. His Honor the Court, the United States District Court for the District of Alaska is now in session, the Honorable John D. Roberts presiding. Please be seated.

THE COURT: We will continue at this time with the evidentiary hearing, A98-158 Criminal, *U.S. versus Constance Walker*. Defendant and counsel are here. The witness is present, should be sworn again for today's testimony. Would the clerk administer the oath, please?

THE CLERK: Would you please raise your right --

DAVID C. RASKIN, PH.D., DEFENDANT'S WITNESS, RESWORN

(Recalled)

THE CLERK: Thank you. If you'll please be seated. For the record, please state your full name and spell your last name.

THE WITNESS: David C. Raskin, R-a-s-k-i-n.

THE CLERK: Thank you.

CROSS-EXAMINATION, CONTINUED

BY MR. COLLINS:

Q Good morning, Dr. Raskin.

A Good morning, Mr. Collins.

Q You retired from the University of Utah in 1995; correct?

A Correct.

Q And since that time -- did you move up to Alaska shortly thereafter or --

A The -- actually I -- I moved up before my official retirement. I had no more duties, so I moved probably a week or two before. My birthday was on the 28th, so actually I was -- I had no more duties, but my early retirement plan didn't start till my birthday, so technically I moved just before that.

Q And that was in what month?

A July of '95. Think I left Salt Lake City on July 1st.

Q Since that time you have spent most of your time administering polygraph examinations and testifying as a polygraph expert?

A Professionally I've been -- more time fishing, but in terms of my professional activities, testimony, polygraph exams, consultations, and scholarly writing and research.

Q And in addition to testifying as a polygraph expert, you -- most of the cases that you refer to in your curriculum vitae in Alaska have been attacking statements of sexual abuse victims?

A I don't attack sexual abuse victims. I provide evaluations of investigative procedures and interview procedures.

Q And you've been an expert -- you've been offered as an expert on fabrication of memories?

A No, I don't think that'd be quite accurate. I -- one of my

areas of expertise is human memory. And the testimony and the offer there of my expertise relates to how human memory and reports may be affected by interview procedures and other contacts with an individual and other experiences during intervening times from an incident to a report.

Q How much do you charge to administer a polygraph examination?

A It varies. It depends upon who requests it and how complicated it is. My hourly rate for doing work for government agencies and public defenders and indigent cases is 150 an hour.

Q And how much do you charge to testify in court in support of those results?

A The same.

Q You don't charge a flat rate for testifying per day?

A I sometimes do, if I have to travel a long way, I -- because I can't do anything else. But like when I come up here, where I -- it's close by, it only takes me an hour to get here, I normally charge by the hour, for the hours that I work.

Q So \$150 per hour?

A Yes.

Q Yesterday we were examining the topic of -- back up. You -- in the chart that you got -- I believe it's marked CC, Defendant's Exhibit CC, the first two lines from the top, TR

and AR, represent breathing; correct?

A Correct.

Q And SC is skin conductivity?

A Yes.

Q Even though in some places it's referred as, I believe, GSR?

A Yes, that's the older term, but this is a more specific, correct term.

Q The BP is blood pressure or blood volume?

A Blood pressure. And it actually measures changes in blood pressure, not absolute pressure.

Q And the bottom is the plethysmograph which I've had work over pronouncing, but that's the finger test; right?

A Right. You got that correct, plethysmograph.

Q The effect of a person breathing upon their total body responses or the reactions of other physiological parts -- the physiological reactions is affected by breathing; correct?

A May be affected by breathing. Not necessarily.

Q For instance, if a person takes a deep breath, they're super-oxygenating their system, as opposed to a normal breath, which just oxygenates it?

A I think that's probably an overstatement.

Q But when a person takes a deep breath, they're taking in more air than they do with a normal breath; correct?

A Right, but the major effect of that is not more oxygen, but to ventilate the lungs to remove carbon dioxide, which is a negative influence on the chemistry of the body. The actual oxygenation wouldn't be greatly increased unless the person hyperventilated continuously, such as divers do, like skin divers, when they're diving really deep they'll take many, many breaths. That super-oxygenates. But one single breath wouldn't have much effect.

Q I stand corrected then. A deep breath, however, can disrupt responses in other physiologically measured aspects of the human body?

A It can. It depends on the individual. Some individuals show a strong linkage like that, is the term that's used, and some individuals show very little linkage. So you have to evaluate it on an individual basis.

Q The -- one of the aspects -- or one of the things that polygraphers attempt to do is to ensure that an individual's not moving in any way during the administration of a test; correct?

A Well, you can't force a person not to move. Some people think you can. You can advise them not to move. But you can't prevent them. And some people engage in -- you know, show movements, and they're not even aware of them. Nervous habits, things like that.

Q Physical movements can have an effect upon --

A They can.

Q The test in this case -- back up. The -- some polygraphers videotape polygraph examinations; correct?

A Some do. It's relatively uncommon.

Q And some audiotape?

A Correct. I always audiotape.

Q And you're aware of cases where no such videotape or audiotape is used?

A That's correct. That's the more common practice. Government polygraph examiners typically do not audiotape or videotape and have a policy against doing it.

Q And most government polygraph examinations are not introduced into court?

A That's true.

Q Your preference is to audiotape, though?

A Yes.

Q And others prefer to videotape?

A Yes. Very few, though.

Q And there are no standards applying to who's going to audiotape, who's going to videotape, or not to record it in any way?

A Yes, there are standards. The federal government has a policy in general of not taping at all, because they don't want

anybody to know what they did, basically. So they -- that is their standard. The standard that I abide by is also the standard that is required in the two states in which I'm licensed, in Utah and New Mexico. In Utah you must audiotape all polygraph examinations, and in New Mexico you must audiotape if the evidence is going to be utilized as evidence in court. So that's a -- that's a standard in some places. Depends on the jurisdiction. And then the rest would vary from locale to locale and department policy and law enforcement. Some -- some local law enforcement agencies require taping and others don't.

Q So it's like a patchwork throughout the country?

A It's like everything else in our country. Like the legal system, it varies from one jurisdiction to another.

Q The -- you were involved in the *DeLorean* case; correct?

A That is correct.

Q And in that case you were involved in the polygraph examination presented or administered by Mr. DeLorean?

A Not by Mr. DeLorean.

Q Well, by his defense?

A I administered a polygraph to Mr. DeLorean. The FBI also administered a polygraph to Mr. DeLorean.

Q And in that case a videotape was made?

A Yes.

Q And ultimately that -- those polygraph examination results were not admitted?

A That's correct.

MR. McCOY: I'm going to object, on the grounds of relevance. I think the *DeLorean* case was some 20 years ago. I don't know if we're going to go a long way with this, but it seems irrelevant.

THE COURT: It goes to the weight.

MR. McCOY: Goes to the weight.

THE COURT: Overruled.

BY MR. COLLINS:

Q And one of the things that happened in that case was Mr. DeLorean was rather fidgety?

A Yes. He was a very tense, fidgety person throughout the entire examination.

Q And that was captured on videotape?

A Yeah, to the extent that you could see that, yes.

Q And one of the reasons why was -- the polygraph examination was thrown out was because of his constant moving around?

A Well, I need to clarify that. The judge ruled favorably on all of the issues and contrary to the government's position to keep that out, except he said that with regard to the movements, although he thought I could have explained that further, it was not done completely in the hearing, and

therefore he had concerns that there was a 403 issue there because of the unresolved nature of the -- the explanations for those movements. The judge informed me later that he was upset that I didn't have the opportunity to further clarify that, or he would have admitted the polygraph.

Q That's your recollection of the judge's --

A That's what the judge told me personally. It's not a matter of recollection. That's exactly the conversation.

Q In essence, the sideshow would have taken over the circus?

A Pardon me?

Q The sideshow of trying to admit the polygraph in the *DeLorean* case would have overtaken the focus of the trial?

A Is that your opinion? I -- I don't know where that comes from.

Q Well, let me back up.

MR. McCOY: Your Honor, I would object, and just ask that he move on to another question.

THE COURT: It's cross-examination. The Court has to allow a little bit of latitude here, but there'll be a limit to it.

BY MR. COLLINS:

Q One of the concerns was about the amount of time, the amount of testimony, the amount of attention to a collateral issue during the trial would have taken up time that could have

been directed towards the ultimate issues of the case?

A I think that's incorrect and was not stated by the court to my knowledge. That was not the court's reason for failing to admit it. The court's main reason was because, as I stated before, and in fact his only reason, was that he felt that because the testimony did not put to rest certain questions that were raised about the movements at the hearing, that he felt there could be a weakening of the probative value of the evidence. And because of that, relative to the possible effects of the testimony, he felt that it should not be admitted. But that was his -- his written opinion -- his opinion on the record. And as I stated, he told me personally that had that been clarified at the hearing, he would have admitted it.

Q Do you recall appearing on the KALL radio show, radio program, 17 May 1984, in which you said that -- after talking about the fidgetiness of Mr. DeLorean and that because he had moved a number of times, that the basis on which the judge decided not to admit it at trial, because you would have had then about a "three-week swearing match essentially between the government witnesses trying to discredit us and between our trying to present the results as we see them," that that would take a lot of time and probably the jury would end up saying, "Well, it's a wash, let's just forget about it." Recall saying

that on the radio show?

A I probably did.

Q In the *Orions* (ph) case, who administered the test, the polygraph examination? Do you recall?

A There were two examinations. As I recall, one was administered by Tom Ezell (ph). And I think the other one was administered by Cy Gilson (ph). There was a test on Mrs. Orions and a test on Mr. Orions.

Q Isn't it true the accuracy of any study involving polygraph depends in large part on the reliability and willing participation of the subjects?

A I'm not sure what you mean by the reliability of the subjects. I -- I don't know what that means at all.

Q Well, let's say about the willing participation of the subject.

A Well, if the subject is being forced to take the exam, that's not a good circumstance in that resentment and anger and things like that can produce false positive results in a truthful person.

Q And you would agree the polygraph doesn't truly measure lies?

A The polygraph just measures physiological activity, as I mentioned yesterday.

Q Would you agree that laboratory settings differ

considerably from real life, because it's impossible to test or assess ground truth in the field?

A No, that's not correct. The first part of your statement is generally correct in the sense that there are differences between a laboratory and the real setting. That's quite obvious. And one has advantages over the other and vice versa, for research. But it is not impossible to establish ground truth in the real life situation. If it were impossible, then we wouldn't even have courts.

Q The problem with a laboratory result -- setting is, while you try to give an incentive by the \$15, or let's say \$100 for today's terms, let's say --

A Okay.

Q -- a hundred dollars -- a hundred-dollar incentive to beat the exam doesn't in any way compare with the threat of going to prison, does it?

A Well, it does in many ways compare to the threat of going to prison, and in some ways it doesn't. To say that it doesn't in any way I think is incorrect. Psychophysiological, anything that motivates a person to succeed on the test can have substantial effects on their physiological reactivity. In fact, our research shows that the underlying psychophysiological structure -- and it's in some of the publications that were introduced as exhibits yesterday -- the

underlying psychophysiological structure between a laboratory situation with money at stake and a criminal investigation situation with possible incarceration as a consequence, those two structures have great similarity. The major difference is that, when you go from the laboratory to the field, the intensity of reactivity in general increases such that the reactions to both types of questions, relevants and controls, gets somewhat greater. But the differential remains the same. So in terms of the underlying theory of polygraph, it doesn't seem to matter very much, except that there's perhaps a slightly increased risk of false positive errors, of innocent people failing the test, but not false negative errors of guilty people passing the test.

Q And that's research done on the comparison control question format?

A Yes.

Q With the probable lie as a comparison?

A Yes.

Q Part of the exhibits admitted were documents related to the Department of Defense Polygraph Institute, Dr. Barland's notes, whatnot, report or --

A His --

Q -- fax copy?

A His report and testimony and published articles.

Q And it's your representation that the Department of Defense uses a -- directed lie examinations; correct?

A They teach it and many agencies utilize it.

Q The method of score that you use in your directed lie -- well, let me back up -- the direct -- the examination -- the directed lie that you administer uses a composite score. It combines the scores to achieve an overall rating; correct?

A In part. It depends upon the type of tests being conducted. If it is a single-issue test where the only questions are, "Did you shoot, did you shoot, did you shoot," kind of thing, then -- or if it's -- the questions are such that the person's either lying or telling the truth to all questions, so that they're either lying to all the questions or telling the truth to all the questions, because it can't be a mixture, then you simply add up the total score and utilize that as the basis for a decision. If, however, the -- the relevant questions could be answered, some truthfully and some untruthfully, because of the nature of the situation and the types of questions, then you add them up totally to see what the overall result is that you also add up that -- inspect the totals for each relevant question separately to determine if there are patterns that show them all to be the same result, either all truthful or all deceptive, or whether there's some mixture.

Q The *Orions* or *Orions* case, the total test score that you testified to, was that irrespective of inconclusive results to one or more questions or serious fluctuation in the scores across charts, you used the combined total score?

A I had a little trouble following that. I'm sorry.

Q The results -- the test -- the scoring method that you used in the *Orions* case, the total test score --

MR. McCOY: Your Honor, I object, again on relevance grounds. We're not here on the *Orions* case. We're here on a *Daubert* hearing for this particular test.

THE COURT: Overruled.

BY MR. COLLINS:

Q The scoring method used in the *Orions* case and testified to -- the score that you use -- scoring method you used was that you used a total test score irrespective of inconclusive results to one or more questions or serious fluctuation in scores across the charts; is that correct?

A I don't even know what that means, I'm sorry. You'd have to show me the scoring so I can tell you what I did. I can't tell you off the top of my head what my score sheet looked like.

Q Do you recall that the *Orions* case, the hearing was held in the early part of 1998?

A That sounds about right.

Q The Department of Defense scores their -- which you represent to be a directed lie test -- different from the way that you score tests; correct?

A There are some differences in their scoring system compared to the Utah scoring system.

Q The -- in fact, the Department of Defense considers all tests in which the result to -- on one or more individual questions makes it inconclusive or there's a significant fluctuation across the charts to render the examination inconclusive overall; correct?

A I believe that's quite correct. I -- I think that Dr. Barland has the position that if there's a lot of fluctuation over the charts, he personally calls it inconclusive. And I think that's what he testified to at *Orions*. But that is not part of the scoring rules for the Department of Defense that they teach at their school, to my knowledge. They teach that you add them up for all the charts and come to total scores. And whether there are fluctuations from chart to chart, which there always are, that doesn't render the examination inconclusive. That's -- and there's absolutely no scientific support for the proposition that you just read. It's incorrect.

Q And Dr. Barland is employed full-time in the area of polygraphy; correct?

A Well, that's what he represents. I know he does a lot of intelligence work. His position's actually funded by the National Security Agency, and he works on a lot of classified things that may or may not relate to polygraphs. I don't know, it's classified.

Q And he's performed extensive research on polygraphy?

A He has, yes. He's devoted a lot of his career to that since he studied with me.

Q And he supervises students in the area of polygraphy?

A I couldn't tell you what his supervision duties are. I don't believe he does that now. In fact, as far as I know, Dr. Barland hasn't done any actual polygraph tests for more than 10 years. He's testified to that.

Q The test that you administer in -- the direct lie test, that means they're directed to lie to some questions, so they're told to lie, and that's the thing to which you're going to compare the relevant question; correct?

A The reactions to those --

Q The --

A -- questions, correct.

Q Yes. And it's intended that the person say "no"; because you preformulated these questions; correct?

A Yes, they're simple questions, as we discussed yesterday.

Q And the purpose of those is to get a "no" response?

A Yes.

Q And you've testified -- well, in the *Orions* case, Ms. Orions actually answered "yes" to one of the directed lie questions?

A That's correct.

Q And you indicated that it didn't matter?

A It doesn't matter in terms of scoring the test. It does matter in the sense that you then tell the person after that chart that you want them to answer "no." And if they continue to answer "yes" to a directed lie, it would increase the risk again of a false positive, because it wouldn't function very strongly as a control or comparison question. But if a person, having been instructed to answer "no" on a chart answers "yes" -- which is rather common, actually; people get confused about that -- that is a scorable question; in fact, the scientific research shows very clearly that it is appropriate to score that question.

Q In the field study that you conducted, everybody answered "no"; correct? They followed your directions?

A Probably not. I think that we didn't -- when you say the field study, you mean the 1988 --

Q 1988.

A I'm sure that if we went back and looked at those original charts, we would find some instances of people answering "yes,"

because about one out of -- oh, let's see -- it's about one out of five people at least answers "yes" to a -- a control question, whether it be a probable lie or a directed lie. Even with probable lie questions, one out of five people I think answers at least one with a "yes" and then they have to -- that has to be discussed with them. So I think if we went back and looked at it for that purpose, we would find a number of instances where people answered "yes," just as we did when we went back through a series of laboratory studies to assess this question and published an article about it showing that it's much more common than the government people claim that people answer "yes" even though the reviewed answer was "no."

Q So there are some information that's not contained in your reports, your field studies and laboratory results, about inconsistent -- or the failure to follow the protocol --

A Oh --

Q -- answer "no" to these questions?

A That particular article is not in these exhibits. I can certainly produce it, but there's lots of articles we didn't put in these. The book would be too heavy to carry.

Q Have you -- do you acknowledge that there's a potential error -- rate for error caused by additional bad acts with which a subject is concerned?

A I'm trying to understand that question. I'm not sure what

you mean by additional bad acts with which a subject is concerned.

Q Additional bad acts, other acts, bad acts during the examination that the person may be concerned about.

A Do you mean they're concerned about other illegal things that they may have done that are part of the case, or other illegal things they have done that aren't part of the case, or just bad behavior that their parents might have punished them for? I'm not sure what you mean, Mr. Collins. That's a pretty broad term, "bad acts."

Q Well, it's like theft or infidelity, or something that may be encompassed within the subject of the polygraph examination that may not necessarily be the subject, but may in some ways be related to the subjects of the polygraph examination. For instance, if you are examining a person accused of robbing the National Bank of Alaska, and a couple years prior they had robbed the First National Bank of Alaska, are you saying that that would not have an effect upon the subject of the National Bank of Alaska polygraph examination?

A No, I didn't say anything about anything not having an effect. That's your statement. I'm just trying to understand the question. If you want me to answer that one, the answer would be, if a person is accused of robbing the National Bank of Alaska, and previously -- and did not rob the National Bank

of Alaska but robbed the First National Bank of Alaska on a previous occasion, they would have a very high risk of failing the question on robbing the National Bank of Alaska, because it's so closely related. When asked that question, that would bring to mind the other thing and they would be concerned about being caught on that one. So that even if they didn't rob the National Bank of Alaska but robbed the First National Bank, they'd be very likely to fail on that question when they were telling the truth and denying that they didn't rob the National Bank of Alaska.

Q So there is a potential that there would be an erroneous result in the National Bank of Alaska?

A Yeah, a false positive error. You might have an innocent person who fails and looks like they're lying about the National Bank when in fact it's because they're concealing the First National Bank.

Q What's the --

A But if -- excuse me. But if you had proper control questions that excluded that National Bank of Alaska incident by time, just to -- to expand the hypothetical to make this clearer, suppose they're accused of robbing the National Bank of Alaska in 1998, and that's what they're being examined about. But in fact, in 1997 they robbed the First National Bank and didn't rob the National Bank in 1998; if you had a

question that said, "Prior to 1998, did you do something dishonest or illegal," for example, then the First National Bank issue would be encompassed by the control question, and the National Bank issue would be encompassed by the relevant question, and then they'd be very likely to pass if they were truthfully answering about the National Bank of Alaska, and you would have a correct result.

Q And the way you phrased that question right now in your example is exactly the same as you phrased the probable lie, phrasing the question yesterday?

A That is a probable lie question.

Q And the questions that you use in the direct lie don't focus, they just said, "Ever in the past, have you told one lie?"

A Yeah, or make a mistake, or do something you knew was wrong. So if you had the "do something you knew was wrong," and that encompassed the time period of the First National Bank and excluded the time period of the current accusation, the National Bank, then the result would be the same. And it would be correct.

Q The -- I want to focus -- the test that you administered in this case was a test -- a directed lie test where every one of the control questions was a directed lie?

A That's correct.

Q And you varied that throughout your career or have you always used that method?

A No, I -- I used the probable lie method before the directed lie was developed. Obviously, I -- I began doing these examinations in the early 1970s, and at that time the directed lie technique had not even been developed, to my knowledge. I used probable lie questions until -- exclusively until 19 -- about 1984 or '5. I think it was 1985. And that's when, after Mr. Kelly that I described yesterday, the probation officer, and then Dr. Honts tried out some directed lies in real cases, then I started trying out one, and that was I think beginning in 1985. And then as I described yesterday, it went from using one to using two probable lies and two directed lies, what we call the hybrid test that we talked about yesterday. I used that for several years until we had gathered enough information and also completed the Horowitz big laboratory study with all directed lies, such that the combination of scientific evidence in the laboratory as well as evidence from a couple hundred cases I think we had in the field, indicated that it would be preferable to use all directed lies. And I began doing that I think about 1992. That's my best estimate, maybe '91.

Q So you -- by '91, '92, you started using all directed lies?

A Yes, because that's what the scientific evidence indicated and the field experience indicated, and it would be unethical

for me to do otherwise if that's the best test. And as a psychologist, I would be required to use the best test, just as a physician treating cancer, if he knows of a better treatment, is obligated to use it. Can't just use an older, less effective treatment just because he's used to it.

Q Dr. Honts is a colleague of yours; correct?

A Well, he's a former student of mine. He is a -- he worked for me in a post-doctoral capacity. Then he was at the Department of Defense Polygraph Institute for two and a half years as a research scientist, and then has had academic positions since then. But we continue to work together and write together and consult together. So in that sense he's a colleague, but he was never, you know, a faculty colleague in the same department.

Q I should define -- and we're trying to define --

A Yeah. Yeah.

Q -- "colleague" in the field of polygraphy.

A Yes. I mean, he's certainly somebody that I rely on and consult with and work with.

Q And the way he directs the -- administers the directed lie test is to include four relevant questions, one probable lie control question, three irrelevant or neutral questions, and two directed lie?

A I don't believe that's currently correct.

Q At least that's what he --

A He -- he was doing that a few years ago, and I think he did something like that -- if you read the *Gilliard* (ph) opinion, he did it in that particular case, but that is not his standard procedure these days. He uses all directed lies.

Q So it's been kind of changing throughout, ever since this report was issued by you in 1988, where one directed lie was incorporated; it's been one directed lie, some probable lies, or two directed lies, probable lie, or -- and now in yours it's three directed lies. So it's been kind of like a storm front, it's been kind of like clouds building on a storm front, pushing forward and changing and --

A Well, with all due respect, I -- I think the weather analogy is not quite correct. This is based upon scientific evidence, it's based upon developing better techniques. It would be more like, if you want to use a weather analogy, developing better meteorological models, better computer programs --

Q Well --

A -- to improve your forecasting. And that's based on science, not on clouds billowing in the atmosphere.

Q And Dr. Honts testified that he, you, and he only identified the Arizona School of Polygraph and the Arizona State Police using the directed lie, as well as four other

individual polygraphers?

A I'm sorry, I don't know what he testified to. If you're reading out of an opinion, that may be what that opinion says. But certainly that is not a correct statement.

Q Regardless of whether or not you agree with the studies, you have to admit that there are studies that represent that the error rates have varied throughout -- the error rates of polygraphy, the results vary in the field? The field reports, the field -- I mean, sorry, the field -- the publications reflect that error rates vary?

A Well, every study is going to have a slightly different number. I mean, you never are going to have exactly the same in any study on any phenomenon. Even if it's a replication, an exact replication, there will be variation. That's the nature of the world. That's why we use statistical analysis.

Q The high --

A And it's true in physics too.

Q The high would be 90 to 95 percent known error rate?

A The high would be closer to 100 percent.

Q And the low would be in the range of 48 percent?

A Forty-eight percent correct; are we talking about lab studies, field studies?

Q We're talking about the studies known -- conducted in attempt to determine the known potential error rate.

A Yes, but I -- I'm just asking you if you're referring to field studies or lab studies or both.

Q I'm returning -- referring to the literature that's been published regarding the error rates. For instance, Iocona (ph) and Lichen (ph) put the error rate somewhat slightly better than chance or less than?

A Iocona and Lichen made a lot of statements, including, you know, it's like flipping coins. But that's not an accurate reflection of the scientific literature. Certainly you can find some poorly-done studies that have low accuracy. But they are the exception and they are not studies that would meet a standard of competence with regard to using techniques properly and conducting research properly. That would be true in any field, whether it be polygraph or biology or psychology or physiology. You can do a study poorly and get bad results. Any incompetent person can do that.

Q The -- you used the analogy yesterday of testing a steel sample.

A Yes.

Q And you used -- you extrapolated from that to testing what's going on in someone's mind, the psychophysiological responses?

A No, I didn't. I used the steel sample as an illustration of the concept of reliability. Had nothing to do with what's

going on in someone's mind.

Q The problem with the steel analogy and using that to make a conclusion about whether one is being deceptive or being truthful is that steel is a physical thing that can be tested, and the psychological is something that can only be approximated? Because you really never know what's inside a person's mind?

A Well, first of all, I did not use the analogy for that purpose, or it's a mischaracterization of my testimony.

Q Well, I'm using it now for this purpose.

A Well, I would never do that, so it's just inappropriate.

Q But you used the fields -- the analyses of blood, hair, fiber, to buttress your assessment of the accuracy of polygraphy.

A The use of hair, fiber, and so on, I did not use to buttress my assessment of the accuracy of polygraphy. The accuracy of those tests is what they are. The accuracy of polygraphy is what it is. The purpose of that my was to illustrate that various types of evidence have various error rates, some of which are acceptable in court and some of which are not, generally. And the type of evidence that I referred to yesterday about physical criminalistics is the type of evidence that's commonly admitted in court. And much of it has very high error rate. Whereas polygraph, which has generally a

very low error rate, is commonly rejected in court. That was the purpose of that. It was not a buttressing. It was simply an illustration of how evidence is used.

Q You're an expert in psychophysiology; correct?

A Correct.

Q And the difference between the hair and the fiber and the blood is that it's physical evidence?

A The evidence is obtained from physical samples. The tests are done by individuals, humans.

Q And the purpose for the polygraphy examination is determine, in essence, a psychological state by determining physiological evidence; so you're taking evidence and drawing a conclusion with regard to what's going on in a person's mind, correct?

A To making an inference. It's a psychophysiological process. And we don't separate the psycho from the physio as you have done. It's one word.

Q The --

A Because there's an interrelationship between those processes that cannot be separated.

Q The blood sample, the hair sample, or even the cocaine sample, or the knife, the fingerprints, is something that physically can be submitted to another lab for examination, while the psycho -- the psyche is something that you're -- you

really can't measure; you're just drawing inferences from physiological, physical evidence; correct?

A Oh, no, the -- the psyche can be measured, I beg to differ. The -- the largest field of applied psychology ever since the beginning of this century has been the measurement of the psyche, psychological testing, the measurement of it. And you and I both have taken more of those tests than we ever wanted to throughout our lives.

Q Well, I'd have to --

A Measure --

Q -- beg to differ with you, because I don't think I've taken one.

A You've never had a psychological test?

Q But that's --

A You never had an intelligence test, a -- an aptitude test, a -- an achievement test, an interest test? You cannot go through our school system with having -- without having those things repeatedly. Our society is pervaded by them. So I beg to differ too, unless you have an unusual experience. But that is the largest --

Q The --

A Excuse me, may I finish my -- my answer now?

Q Well, I think we've -- you've made your point, we'll move on.

THE COURT: Let's let him finish his answer.

BY MR. COLLINS:

A That is the largest area of applied psychology. It is a multi-billion-dollar business in the United States.

Q And drawing from that then, you have to admit, as you previously testified, however, it does not measure lies?

A "It" meaning --

Q The polygraph.

A The polygraph is a physiological recording instrument. The polygraph examination is designed to assess truth and deception, just as an intelligence test is designed to assess intellectual aptitude or intellectual functioning.

Q You would have to agree that the -- in the polygraph technique, that it's the examiner, not the machine, that's the crucial factor?

A Both are crucial. You cannot have a polygraph examination without either one.

Q The polygraph examiner determines the suitability of a subject for testing; correct? The machine doesn't.

A That's true.

Q The polygraph examiner formulates the proper questions; correct? The machine doesn't.

A The polygraph examiner, probably in consultation with whoever requested the examination should always be in

consultation, and with the subject also in terms of making sure that the questions are clear.

Q The polygraph examiner is the one who detects attempts to mask or create chart reactions or countermeasures; correct?

A I'm -- the polygraph examiner attempts to --

Q Determine attempts to use countermeasures or to mask or create other reactions?

A Well, they may try that. Polygraph examiners are not very good at it, as the research shows.

Q The polygraph examiner is the one who stimulates the subject to react?

A In part. Most of the stimulation to react comes from the subject him or herself in terms of their concerns that they bring with them to the examination.

Q Chart Number CC is a stimulation test, isn't it?

A It's a number test. It's --

Q And you --

A -- sometimes referred to as a stimulation test. I -- I'd prefer not to use that term because it's misleading.

Q You use that to get a person to react, so that you can record?

A It's a demonstration to the person and a method of getting the person accustomed to the testing procedure, and it also serves a psychological purpose of explaining how the test

works, and by doing so, predisposing the person to react appropriately during the main test. So it serves many purposes.

Q And finally, you as a polygraph examiner interpret the charts?

A That's correct. Score them.

Q The machine doesn't do that?

A Correct.

Q The -- when they assess -- test blood samples, hair samples, the knife, they don't draw a psychological response from those tests, do they?

A The question answers itself, obviously. Knives don't have psyches.

Q Neither does the blood? It has -- no --

A Well --

Q -- you don't interpret psychological states of mind --

A Well --

Q -- based upon blood samples --

A I don't. Cleve Backster might, but I don't.

Q But you don't know that Cleve Backster does?

A Well, he does that with yogurt and brine shrimp and things like that. So he might do it with blood also. He does it with philodendrons.

Q And Clyde [sic] Backster was your teacher?

A He ran the school that I attended.

Q You exchanged services to attend his school?

A No. He invited me to attend his school free of charge, and in return for that nice invitation I offered to teach part of the course. And then because I felt he was kind enough to allow me to attend the course free of charge, otherwise it would have been expensive, I offered to him that whenever he wanted me to, I would come and teach the psychophysiology part of this course free of charge, which I did for a number of years.

Q His school is where you learned how to apply the polygraphy part of --

A I learned some things, as I described yesterday, but there are many things I did not learn there, in fact, many things that were taught there that I did not agree with then because they're contrary to psychological science, and I don't agree with now.

Q So there's a difference in the field between you and the Backster school?

A Yes, there's a great difference. What I do is based upon psychological science, and what Mr. Backster does -- he's a very clever man, but he lacks formal education -- is based upon his own notions and his experience. And some of those things are very good, some of them are not so good.

Q So there's inconsistency between the field of polygraphy and the different schools?

A There are different points of view in the field of polygraphy just as there are in physics and mathematics and biology and psychology. That's the nature of the world.

Q In 1986, the American Psychological Association adopted a policy which called the reliability of polygraph test results unsatisfactory; is that correct?

A Yes. I was the instigator of that policy. And the final wording of the document was in great part wording that I suggested. And they were drawing particular attention to the problem with polygraphs when they are used in employment screening and when they are used in testing victims of crimes, such as rape victims or victims of assault, and when they're used in situations where the base rate of deception is very low, such as in intelligence screening applications.

Q As well as there was no acceptability for courtroom use?

A Oh, no, I don't believe they took that position at all. The American Psychological Association did not take a position on the use of polygraphs in court.

Q There are no surveys with regard to the acceptability of the use of the polygraph in the court?

A Now you're talking about something different, not the American Psychological Association --

Q I'm talking about other survey.

A -- policy but a survey?

Q Yes.

A There have been surveys done. There have been a total of four surveys of different groups done with regard to polygraph testing, and we described in greater or lesser detail yesterday those surveys.

Q Despite your earlier testimony about the standards, there are no mandatory standards controlling the administration of polygraph examination, are there?

A Yes, there are. There are standards that the federal government imposes on all of its examiners. Each agency has its own standards, plus general standards taught at the Department of Defense Polygraph Institute. There are standards that are mandatory if one is licensed in a state, conducting the examinations in that state. And I have mandatory standards that I must comply with in the two states in which I'm licensed. And I do the same wherever I am, whether --

Q The --

A -- I'm required to or not.

Q The federal government's position is that polygraph evidence is not admissible in court?

A I don't think that's correct. The Department of Defense Polygraph Institute teaches to its examiners how to lay a

foundation to get polygraphs introduced. The federal government, as you know, is a very large organization. The Department of Justice has a policy generally the -- that they should not be used as evidence, but that policy is a matter of, as I understand it, individual choice when it comes to a particular U.S. attorney with a case. I've had two U.S. attorneys in the last several months contact me from the U.S. Department of Justice asking for my assistance with regard to introducing polygraph evidence in federal cases that they were handling.

Q Who were those two U.S. attorneys?

A I have to think for a minute. I've got the files sitting at home. One of them I know I can't remember, because we've only had the phone conversation and I've received no written documents. I have notes on the conversation at home. The other one -- we've had a number of conver- -- Steven Handler is his name, H-a-n-d-l-e-r.

Q In fact, you have not been hired?

A I have a retainer or consultant agreement signed and executed and on file with that department, yes. I have been in that sense.

Q Steven Handler can be contacted how?

A At his office in Washington, D.C.

Q Department of Justice; which division?

A Fraud Division, as I recall. But the case I'm working on is a civil case.

Q The American Polygraph Association and the Association of Police Polygraphists have no authority that members comply; it's a voluntary compliance, correct?

A Compliance with what? I don't -- I don't know what you're --

Q With the standards of control of administering the polygraph examination.

A Well, the American Polygraph Association, I'm more familiar with them than with the Police Polygraph Association. But the Little APA, as we call it, American Polygraph Association, has standards and it has ethical guidelines. And if a person violates those and a complaint is brought to the association, they can be severely sanctioned and actually removed -- have their membership removed. So they can control their people, and they have done so in the past, of terminating membership, as I understand it.

Q There are about 2,000 polygraph examinations who do not belong to either of the societies?

A I don't know. I don't know what the numbers are, I don't know that anybody knows the numbers, because I don't know that anybody knows exactly how many polygraph examiners there are in the United States, since the majority of states don't require

licensing.

Q And so we don't know how many people are members -- according to your testimony, we don't know how many people are complying with the standards and how many people are not complying with the standards?

A That's true. And I'm sure that's true in every profession. We don't know how many medical doctors fail to comply with standards and so on. That's why there are lawsuits all the time.

Q And it's correct there are no mandatory guidelines regarding the selection of polygraph examiners?

A No, I don't think that's -- when you say selection, you -- I'm not sure what you mean. I'd have to --

Q People who will become polygraph examiners.

A Well, again, it depends upon under what auspices. If they are federal examiners, then there are guidelines. There are selection procedures. There are requirements to be able to attend the Department of Defense Polygraph Institute. There are general requirements imposed by the American Polygraph Association about the qualifications of people who attend training schools, and then you have licensing regulations in various states, and those licensing regulations specify who can or cannot become an examiner, what the requirements are. And then you have unregulated places where a person such as

yourself could decide, well, I've read this material and I think this is interesting, and I'd like to become a polygraph examiner, and go out and buy a polygraph instrument and start doing them tomorrow.

Q And the APA code, the American Polygraph Association, with regard to the application or the use of the techniques that they stated that members are directed to use only those test techniques and question formats which are considered generally acceptable within the profession?

A I don't know if you're reading from something, but I'd have to look at it to verify what you just said.

Q You don't know what the APA code is regard -- in the use of techniques then?

A I believe that they advocate that one should use only those techniques that have been demonstrated to be effective. That would be a reasonable position for any organization with regard to any technique.

Q You're not a member of the American Polygraph Association, are you?

A No, I'm not.

Q In fact, you have stated that you will make it your business to tell others what a poor organization it is?

A Could you show me that statement?

Q You don't recall that statement?

A Well, I don't know that I made a misstate- --

Q A letter in 1992 --

A Pardon me?

Q -- after your application was rejected?

A No, my application was not rejected, first of all. That's a inaccurate statement. I withdrew my application because I was asked by the leadership to apply for membership, and they assured me that this organization had become more amenable to scientific discourse and open discussion. And so against my better judgment, but because of pressure from the current president and the past president and a few others there I said, "Okay, I'll join," because they said, "We need people like you."

So I submitted an application. And then when one of the people on the board of directors, who has always been antagonistic to science and to myself and my laboratory, made a point that they were going to look into public statements I'd made which were critical of the polygraph profession, because many of them harbor resentment for my role in the Senate hearings and drafting of the Employee Polygraph Protection Act. They said, "We're going to take that into account when we process your application." So I wrote them back and said, "I will not belong to an organization that's going to censor what I have to say, because as a scientist and an academic and as a

professional person, I have an obligation to speak out on issues that I think need to be discussed publicly. And therefore, please send me back my application and my application fee."

Q You don't recall telling them that you're going to tell people this is a -- an unethical organization?

A Well, I don't know if I used that word, "unethical." I did indicate that I would tell people that that is how they operate and that they are not an organization that will embrace full discourse and constructive criticism.

Q The Department of Defense and the American Polygraph Association merely establish customs and habits to follow; correct? Follow the teachings of the Department of Defense?

A Customs and habits? I -- that's something that I'm not familiar with. They have guidelines and they have rules. Particularly the Department of Defense, as you know, is rulebound by everything. So I don't know what you mean by customs and habits.

Q In applying -- in how to apply the polygraph examination.

A They have very specific written guidelines. They have training materials that if we stacked them up would probably be about three feet high here, at least, manuals.

Q So you're disputing that neither the federal government or the American Polygraph Association have formally established

standards for use within their own organizations the instructions on how to administer the test?

A That's -- I think if I understood what you just said, that's just what I said, which is contrary to what you had said before. So I'm not sure what you're saying now.

Q The Department of Defense, you admit, teaches a different scoring method than the one that you use?

A It is somewhat different, but in recent years it has been moving more and more toward the Utah system, based upon scientific research. I think it's an incremental process. As you know, federal agencies, and particularly the Department of Defense, are slow to change; but they are changing and they are moving in the direction of science. And when --

Q That's based upon --

A -- they move -- excuse me -- when they move in the direction of science, they move in the direction of the Utah method, because it's based on science.

Q That's based upon your estimation of how the field of polygraphy is progressing?

A That's my description of what I understand.

Q It's not based upon any publications by the Department of Defense?

A Well, Department of Defense would never publish a statement like I just made. They would simply revise their procedures.

Q The Office of Technology Assessment in 1983 concluded -- well, back up a little bit here. Exhibit E --

A Yes.

Q -- page 97 --

A Yes.

Q -- it listed the accuracy, average accuracy rates based on six prior reviews, that it ranged from 64 percent to 98 percent?

A Where are you reading from, so I can find it.

Q Column 1, page 97.

A Yeah, but there's a whole bunch --

Q The bottom --

A -- there, so --

Q The bottom, very last, where it says "Six prior reviews..."

A Oh, I'm sorry, yes.

Q So the average --

A Yes.

Q -- accuracy ranged from 64 percent to 98 percent?

A That's what it says.

Q And then at the top of column 2 it states that correct guilty detections ranged from 70.6 percent to 98.6 percent?

A Yes. But you have to recognize that that is including inconclusives as incorrect results, and that's not appropriate. It's misleading.

Q So that is an invalid statement then, because you say it's --

A No, it's not an invalid --

Q -- based in improper --

A No, it's not an invalid statement in the sense that the numbers are incorrect. But it combines inconclusives and errors as if they were the same. There was extensive discussion about this at the advisory panel. And the person who finally wrote this, wrote it that way, it was not what some of the scientists felt should be done. But -- so that's why one has to go to the second half of each of those paragraphs under "Ten individual field studies" and "Fourteen individual analog studies" to get the correct numbers. Because those are the actual errors, not a combination of errors and inconclusives. So that --

Q So the data was -- in some of the surveys was held to be invalid and that it was manipulated to adjust it to this 86.3 percent; is that correct?

A That's not what I said. I didn't say anybody manipulated anything. What I said is they incorrectly included the inconclusive results as if they were errors instead of keeping them separate. So it's -- when you read that, if you don't know that's what they did, then you would be misled into thinking that there were that many errors. But if you read the

bottom two lines on each of those, then they talk about the actual errors. And though -- that is clear.

Q The correct innocent detections range from 12.5 to 94.1 percent and averaged 76 percent; your testimony just now, does that apply to that same statement?

A Yes, it does. The first two statements in each of those sets combines inconclusives and errors as if they were the same. The second two actually describe the error rates themselves, which is a direct and clear statement.

Q So a person reading that wouldn't know?

A Well, it depends on which person. I know; people who worked on this report know; people who are familiar with this literature would probably know, especially if they read the chapters which present the data from which these conclusions are drawn. But others such as yourself might be misled. That's why a number of us said it shouldn't be written that way, but the person who wrote the report decided to do it that way anyway.

Q And the paragraph that follows the table reads, doesn't it, "The wide variability of results from both prior research reviews and OTA's own review of individual studies makes it impossible to determine a specific overall quantitative measure of polygraph validity." And "The preponderance of research evidence does indicate that, when the control question

technique is used in specific-incidents" polygraph detection deception rate -- detection -- polygraph detects deception at a rate better than chance, but with error rates that can be considered significant? That's what it reads, doesn't it? That's out of the --

A That's what it says, yes. And that's I think a reasonable characterization of things in 1982. It's not representative of the situation today.

Q In the Gallup poll, the material related to that, you've testified that what's really important is you take -- don't look at the whole average number, look at this particular section because that number is greater, with regard to response number B -- or letter B?

A I don't believe I said that. I said that if you look at the first column, it does not separate the results according to whether the person was knowledgeable about polygraphs. And the second column presents the results separated for those who are the informed, and that the latter is a more accurate indication of the relevant community. But even the former, including people that are not very knowledgeable, shows a strong -- shows a strong preponderance of favorable attitudes.

Q So you --

A So either way you look at it, it's favorable to our polygraph, but if you're looking toward the *Daubert* factors,

where you should be assessing the relevant scientific community, the relevant community is the informed community.

Q You are minimizing the overall 60 percent --

A No, I'm not minimizing it.

Q -- and accentuating the 80 percent?

A I am simply doing what I just described. If you take the unselected group, it's a total -- a total of about 63 percent that have favorable attitudes, which is far better than half. And that includes people that are not very knowledgeable. But if you look at the well-informed group, those who know enough to give an informed opinion, which is what I think any court would want and what *Daubert* certainly clearly suggests, then the 83 percent figure is the more appropriate number. I'm not minimizing anything. I'm just simply explaining the difference.

Q The United States Supreme Court reviewed the materials, some of which are included in your exhibits here. And the majority opinion concluded that to know the -- that there was in the scientific community extreme polarization of those in that community?

A That's true. There are some very vocal critics and there are some very vocal proponents. That describes polarization. And I would say that is characteristic of all the fields of science when it comes to anything that has substantial

application in society and where there is a range of opinion. That's typical of science; it's not peculiar to polygraph.

Q The United States Supreme Court concluded that -- they reviewed that in some instances the control question technique, the accuracy of the control question technique was letter -- little better than the flip of the coin?

A Well, they were quoting from Dr. Lichen. That's not a scientific study, that's a -- a pejorative comment by Dr. Lichen. But that was -- some members, I think you'll find, that were four members who signed on to that, and there were -- there was one who wrote a blistering dissent, Justice Stevens, and there were four other members who were pretty lukewarm and sort of apprehensive about endorsing that and said that issue should be revisited. So it's not a majority, and it's simply repeating a statement made by Dr. Lichen, which is not surprising coming from Dr. Lichen.

Q And you would agree that the United States Supreme Court found the governmental use polygraph, however, is primarily restricted to the field of personnel screening and to a lesser extent as a tool in criminal and intelligent investigations, but not as evidence in trial?

A That's generally how the federal government uses it.

Q And you relied upon the federal government's Department of Defense and other aspects of the federal government to buttress

your claims with regard to polygraph in early parts of your testimony, haven't you?

A Well, used published research from the federal government, scientific research, to understand the science in the current situation. That has nothing to do with policy, which is a political decision, not a scientific decision.

Q Isn't it true that a polygraph examiner can only supply the jury with another opinion about whether or not that the defendant is telling the truth?

A No, I'm not sure that that's all a polygraph examiner could do or whether a polygraph examiner would be allowed to do that. It would depend. But presentation of a polygraph examination involves more than just a -- a final one-line opinion. It involves a description of the technique and the procedures used, the questions asked, the examinee's responses in relation to the case facts, and so on. I mean, it's a lot, as we talked about yesterday. And what you stated is just perhaps a final conclusion which might or not -- might not be allowed. I don't know. That's up to the Court.

Q In the case of *United States versus Crombie* (ph), the test administered in that test was a control question test?

A As I recall, it was a -- what we would call a hybrid test. I believe it had one directed lie and two probable lie control questions.

Q One directed lie?

A I believe. I'd have to go back and look at the actual charts. But the examination was conducted by Tom Ezell, a former law enforcement examiner, and I believe he used one directed lie and two probable lies. That's my recollection --

Q Not --

A -- subject to verification.

Q Not the test that you used, the three directed lies?

A That's correct.

Q New Mexico is one of those states that specifically allows for the admission of polygraph evidence; correct?

A That is correct. Under specified guidelines.

Q So the legal community in New Mexico is familiar with the state laws --

A I would hope so.

Q -- regarding --

A Not all of them, the legal community is, because the large majority of attorneys don't deal with matters that involve polygraph.

MR. McCOY: I just want to inquire as to how long counsel intends to continue. I could use a mid-morning break.

MR. COLLINS: I've got half an hour, 45 minutes.

THE COURT: When do you want to take the break?

MR. McCOY: Right now.

THE COURT: All right.

MR. COLLINS: That's fine.

THE COURT: This will be the mid-morning break then.

What do you need, 12 minutes?

MR. McCOY: Yeah, that'd be fine.

THE COURT: Be in recess.

THE CLERK: All rise. Court now stands in recess for 12 minutes.

(Recess at 10:22 a.m., until 10:35 a.m.)

THE CLERK: All rise. His Honor the Court, this United States District Court for the District of Alaska is again in session. Please be seated.

THE COURT: Mr. Collins, go ahead.

MR. COLLINS: Mr. McCoy is reviewing some exhibits that I handed him. If I may have until he's --

(Side conversation)

BY MR. COLLINS:

Q Dr. Raskin, can you turn your attention to the charts -- and unfortunately, I don't think the Court can see with as much clarity as may be evident in -- from your position. But these are exhibits -- these are charts that were created during Mrs. Walker's polygraph examination; correct?

A Yes, except these are shrunken-down versions.

Q Okay. And the judge in the notebook has copies of these at

the back of the book; correct?

A Yes, I believe so.

Q And each chart has a number on them; correct?

A Yes.

Q The top chart, which is Defendant's Exhibit CC, is the initial examination, the number test?

A Correct.

Q And that's noted up at the top; correct?

A Yes.

Q Where there's a green mark -- do you see that?

A Yes.

Q That's chart number 3; correct?

A Yes.

Q That's the chart that you did not score; correct?

A That's correct.

Q That's the one you threw out?

A I did not score it. I didn't throw it out. It's there.

Q Well, you did not use the results?

A Yes.

Q Chart number 1 is this one that's got the little laser beam on there?

A Yes.

Q Chart number 2?

A Yes.

Q Chart number 4?

A Yes.

Q Chart number 5?

A Yes.

THE COURT: What's the exhibit number of this?

MR. COLLINS: I haven't marked it as an exhibit. I can do that so that -- since the Court has copies, I wasn't going to admit, but if the Court wants me to mark it for evident- --

THE COURT: You don't have to offer it, but you should have it marked.

MR. COLLINS: I'll put Plaintiff's Exhibit 8 on it, Your Honor.

THE COURT: Thank you.

BY MR. COLLINS:

Q Chart number 1, where the red dot is, that's the -- this thing doesn't die on me -- the blood pressure line?

A Yes.

Q And the top two are the respiration lines?

A Correct.

Q And focusing, the top, the TR, the thoracic respiration line, there's a peak that has a black bar at the top; that's because it's capped out, correct?

A Capped out?

Q I mean, it -- there's a black bar?

A The black bar means the top was edited off because it went outside the window there, basically. And for purposes of presentation in the printed form, it's easier to interpret the chart if you cut that off and indicate that's what was done, which is what the black bar is.

Q And there's another black bar on the abdominal respiration? Maybe if you just looked at the ones that you have, you might be --

A Yeah, it might be easier for me to just follow along with mine. So we're on chart 1?

Q Chart 1.

A No, there isn't on the abdo- -- we're talking at D2, is that right? At D --

Q I'm sorry, from my distance I saw it as a black bar, you're correct. There's no --

A No, there's no alteration there.

MR. COLLINS: The Court has chart 1 in front of it?

THE COURT: Yes.

BY MR. COLLINS:

Q At the blood pressure line --

A Yes.

Q -- been control directed lie question D2 and relevant question 3, which is noted by an R3, and directed lie is D3; correct?

A Yes.

Q The blood pressure has a solid black mark --

A We'll have correct -- it's not D3, it's D2.

Q I'm sorry, is that D2?

A Yeah.

Q D2 and R3?

A Correct.

Q There's a solid black bar there; correct?

A Yes.

Q In chart number 4, we have two solid black bars in the blood pressure graph; correct?

A Correct.

Q And in chart number 5, there's a flat line on the plethysmograph?

A Yes.

Q Let me -- back to blood pressure, Mrs. Walker wasn't fibrillating on D -- at that point, was she?

A I'm sorry, was she what?

Q Her heart wasn't beating at a rapid rate?

A No, she had a -- as I recall, a movement there, and you can see that I marked right there, there is a little "MV," indicates that there was a movement here, and that movement artifact was edited there so that it wouldn't take up most of the range of the display. And it was marked by a movement, and

then I gave her an instruction, you see an "I" here, and that indicates that I instructed her to try not to move her arm, or something like that.

Q In chart number 4, there are two such bars?

A Yes.

Q And in chart --

A But -- but the movements were not apparent, I think.

That's why there's no instruction. They were just brief blips on the cardio tracing, which can be caused by just a little twitch of the arm.

Q And that would cause the little -- it doesn't record at that point then? You edited that out?

A I edited that out. If you look at the raw recordings, you'll see the tracing go up down there, and it's edited out. And indicated that it's an edit by that bold bar there. The notation at the front that you have in green here shows that. It says edits indicated in bold. So that the -- anybody can see what I did.

Q So the version of the charts the defense turned over to the government are the edited charts?

A Yes, because they're the easiest ones to see.

Q The original charts were not turned over --

A No, but --

Q -- to your knowledge?

A -- they could be made available. They're just less useful.

Q They were not made available to the government prior to this hearing?

A I guess not. I may not have even given them to Mr. McCoy, because they're more difficult to read. That's why the edits are done. Actually the best way to do it is on the computer, to view it on the screen, so that you can expand it and see it even more clearly. And that's how I score the charts, using the computer.

Q In your -- you previously testified that -- well, let's define the term. A blind review is one conducted by a polygraph examiner done after the polygraph was administered the subject and the review was done by someone who was a part of that examination; correct?

A Some independent examiner.

Q And --

A Although you could do a blind review by somebody who actually did the exam, but he doesn't know which exam he's reviewing.

Q And you've probably testified that blind reviews tend to be more conservative than the original examiner, because they don't have the full information in front of them? Is that correct?

A Yes, that's what our research shows.

Q And so there would be a tendency for more inconclusive results on the independent evaluation as on the original?

A Yes, that's a very common pattern in those studies.

Q And you've also shown -- testified that there's an extremely high degree of reliability when independent evaluators score the same sets of charts without any other information, just the charts themselves?

A With the caveat that they are properly trained and experienced in scoring the charts and use the same scoring system. Clearly somebody not properly trained or somebody who uses a totally different system that produces different kinds of results would be more at variance, or somebody who scores them who has a particular outcome in mind and is not objective.

Q So you're saying that the results will vary depending upon which scoring method that they choose to use?

A They would vary somewhat. It depends upon the scoring system. For example, if the -- if I scored these using the Utah system and somebody else scored them using the Utah system, and they were trained and experienced in that system and did it objectively, they should come up with pretty similar results. If they were not objective, they could come up with any result they wanted to and that would be not very ethical, but unfortunately, that could happen. And then if they used a system which is somewhat different, if they used the straight

U.S. Army system as it is now, it's similar enough to the Utah system that it would probably be rather similar again from somebody who's trained and experienced and objective. If they used the Backster system, then we have serious problems.

Q So there are a variety of scoring systems used?

A Well, yes. Some are more scientifically validated than others, and that's the issue. If you use a scientifically validated system, then the results should be similar. If you use one that's been shown not to be scientifically valid or one that doesn't even have any studies supporting it, then almost anything could happen.

Q You suggest that that -- the subjectivity of the examiner could have an effect upon their evaluation of someone else's polygraph examination?

A It could. I mean, in the -- if they are scoring charts with a preconceived outcome, then they could assign whatever numbers they want. Wouldn't be correct, but I've seen people do that. Just as they do it in other forms of forensic evidence. Sometimes people do things they shouldn't do.

Q So a person's subjective -- or let's define the subjective. If a person knows by whom they're hired, knows for what purpose they're hired, either to debunk or to invalidate or to find inconclusive or deceptive, or if they're hired to find a person truthful, could have an effect upon how they score the exam?

A Well, if they're the kind of person who will be hired to do what you suggested, then they might do what you suggested. If they're a truly professional person and they do what they should do regardless of the hopes and wishes of the person who hired them, then it shouldn't affect them on a -- when I'm sent charts, I look at them for what they are, and more often than not, the results I give to the person who hired me when I'm reviewing somebody else's are not helpful to them. And I say, "I'm sorry, I just can't support this, and I can't be of any more help, and I'll see you later," so to speak. But other people, I've seen instances where they come up with whatever result the person hired them wants them to come up with, and they continue to do the work and get paid. And that's not very desirable, but unfortunately, there are people like that.

Q Do you believe that in the field of polygraphy there are hired guns?

A Just as they are everywhere else. In the field of DNA, fingerprint testing, blood, you name it, there are people who have high ethical standards and are very competent and careful and there are people who fall short of those standards.

Q And a hired gun is someone who's hired by a party to produce results favorable to that party?

A Well, not hired to produce those results, but hired with the hope they'll produce that result, and they produce that

result in spite of what they should have done. That's a hired gun. If they produce the result that was desired but that is the correct result, that's fine, that's the way it ought to work. Or if they are willing to say, "I'm sorry, but I come up with findings that are not helpful to you," that's what should be done if that's what they're -- the majority show. The hired gun is the one who ignores what's correct and simply provides the result paid for.

Q Polygraphy is -- an examiner is intended to interpret the results -- make interpretations from physiological reactions; correct?

A Yes.

Q And drawing inferences from those reactions; correct?

A The reactions in the context of the test, the examination, the question structure, and so on, yes.

Q And in essence, the examiner then makes the determination of how many points to score on the examination; the computer doesn't do it?

A Right. You -- you may use the computer to display it so you can see it better, and in fact, the computer system I use actually makes the measurements for me of amplitudes of things like how big the GSRs are, so it's easier for me to apply the rules. And I do it with the aid of the computer. But I ultimately enter the number.

Q The chart number 3 was not used because the computer malfunctioned; correct?

A Correct. It just did something strange during the collection of the chart, and I couldn't rely on what was there.

Q I asked you earlier about a letter that you wrote to the American Polygraph Association and you asked me to provide you a copy.

MR. COLLINS: Approaching the witness with Plaintiff's Exhibit 6, Your Honor.

BY MR. COLLINS:

Q Do you recognize Plaintiff's Exhibit 6?

A Yes, I wrote it in -- on the 10th of June 1992.

Q On the second page above your signature, latter part of the paragraph --

A Latter part of which paragraph?

Q The paragraph above your signature.

A Well, there's a three-line paragraph.

Q Above that one.

A Okay.

Q To summarize -- or maybe you can just read that last part. I don't want to put words in your mouth since you've put your words on paper. What did you write there about the American Polygraph Association?

A Well, the whole letter deals with the American Polygraph

Association.

Q Well, I'm talking about that paragraph.

A Oh, that --

Q The one before you sign off.

A You want me to select that one. Do you want me to read the entire paragraph?

Q Is that what you wrote?

A I wrote the whole letter.

Q Yes. And would you read --

THE COURT: Mr. Collins, the letter is not in evidence, and if you're going to put it all in evidence, fine. If you're not, then he should be allowed to explain the context of the paragraph that you're asking him to read.

MR. COLLINS: I'll move for the admission of Plaintiff's Exhibit 6 then, Your Honor.

THE COURT: Hear no objection; admitted.

(Plaintiff's Exhibit 6 admitted)

BY MR. COLLINS:

A And now, what did you want me to do?

Q The last paragraph, you talk about how you think that the American Polygraph Association isn't -- is not worthy of --

A I'll read it, and the --

Q Yes, why don't you read it.

A After giving a little preamble as to why, I then stated,

"It is clear to me that the American Polygraph Association and its members do not embrace the scientific and professional standards that are necessary characteristics of an organization with which I will be associated. Furthermore, they apparently do not even believe in the principle of free speech as embodied in the First Amendment to the Constitution of the United States." That's based upon what I had written before.

"This episode is just another instance of the behavior about which I have complained in the past, and I shall add it to my list of criticisms and all future comments that I have the opportunity to make about the American Polygraph Association and its members. Your association certainly does not deserve recognition as a professional or scientific organization, and I will so state at every opportunity, in private and in public. With this letter I hereby withdraw my application for membership in the American Polygraph Association. I expect to receive a prompt refund of my application fee of \$100."

Q So now in court today, you've repeated your statement contained in that letter; correct?

A I just read something. Is that what you're referring to?

Q I said, you've been given an opportunity to repeat the statements that you said you would make in that letter; correct?

A That's correct, and I've made them at other times too, because the American Polygraph Association is devoted to furthering the polygraph profession and furthering the economic interests of its members, and that's certainly a -- a valid thing to do. But when that comes in conflict with scientific criticism and responsible professional criticism in public, they don't like that, and they therefore like to keep people from doing that. And that's what they clearly were intending to do with me and that's why I made those statements and withdrew my application. That doesn't mean they don't do some good work, because they do. But I have a higher standard and I -- that's why I belong to scientific associations that don't have those economic conflicts.

Q You wrote a letter to the Utah Polygraph Association which you don't have a date on. Do you recall writing that letter in which you --

A My resignation letter, or offer to resign or something like that?

Q Right.

A Yes.

MR. COLLINS: If I may approach the witness, Plaintiff's Exhibit 7, Your Honor?

THE COURT: You don't need permission in a nonjury situation. Just call it to the attention of the record.

BY MR. COLLINS:

A Yes, I wrote this letter. I think it was -- well, there is a date. It's unfortunately not on the first page but it is on the second page. It's 16 October 1985.

Q And at that time you wrote that letter, you were acknowledging the flattery of having been voted the person who's done the most damage to polygraphy?

A I'll -- I'll read you the operative thing.

Q Why don't you read the underlined portion there.

A Yeah. It -- well, the -- the whole sentence says, let me begin -- you know, after an introductory paragraph saying what they had done: Let me begin by stating that I was very flattered to have been officially accorded the honor of being identified as the person, quote, doing more harm to the polygraph profession than anyone else, unquote.

MR. COLLINS: I'd move for the admission of Plaintiff's Exhibit 7, Your Honor.

MR. McCOY: Relevance.

MR. COLLINS: It's relevant to Mr. -- Dr. Raskin's standing in the community that -- which is a part of the factors, the -- his opinions as to polygraphy in the community and how those opinions are not held by others in that community.

THE COURT: I'll admit it. I think it's relevant to the

issues that have been brought out at this hearing, not necessarily everything that you've directed to that. I think the Court has to decide for itself what weight and -- to accord it, but I think it is admissible. That's 7, is it?

(Plaintiff's Exhibit 7 admitted)

MR. COLLINS: 7, yes, Your Honor.

MR. McCOY: And if I could just ask counsel to provide me with copies at the end of the day.

MR. COLLINS: I will provide a copy, yeah.

THE WITNESS: Would you like these back?

BY MR. COLLINS:

Q The American Polygraph Association, as you put in Plaintiff -- in Defendant's Exhibit U, lists a number of schools where the art of polygraphy is taught?

A Where polygraph examiners are trained to do polygraphs, yes.

Q Correct. Only one school teaches the directed lie method; correct?

A I don't think that's correct. I think three of the schools listed there, at least three, teach it. The Arizona School of Polygraph Science, the Department of Defense Polygraph Institute, which is on the second page, and the Canadian Police College, which is on the second page. I know that all three of those teach it and there may be others. I don't know, I don't

keep up on their curriculum.

Q Dr. Honts then was incorrect when he said it was the only -- Arizona School of Polygraph Science was the only school?

A Well, I don't know when he said that. There -- I'm sure that -- that may have been true some years in the past, but as of today, I don't think that's correct.

Q In testimony in *Gilliard* in 1998 was when he made the statement.

A '98? I think that *Gilliard* was prior to '98. I think the opinion you're referring to may be an appellate opinion, but I think the actual testimony was earlier than that. It was I think either in '96 or -- somewhere around there, maybe '97.

Q You've testified that you've been involved in reviewing other examiners' results and testified about your review of those results as well as testifying about the examinations that you had administered; correct?

A Well, to answer the first part, sometimes I testify about my review, and more often than not I don't, because more often than not, when I review somebody else's -- and asked part -- as part of a request to help get such evidence admitted, I cannot support the techniques used and therefore I can't proceed any further, and so I don't testify about them. But sometimes I do. And then as far as my own, occasionally I have the

opportunity to testify.

Q You testified in a case, *United States versus Green*, out of California, where you reviewed someone else's exam and you called the defendant truthful, whereas after the defendant was correct -- convicted; correct?

A No, that's not correct. I reviewed examinations conducted on three individuals by another examiner. And I found that one of the defendants had a truthful outcome. The original examiner had said they were all truthful. I found that another of the defendants who had been tested and then retested was inconclusive and maybe -- maybe deceptive on one test and inconclusive on the second one. And the third individual I found to be deceptive and therefore could not support the use of that by his defense counsel. I testified at trial in federal court at San Diego, California before the jury on those matters. And the one individual whose results clearly indicated truthfulness, who was an attorney who had been somehow drawn into something that he wasn't aware of, was acquitted by the jury. That's the one I found clearly truthful. And the other two, as I recall, were convicted.

Q You testify -- you scored Mr. Green as truthful to all the questions; correct?

A No, that's not true at all. Mr. Green was the one that I found deceptive, clearly deceptive. It was Mr. Rembach (ph),

the attorney, that I found truthful and he was acquitted. You're reading from a document prepared by Dr. Barland which has a great deal of absolutely erroneous, factually incorrect information. And I have formally notified Dr. Barland of that, and I'm surprised it's still being used, because it's slanderous.

Q Well, let's focus then on a case that I think we can agree upon. You testified -- we'll back up. You know Mark Hoffman, Mr. Hoffman out of Utah?

A Well, I interviewed Mr. Hoffman one time in the prison after he had been convicted. And I wrote an article about that interview for the Utah Bar Journal.

Q You review --

A It's my only contact with him.

Q You reviewed his polygraph examination; correct?

A That's correct.

Q And you found him to be true -- well, maybe lay the context for the Court. There were -- there was a case in the 1980s of a gentleman trying to pass off forged documents as relating to the history of the Mormon Church; correct?

A He did more than that. He was probably the greatest and cleverest forger in the history of the United States, perhaps anywhere.

Q And --

A A brilliant forger.

Q And during that crime -- his commission of those crimes, some pipe bombs went off; correct?

A There were three pipe bombs. Two killed two individuals and one almost killed Mr. Hoffman.

Q And you reviewed the polygraph examination administered in that test and you said that he was being truthful when he was denying any involvement in those offenses charged; correct?

A Yes, that's correct.

Q And you went before the press to announce your results?

A I was asked in an interview what my opinion was, yes.

Q And you were on the television with regard to your opinion?

A Yes, I was not formally retained in that case, so I was not part of the actual legal process. And so therefore I was available to be interviewed.

Q And while you were giving this -- these interviews, Mr. Hoffman was in fact confessing to the crimes?

A Well, he confessed a great deal later. That took a long time.

Q And you suffered some public embarrassment as a result of that?

A Well, you might say it was public embarrassment. It's a matter of how you view it. It certainly was not something that I was happy to hear. On the other hand, such a thing can

happen and it did happen. And Mr. Hoffman was such a brilliant criminal that rather than, you know, hiding and denying what had gone on, I as a scientist thought I should publicly try to find out how he did it. So I arranged to interview him at the Utah State Prison after his conviction to find out from him what it is he did to beat that polygraph, because it was a very unusual case. And he told me in great detail what he had done, and I was able to independently confirm part of it, and I wrote an article all about it for the Utah Bar Journal, because it was an exceptional case. There's been no other case like it that I know of in the history of polygraph or hypnosis. And it was of great interest. And I wrote an article about it, so I -- although I was chagrined that it happened, I was not embarrassed I think in the way you imply. I simply was eager to find out why and to help people to understand why.

Q Are you stating that you disagree with the article in the Salt Lake newspaper, headlined "Deceived University Polygraph Experts Itch for Chance to Quiz Hoffman"?

A I'm sorry, I'd have to look at that article to know what you're talking about.

MR. COLLINS: Marked as Plaintiff's Exhibit 9.

BY MR. COLLINS:

A Are you reading from the headline, and the headline -- I mean, "itch," of course, is their term. But I was very eager.

As I told Mr. del Porto (ph), the reporter, was very eager to find out how he had managed to do that. And as I said in the article, I'm quoted here, "It's the first case where we have an absolutely false negative error in an important case. I would love to talk to him and find out if he can enlighten us as to how the test came out the way it did." And that's what I proceeded to do, and arranged with his attorney to take me down to the prison so I could interview him, which I did.

Q You've administered polygraph examination yourself, you with the examiner, where the polygraph was thrown out, it was not used as evidence; correct?

A Well, many times polygraphs are not utilized as evidence. That's more the exception -- the rule than the exception, except in New Mexico, where it's the other way around.

Q For instance, in the case which was known -- I think it received some national attention in the Seattle-Tacoma area, the Chinatown Massacre, where suspects went in, massacred 13 individuals in a gambling parlor, and one --

A I -- I think it was more like 15.

Q And one of the defendants was a Fay Mack (ph)? Mack or Mock?

A I thought it was Kwan Mock.

MR. McCOY: Your Honor, again, I just for the record want to entertain an objection. We're at a *Daubert* hearing.

Questions about the accuracy of Mr. Raskin's tests are really questions that go to the weight of the evidence as to -- instead of the admissibility. This is sort of far afield, and I have an objection on relevance as to this hearing.

THE COURT: Objection overruled. I think it also goes to admissibility.

BY MR. COLLINS:

Q In that case you conducted a polygraph examination of Mr. Mock -- and I do note that it was Kwan Mock.

A Yes. I -- I did two tests, one examination, two tests.

Q And you found him not to be deceptive when he was denying involvement in that massacre?

A That's not correct. Both of his tests showed deception.

Q Did you not state, "I do believe that Mock was very likely telling the truth when he said he wasn't doing any of the shooting and he didn't know any killing was going to take place"?

A I think that's the newspaper's characterization of it. I did indicate that he failed the tests. But because of the pattern reaction to the various questions, there was a real likelihood that although he was involved in the situation and in the robberies and possibly some physical beating of -- I can't remember exactly -- that he did not show similar reactions to having shot anyone himself. Those results on

those questions were much weaker. And so I indicated that there was a possibility that he in fact would be telling the truth if he were examined only on those issues.

In fact, I examined him twice. After the first one, he failed the test, and I had a conversation with his attorney -- this was done at the jail -- and I said -- told the attorney that he failed the test, but that I felt that he was not being forthcoming, that there was something he was withholding because of the pattern of the reactions, because the strongest questions were, "Did you shoot someone?" And those were the ones he had the least reaction to. I said, "There's something going on here, and I want you to talk to him and see if you can get him to tell you more," so that I could maybe clarify that and run another test that would give us a better picture of what's going on; which he -- his attorney then did, and then I ran a second test, and Mock gave me a little bit more information but not much. And the pattern results was very similar: strong reactions to certain questions but relatively weak reactions to the questions about doing shooting. So I reported to his attorney that I think there's a good chance that he didn't actually do any shooting himself, but he's still not giving all the information. And until he does so, we're not going to be able to resolve this. That's what I told the newspaper reporter, and that's the construction he gave it,

which was not quite correct.

Ultimately, Mock was convicted and then his conviction was reversed -- reversed and the death penalty was reversed, and his sentence was changed, because there were serious questions about whether or not he actually did any shooting.

Q He was convicted?

A He was convicted initially on all counts, but then after appeal -- and I can't remember, they had a retrial or simply the court changed it based upon the proceedings, that he was -- his conviction on the murders themselves, the direct shooting, was reversed, and he was sentenced on the basis of having been involved in the situation but not for shooting, which would be consistent with what the polygraph suggested to me. But I couldn't draw a firm conclusion, because as I said, it wasn't coming out clearly, and I -- I knew there was something he wasn't acknowledging.

Q So in your application of that test, you focused on certain questions, not the whole examination?

A No, that's not true. I focused on all the questions. And the results varied, depending upon which questions. And clearly the most threatening questions, the most serious issues had to do with whether he shot anyone, and those were the ones that he had the least reaction to. He had borderline -- I think there were inconclusive results on both of those

questions. He had clearly deceptive on some other aspects of it that were not the shooting itself and doing any shooting. So you had to look at that, because those are issues, so he could be lying on some and telling the truth on the other. And what our scientific research shows, is that if a person is lying on any relevant question, even if they're telling the truth on some of the other relevant questions, that may be obscured and you can't get a truthful result on the questions they're telling the truth to, because the fact that they're lying on other relevant questions sort of colors the whole test, and they don't have as big reactions to the controls; whereas if you had those issues to -- completely separated and had all the information in full disclosure, you might be able to disentangle those.

Q So what you're saying is that one reaction could overcome -- or have more effect upon the reactions of other relevant questions?

A Well, what it does -- take Mock's case. If he's lying about being present once some shots were fired, and he's telling the truth that he didn't himself fire any shots, then he has the strongest reaction to being present when shots fired, to which he's lying.

Q In the --

A His -- his control question or comparison question

reactions are therefore diminished, because his concern is focused on the ones to which he's lying that are relevant questions. And therefore when you compare the other relevant questions to the control questions, the comparison questions, you don't get the proper comparison, because those comparison questions' reactions are too much affected and overshadowed by the relevant question to which he's lying, and it doesn't give a proper opportunity to verify his truthfulness on the ones to which he's telling the truth. And that's what I think happened in the Mock case, and subsequent proceedings seem to have confirmed that.

Q In this case, Mrs. Walker's case, you used a method where you combined all scores, plus and minus, and came to a total score?

A I did, and I also looked at the individual relevant question totals. I did both, which would be appropriate in this case.

Q Directing your attention to Plaintiff's Exhibit 10. You've got a system here where you've taken what would be under the point scale inconclusive results, combined those to achieve a total score in excess of 6; correct?

A No, that's not correct. There's no -- not inconclusive results. The results are conclusive.

Q The scoring method that you described is anything above

a -- anything of a 3, positive 3, is truthful, zero being zero, and minus 3 being deceptive; correct?

A Not quite. Would you like me to tell you what it is?

Q I think you presented that in your affidavit, the method that you used. Move on here.

A Let me check the affidavit to see if that's correct. There's nothing in the affidavit that says anything about plus or minus 3s, so your characterization of it is incorrect. The system I used is described in detail in the exhibit that we introduced on the Utah scoring system, and that is what I used.

Q In the case of the State of Massachusetts -- *The Commonwealth of Massachusetts versus Louise Woodward*, the case that is referred to in your exhibit of -- affidavit of Dr. Katkin, you conducted the examination of Ms. Woodward; correct?

A Correct.

Q And you found that she was not deceptive when she denied any responsibility for causing the death of the baby in that case?

A That's correct.

Q And she was convicted, she was found guilty of being responsible for that death, and even though the court reduced it to manslaughter, the court found that she was responsible for the death of that baby?

A That may be, but that case is not over with, and the

medical evidence is being reexamined right now. And I think you'll find in the very near future that the medical evidence strongly supports her innocence. Much of the evidence that is available was not made available to the defense, it was not presented to the jury. And that's going to be coming out very shortly.

Q In that case --

MR. McCOY: Can I interrupt with an objection? Just -- not to interrupt. I'd ask for a continuing line of objection as to these questions as relevant and far afield as to why we're here. We're here to establish a *Daubert* foundation for the admissibility of polygraphs in the Federal District in Anchorage.

THE COURT: The reliability of the test is also one of the factors. Your objection has already been stated.

MR. McCOY: And may I have a continuing objection so I don't have to interrupt?

THE COURT: To similar types of questions, yes.

MR. McCOY: Thank you.

BY MR. COLLINS:

Q In the *Louise Woodward* case, the results of her polygraph were described by the defense as, she passed with flying colors?

A That's lawyers' terms, not mine. You'll not see the term

"flying colors" in anything I've written. That has to do with sailing.

Q And the defense in this case has described Mrs. Walker's results, that she resoundingly passed?

A That's his words. She has a clear, definite, truthful outcome.

Q And as you testified, the results in that examination were not admitted?

A In the *Louise Woodward* case.

Q Correct.

A Yes, due to a rather strange ruling.

Q One of the bases for Judge Zobel's (ph) conclusion was that the exams that you had administered were not independently verified?

A That was one of the bases. That was his opinion, that is the only basis that I know of that he used to reject it, and that is based upon -- and I have to explain that so it'll be clear what that means -- it's based upon the *Stewart* (ph) decision in the Commonwealth of Massachusetts, where the Supreme Court -- Supreme Judicial Court of the Commonwealth of Massachusetts in a ruling in *Stewart* about 1996, I think it was, or '95, said that if a polygraph is to be admitted, there needs to be a demonstration that the polygraph examiner has produced results that are accurate and verified by --

independently verified on the order of the accuracy that's being, you know, claimed for that test. And to satisfy that, the defense presented scientific studies conducted in which I performed the polygraph examinations, and which -- in which not a single false negative error occurred, which were independently verified by blind analysis that I did not do, showing that not a single error on a guilty person occurred. They were -- every decision on guilty people was correct.

The court in its wisdom rejected that evidence, saying it wasn't independent because those were done on grants that were given to the University of Utah by the federal government for me to conduct research, and the research was done in my laboratory. And since it was my laboratory, even though they were done blindly and I had no control over, you know, how the outcomes would be, they simply were scientifically done, as they are in any scientific laboratory or any drug company blind test or anything else. The judge said, "Well, it was your laboratory, therefore it's not independent." But I think it's a bizarre ruling.

Q In fact, the judge ruled -- Judge -- well, back up. This was a directed lie test; right?

A Correct, that's the test I used, because it's the best available test.

Q And to lay this in context, this was in July of 1997?

A The hearing was.

Q Yes.

A The examination was done -- yeah, as I recall, in May of 1997.

Q And one of the statements the judge made was that, as you know --

MR. McCOY: Continuing objection as to what the judge made.

MR. COLLINS: He's made his objection to this line of questioning, Your Honor, and asked that it be continuing.

MR. McCOY: Well, I need to repeat it. I think we're just going far afield, what other judges say.

THE COURT: He's entitled to cross-examine by asking the questions from whatever source.

BY MR. COLLINS:

Q In fact, the judge noted that the reports or the studies used to substantiate your testimony that you submitted were the 1988 field study and the Horowitz report; correct?

A Wrong. The 1988 study and a study that was published in psychophysiology in 19 -- 1978, a big study I did on a federal grant from the U.S. Department of Justice in which convicted felons and psychopaths were the subject.

Q You've previously testified that there has only been one field study conducted on the directed lie control question

test, and one --

A Correct.

Q -- laboratory study?

A Well, one laboratory -- no, there's more than one laboratory study, as we talked about yesterday.

Q The judge in essence ruled that you're vouching for your own accuracy by relying upon reports -- studies that you conducted and studies in which you participated?

A That's how he characterized it. I mean, if science -- if science from my laboratory vouches for my accuracy, then it vouches for my accuracy. That doesn't mean that it isn't hard science. And for him to say therefore it disqualified as science, even though it's been published in the most highly-respected scientific journals and undergone extensive peer review and was blindly interpreted, that's what he said. It's just plain wrong.

Q You've conducted examinations in at least eight cases throughout the states, state court system, in which -- following which the defend- -- where you found the defendant to be not deceptive, but the defendant later confessed -- pleaded guilty or entered a plea of nolo contendere?

A As far as confessions are concerned, I think that's incorrect. I don't believe there's a single case where I've testified in court where the defendant later confessed. I

don't know of one. As far as guilty verdicts, yes, sometimes people have been found guilty. That's an illustration of the fact that juries act independently and they may or may not give much weight to the polygraph; but doesn't tell us which is correct. You never use that for a scientific basis.

Q You --

A Excuse me. And as far as nolo contendere, the same kind of thing. But people often enter nolo pleas because of the fear of being convicted on more serious charges even though they deny having done them. So that's a tactical and, you know, legal decision they make. It has nothing to do with the accuracy of polygraphs.

Q Are you familiar with the procedure in which pleas of guilty or nolo are entered but there's a factual basis stated on the record and the defendant has to admit the factual basis?

A When there's a -- when there's a guilty plea.

Q When there's a guilty plea, and -- as well as the nolo plea, the nolo plea having in effect only for civil purposes.

A I'm not too familiar -- I do know when people enter a guilty plea, usually they are questioned in detail by the court to establish the basis for that guilty plea. And one of the cases that you're referring to which Dr. Barland has put in his little report there is one where the individual entered a guilty plea at the urging of his attorney, but then refused to

acknowledge guilt and refused -- and continually denied that he did it in court. The judge got very angry with him, and told him if he didn't confess to it in court and say he did it, he was going to add 50 percent to his sentence. And the man refused to, he said, "I didn't do it." And the judge said, "Fine, then. You're going to get another four years." He had done this because his lawyer told him if he didn't do that, he might get convicted of 25 or 30 years. And he did it reluctantly and then refused to admit guilt. That's the kind of information you're relying on, Mr. Collins.

Q You've been involved with other cases where you've either reviewed or administered the polygraph examination, other noteworthy cases: the case of Jeffrey MacDonald, the former Green Beret who was convicted of murdering his family, and you found him to be not deceptive?

A That's correct, and that case is still in the appellate process, and they're just now in the process of obtaining DNA evidence which the defense is quite confident will exonerate him.

Q Part of the field studies that you conducted depend upon establishing ground truth; correct? Well, that's the basis for conducting a field study; correct?

A You have to have a criterion of ground truth if you're going to assess the accuracy of a field polygraph test in the

real setting.

Q And one --

A So you have to develop some method for establishing ground truth.

Q And one of the methods for establishing ground truth, as you testified, is whether or not you have a confession?

A That's one method, yes. That's the most commonly used method. I should add that in our recent studies and Dr. Honts's also, we've -- we've used corroborating independent evidence to make sure that those are bona fide confessions, and those are also always confessions that are obtained prior to any legal process where any kind of negotiation or plea might be negotiated. So that these are not the kinds of problems I was just talking about on the cases you were trying to use. These are confessions given during the investigation, not with some incentive to confess for special treatment. So they are much less suspect. And also, a big Secret Service study and the RCMP study had separate evidence to confirm the conviction.

Q The field study that was published in 1988 was --

MR. McCOY: If you'd identify it, please.

MR. COLLINS: That would be Defendant's Exhibit --

THE COURT: F.

MR. COLLINS: -- F2.

BY MR. COLLINS:

Q Was the -- based on -- and subsequent to the polygraph examination, subject confessed or some other suspect confessed and exonerated the subject, or if the accuser of the subject later retracted the accusation in a formal setting.

A Correct. I -- I think there may be something more in that. I'm not sure you read it all. I can't remember if we also had independent evidence in addition. Perhaps if you could show me that I could --

MR. McCOY: Your Honor, I wonder if the witness --

THE WITNESS: -- see if that's complete.

MR. McCOY: -- could be allowed to complete his answer, under 106.

THE COURT: Well, he's asked for more than that, to see the document. It may save time if Mr. Collins shows it to him. Otherwise it's --

MR. COLLINS: He has a copy of F2, Your Honor.

THE WITNESS: F2?

MR. COLLINS: Yes.

THE COURT: It's actually redirect examination material, but you can let him cover it now.

BY MR. COLLINS:

Q That study -- while you're looking for that, that would be page 57. I do admit that you say later, if physical evidence was developed --

A Yeah, you didn't -- you -- I'm -- I -- I could I complete my answer before -- you didn't complete the sentence. It says or if physical evidence was developed that conclusively exonerated the subject.

Q And the point that I wish to make is that this was a field study in which 11 of the suspects were in child sex abuse cases?

A That's correct.

Q And part of the criteria for establishing the baseline or the ground truth was whether or not the victim had retracted the accusation?

A The accuser, because if they retracted it, they were not a victim. But there were only two such cases. All of the rest were based upon confession, physical evidence, and other things, so it -- but only applied to two other cases. So if you took those two cases out, it would not affect the results one way or the other.

Q As part of your post-retirement occupation, you've been offered as an expert in the state of Alaska, in essence where you say that when a person gives substantially different accounts of the central aspects of an important event, it's likely that this person is not relying on memory to describe what happened, but rather is fabricating the description of the event?

A May be fabricating or may be confusing and saying things that have gotten into memory subsequently as a result of suggestive questioning and other kinds of procedures, which the latter is more common.

Q And the State of Alaska considers it problematic of having -- or the danger of experts who set themselves up as human polygraphs?

A I don't know what the State of Alaska considers. It has nothing to do with me.

Q In conclusion, following the *Louise Woodward* case, as part of your appearances on various television shows and other forms of the media, you -- did you say -- do you recall saying that lawyers rarely like to deal with science and truth?

A A lot of lawyers have a problem with dealing with science, yes. They're not trained in science.

Q No, this question was, do you recall say -- lawyers rarely like to deal with science and truth?

A Well, truth in the sense of using the polygraph. And also, it has been my experience, and this is what I'm referring to, to use your term, that things are very adversarial, that unfortunately in our legal system, lawyers tend not to want to deal directly with the substance of testimony, such as the substance of my testimony, but rather like to deal with the kinds of information that you've tried to bring up, which

really have nothing to do with the substance of my testimony. In other words, obfuscating the issues and avoiding things. So that's what I was referring to, rather than dealing, well, here's the evidence; let's analyze the evidence itself. Because that's what gets us to the truth. Rather, there are personal attacks, professional attacks, attacks on irrelevant things, personal life, et cetera, to obfuscate the issues. And I think, unfortunately, that's happening too much in our courts. And it would be much better if we stuck to the evidence.

Q And you admit there's a lot of evidence that's considered scientific evidence that does not get admitted into court?

A That certainly happens. And I think that's unfortunate, because science is the best information we have.

MR. COLLINS: No other questions, Your Honor.

THE COURT: Mr. McCoy.

MR. McCOY: Thank you, Your Honor. I have a brief redirect.

REDIRECT EXAMINATION

BY MR. McCOY:

Q Counsel asked you questions about the comparison question technique and actually drew a graph. Do you recall that?

A Yes, that thing that's on the easel over there.

Q All right. He discussed with you probable lie questions --

A Yeah.

Q -- probable lie question technique --

A Yes.

Q -- do you recall that?

A Yes.

Q And he discussed with you a technique called the directed lie technique --

A Correct.

Q -- do you recall that?

A Yes.

Q All right. Dr. Raskin, is it correct that the probable lie technique and the directed lie technique are both methods for administering a comparison question test?

A Yes, they are. One is just a variation and refinement of the other.

Q All right. And it's very clear from your testimony that you prefer the directed lie test?

A Well, I prefer it because the science supports it. And the scientific evidence indicates that it is an improvement over the probable lie. The fundamental principles are the same, but the technique avoids some of the problems of the probable lie, and it works better.

Q Let me just -- just if I could interrupt you.

A Yes.

Q First of all, I want you to tell me how it improves upon the probable lie as a technique for administering the comparison question test.

A Well, first of all, we know with the directed lie the subject's "no" answer is a lie, and they know it's a lie.

Q Okay.

A The probable lie, you hope it's a lie, you don't know for sure if it is, and therefore that presents a potential problem. Secondly --

Q Suppose what you thought was a probable lie was in fact not a lie; how would that in fact affect the results?

A Well, if it were not a lie, then it would not function properly as a comparison question, and that would produce a risk of false positive errors. You still detect the deceptive people, the guiltyies, but you would not verify the innocent. It would become essentially the same as a relevant-irrelevant test, because there would only be two types of questions, relevant questions and then other questions, all answered truthfully. And there's no proper comparison. So that is a risk with the probable lie, and especially if the probable lie question is worded such that the person can answer it truthfully with a "no."

Q When you're using a directed lie technique, does that risk exist?

A Absolutely not, because the direct lie questions are chosen such that anyone answering "no," if they've lived on this planet, would be lying.

Q All right. Now, what is the research that you identified that points to --

A Excuse me, I didn't get to finish the answer though.

Q I beg your pardon, sir.

A There's some other --

Q Forgive me. It's been a long day.

A Yeah, that's --

Q Yeah.

A There are some other improvements that you asked about. One is --

Q Please.

A -- the one I just described. Another is, it doesn't require manipulation of the subject. You don't have to maneuver them and make them feel uncomfortable about personal matters, to maneuver them to answer "no."

Q Could you explain that to me, please?

A Well, if you use a probable lie question -- let's start with a direct lie. You say, "Look, everybody's told lies in their lives. We all know that."

Q Uh-huh (affirmative).

A "So I'm going to ask you, during the first 30 years of your

life, did you ever tell even one lie, and I want you to answer 'no,' and that'll be a lie; right?" "Yeah." "Okay, answer 'no' and think of a time you lied. Don't tell me." So there's no personal invasion there, there's no uncomfortable feeling, there's no manipulation. It's very direct.

With the probable lie you say -- well, first of all, you sort of mislead the person. You say, "Well, I have to have some questions on this test that assess your basic character to see if you're the kind of person that would do that. And you're not that kind of person, are you? You wouldn't do something like that. You wouldn't steal something, would you," and so on. "So I'm going to ask you, during the first 30 years of your life, did you ever steal something. You could answer that 'no,' couldn't you?" Well, that's putting the person on the defensive. It's accusatory, it's very personal.

Q Could you not then create a question what was -- the answer was in fact untrue by doing that?

A You -- you could. I mean, you could get the person to answer "no" and they'd be lying.

Q Uh-huh (affirmative).

A But then you can't be sure and you don't know how they interpret the question. You've also made them feel uncomfortable.

Q Uh-huh (affirmative).

A And we don't know what the effects of that are, but -- and you've misled them.

Q Okay.

A And so there's that. And then the third thing is that it has face validity. Using a directed lie question, the person knows that this is how the test works, they've been told that this will measure what their lies look like when they react, and you'll be able to then tell whether when they answer the questions, the relevant questions, that those also look like lies. So it has face validity. And they understand it. And for the guilty person it's "Oh, boy. Now he sees what my lie looks like, and he's going to know when I answer the relevant question and deny it that I'm lying there too, because he can see it's the same." And for the innocent person it's "Well, gee, I -- I know I'm telling the truth on the relevant question. I hope that my lie shows up clearly, so he can see that it's different." And they worry about that, and that's why it works.

Q All right. And you say that resource -- research supports the argument that you've made and the comments you've made this morning?

A That's right. The -- the results of the studies, including the surveys we've done afterward, to ask people about how they evaluated the different questions and -- and whether -- which

questions were most important to them. And it comes out that way, that those directed lie questions become very important in terms of what I've just discussed, particularly for the innocent people.

Q Okay. And how long have you been conducting these surveys? Over what period of time have you --

A Well --

Q -- been studying this?

A Well, we've been doing research for -- on these techniques for 29 years, and the directed lie work we started doing in 1985, approximately.

Q Okay.

A '84, maybe.

Q And would you do a probable lie test now?

A Not unless I had to. If I were prevented from doing a directed lie and had no option, I would do a probable lie because it's the next best thing. But ethically, I think I'm responsible to use the best available technique that would produce the most accurate results. If all I was interested in is finding people deceptive, then I could use a probable lie and not worry about it. But if I'm also interested in verifying truthfulness, then the probable lie has a higher risk of false positive and the directed lie reduces that risk, and therefore I'm obligated to use the best available. Just as I

said earlier, if a physician treats cancer, he's obligated to use the best available technique. If that technique is not available to him, then he should use the second best.

Q I want to revisit briefly your involvement in the Anti-Polygraph Act of 1988. Could you tell me whether that created a fair amount of controversy among polygraphers?

A It did. In fact, my involvement of that began in -- in 1978, when I testified before the Senate Judiciary Committee at the invitation of Senator Birch Baye (ph) of Indiana. And --

Q What was your attitude about polygraphs being used for screening?

A It was very negative, as it was later and it is today, that it's an abuse, it's an abuse of the techniques, abuse of the public, and it should not be allowed. And I started speaking out publicly on that before 1978, but I did testify at the hearings. And a lot of polygraph examiners got really upset with me, because that was their bread and butter. And then nineteen seven- -- let's see, 1986 was when I testified before the Senate Labor and Human Resources Committee on the Employee Polygraph Protection Act, and, boy, they really got very upset with me over that and had been before, because I've been making public statements for many years about that and writing things about it. And so there's been a continuing animosity toward me by many people in the polygraph --

Q And that's because of -- there's been a reduction in the economic return available, because these polygraphs are no longer permitted?

A That's right. There were about -- the estimates were somewhere in excess of a million such tests per year in the United States, and that's pretty much gone.

MR. McCOY: Think we need a bigger table, Your Honor.

THE COURT: Or fewer papers. Are you looking for 7?

MR. McCOY: Perhaps B7 or B6, the two letters that were presented.

THE WITNESS: I remember handing them back that -- there, yeah.

MR. McCOY: Approaching the witness with B6 and B7.

BY MR. McCOY:

Q Sir, do these letters reflect some of that animus that developed out of your public position with regard to the Anti-Polygraph Protection Act?

A Yes. They're in direct response to treatment of me by interested polygraph persons whose livelihood depended on that.

Q Do you at all regret the stance you took with regard to polygraph screening for private employers?

A Absolutely not. I would take that stance every day until I die, unless the scientific evidence showed otherwise. I think it's the only professionally, academically, and scientifically

and ethically responsible position to take.

Q Are you advocating that polygraphs supplant jurors?

A Absolutely not. Polygraphs, or anything else, don't replace jurors. Like any other piece of evidence, a polygraph is something for the jury to consider and to assist them in reaching their decision.

Q And you've had experience with jurors considering polygraph results?

A Yes, in about 50 cases.

Q And they're consistent and inconsistent with your results?

A With my results or with other people's results. And I've testified before juries on both sides of the issues, sometimes supporting, sometimes criticizing polygraphs, and they make up their own minds.

Q Does the scientific literature that you're aware of suggest that juries have difficulty coping with this kind of evidence, properly presented?

A Not at all. And even the Supreme Court in the case that Mr. Collins referred to rejected the notion -- five Justices rejected the notion that polygraphs are an undue influence on the jury or that they are too time consuming. So the Court has recognized that.

Q There was the notion of the polygrapher that was discussed briefly during the direct -- or the cross-examination. Do you

remember that?

A Yes, I do.

Q And we've had many interactions involving polygraph examinations, haven't we?

A We've had a few, yes.

Q All right. Would you tell the judge whether you've been able to help me every time I've asked you?

A The only --

MR. COLLINS: Your Honor, I don't see the relevance of this conversation to --

MR. McCOY: Goes to bias, Judge. He's the one that introduced it.

THE COURT: I don't know -- I'm not sure exactly the purpose of the question. I'll let you ask it and -- subject to a motion to strike.

MR. McCOY: It's going to be a brief -- just brief area.

BY MR. McCOY:

Q Have you -- have I -- have you and I consulted in cases, in polygraphs before?

A Yes.

Q How many cases?

A Three cases.

Q And how many times have you made yourself available to help me in practice?

A Well, I've made myself available to help you, it's just that the help I gave you was not what you wanted to hear, except in this case. This is the first time that what I did was helpful to your client.

Q All right. And you've had that experience with other attorneys around this country?

A All over the country.

Q All right. And the result you give is the result you get?

A That's what it is, and, you know, let the chips fall where they may.

Q There was some further discussion about the friendly polygrapher issue; is there something that you could highlight to the -- bring to the judge's attention in your affidavit and the exhibits attached to the affidavit that address that issue?

A Yes. I wrote a specific section in my affidavit. I think it may be section --

Q Well, if you wouldn't mind --

A -- number 9 --

Q -- finding that, to highlight that for the judge's attention?

A Yeah, let me find that. Yes, it's section number 9 on page 13 in my affidavit, about the friendly polygraph, describing what it is and why it doesn't have any validity. And I make reference in that to my Law Review article, which is an

attachment to that, and a page number where I describe all of the problems with that concept and present data which show that it has no validity, in that the type of polygraph examinations that Mr. Collins talked about as friendly, as compared to one where the government was involved, the so-called friendly ones, at the behest of defense attorney on a confidential basis, have a much higher rate of people failing than those that are involving the government or law enforcement or where there's -- where there was an understanding that the information would be made available to both sides. And Dr. Honts has recently presented a paper to the American Psychological Society with additional data on a study he did from his own cases showing the same pattern.

So the -- the friendly polygraph notion has no theoretical validity, it has no practical validity, it has no scientific validity; in fact, it has just the opposite. It's -- it -- it is not what they claim it is. And the vast majority of polygraph examiners including government examiners don't accept it either.

Q Those are all the questions I have. Thank you, sir.

THE COURT: Recross, if any.

REXCROSS EXAMINATION

BY MR. COLLINS:

Q With regard to your Law Review article on the friendly

polygrapher, I noted that you state at page 63, the page that's cited in your affidavit, that in light of all meaningful scientific data -- but you don't have a footnote citing to it -- you state that there's no credible evidence supporting that theory. But then you go on to cite the *United States versus DeLorean* in support of the proposition. Is that correct? That's how your Law Review article presents it?

A Well, I did cite the judge's opinion, where he also found it to be almost laughable.

Q And I note that you don't cite any of the cases that have found courts are reluctant to admit polygraph examination under circumstances similar to those that were present in this case; no notice to the government; no opportunity to participate, no opportunity to observe. I notice that you didn't cite any of those cases in your Law Review article.

A No, I didn't. This is a Law Review article. As you know, you don't cite all the cases against your position in your briefs either. This is for lawyers to use for their purposes. And I was presenting them with a source from a court that they might want to use. But that is an aside. The important information there is the scientific evidence that studies the data. And you'll note that that's a very minor thing, it's just a reference.

Q Are you aware of the ethical obligation of attorneys to

cite cases that go contrary to their position in their briefs, in their filing with the court?

A Well, if they have such ethical obligations --

MR. McCOY: Objection; relevance to this proceeding, Judge. This man's not a lawyer.

THE COURT: Sustained. I'll sustain that objection. This is not night school law.

THE WITNESS: It's getting near night, though, Your Honor.

BY MR. COLLINS:

Q Are you aware of Mr. McCoy's opinion that any statements made during the polygraph examination are not admissible in court?

MR. McCOY: Objection; relevance to this proceeding. What my opinion is as to the admissibility of statements my client made has no basis to this Court's determination as to whether *Daubert* -- it has been satisfied.

THE COURT: Sustained.

MR. COLLINS: I have no other questions, Your Honor.

MR. McCOY: Brief recross.

MR. COLLINS: You mean redirect.

MR. McCOY: Redir- --

MR. COLLINS: Re-re.

MR. McCOY: Re-re-redirect.

THE WITNESS: All seems like cross to me.

THE COURT: Well, I think --

MR. McCOY: I could even ask the Court to take judicial notice of the fact.

THE COURT: We've had all the examination.

MR. McCOY: All right.

THE COURT: Did you have some judicial notice you wanted?

MR. McCOY: Yes, Your Honor. I wanted the Court to take judicial notice of the fact that the Law Review article that we're talking about was dated 1986. This is the Law Review attachment that was provided by Dr. Raskin, and it predates, obviously, *Daubert*.

THE COURT: And where does it appear in the record?

MR. McCOY: It appears as an attachment to Defendant's Exhibit W. And it's the first Law Review article attached to Dr. Raskin's affidavit.

THE COURT: Thank you.

MR. McCOY: Thank you.

THE COURT: You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: It's about five minutes of 12. We'll be taking a recess soon. Maybe it's a good time to do this now. Because I am the only magistrate judge here today, I have other

duties as well. We'll resume this hearing at 1:45.

MR. COLLINS: Thank you, Your Honor.

THE COURT: You may leave papers in the courtroom if you choose. We'll be in recess.

THE CLERK: All rise. Court now stands in recess until 1:45.

(Recess at 11:55 a.m., until 1:55 p.m.)

THE CLERK: His Honor the Court, the United States District Court is again in session. Please be seated.

THE COURT: We've finished with Dr. Raskin and now we're ready to move on to the next witness. Mr. McCoy, did you have any additional evidence?

MR. MCCOY: I did not. Thank you.

THE COURT: Mr. Collins.

MR. COLLINS: Yes, Your Honor. Before we begin, I notice that Dr. Raskin, who's not a member of a bar, is sitting at -- beyond the bar, is sitting at defense table. He's -- was a witness, and if he's anticipating being called again as a witness, the government invokes the witness exclusion rule. And there's no basis for him sitting at the table.

THE COURT: Well, there are two concerns here. The witness -- invoking the witness rule seems to come late. That should ordinarily be done at the beginning. Neither party did that. Sitting at counsel table, though, he's not case agent.

He's simply an advisor. Mr. McCoy, why should he be allowed to sit --

MR. McCOY: Your Honor, he should be allowed to sit with me pursuant to Evidence Rule 15, sub (3), which talks about the exclusion of the rule. The rule does not authorize exclusion of, and it gets to (3), a person whose presence is shown by the party to be essential to the presentation of the party's cause.

This is -- Dr. Raskin's eminently qualified to assist me in the kind -- formulating the kinds of questions and cross-examination that I intend to proffer to Dr. Abrams. He's exactly the kind of person that this rule was intended to have. Never in 20 years have I had an expert excluded from the table when I represented in good faith that I needed his assistance in reviewing evidence that's being present -- presented and to formulate cross-examination. So he's seated at the table for those reasons and pursuant to 615.

THE COURT: Aside from the fact of whether he's entitled to have the expert at the counsel table, he's certainly entitled to be in the courtroom, because I think it's too late to invoke the witness rule. Which means if he's going to consult, he's going to be going over to the railing and it's going to take a lot longer time. Maybe just having him sit there is an expedient way, in view of the Court's ruling on the witness rule. Does the government want to argue that any

further?

I think he's entitled to sit in here and consult with him, and having him sit on this side of the railing I don't think is going to make any material difference in the outcome.

MR. COLLINS: I think that Dr. Raskin -- I think Mr. McCoy, as he's test- -- or not testified, but he's stated -- he's a well qualified practitioner of law; he is the one who formulates the questions. If he hasn't formulated questions at this time, then he can't bootstrap having someone else assist him in formulating the questions that he intends to use on cross-examination.

Mr. McCoy has known that Dr. Abrams would be testifying at this hearing for some time. The assistance that Dr. Raskin has represented to the Court today doesn't seem to be any more prevalent -- or necessary than it was prior to this hearing. Dr. Raskin is simply seated at the table for -- I don't know what purpose. Because Mr. McCoy in preparation should have formulated his cross-examination prior to this hearing.

MR. McCOY: Does the Court want a response?

THE COURT: If you want to put anything on the record.

MR. McCOY: Only to indicate that of course I'm going to be formulating the questions. He's not licensed to practice law. But he has specialized knowledge that I don't have. And I intend to rely on him based on what I hear today. And it's

going to be extremely time consuming to set him back behind the bar for me to talk.

And I have to say that in 20 years in state court and federal court, I've never had a court order that an expert could not sit at the table. And I've seen prosecutors have expert witnesses --

THE COURT: You've not made any new points, and I -- I'm not concerned with what your 20 years of experience has been. That won't affect the way I rule. The government could have had its expert here, could have attempted at least to have its expert here to assist in listening to Dr. Raskin's testimony, and it didn't choose to do that. The witness rule comes too late. I'll allow Mr. McCoy to have his expert here. So we'll proceed with the testimony.

MR. COLLINS: Call Dr. Abrams, Stanley Abrams.

THE CLERK: Sir, I need to -- for you to stand before me to be sworn.

STANLEY ABRAMS, PH.D., PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please be seated in the witness box. Sir, if you could move that microphone in front of you. Thank you. For the record, please state your full name, your address, and spell your last name.

THE WITNESS: It's Stanley Abrams, A-b-r-a-m-s. And the address is 1618 Southwest First, and that's Suite P-2, in

Portland, Oregon.

THE CLERK: Thank you.

THE COURT: May proceed.

DIRECT EXAMINATION

BY MR. COLLINS:

Q Dr. Abrams, what is your current profession?

A I'm a clinical and forensic psychologist.

Q And are there any particular areas within that field that you focus on?

A Well, there are a variety. I've evaluated people who have committed some sort of a criminal act, and I evaluate their mental state. I evaluate people for how much risk they are to the community, and I also do work in polygraphy.

Q What's your educational background?

A I have a bachelor's in psychology, master's in psychology, Ph.D. in clinical psychology.

Q And have you held any internships?

A I interned at Temple University Medical School and also in the School for the Retarded in New Jersey.

Q Do you hold any doctorates?

A Yes, in clinical psychology.

Q Do you have any specialized training?

A Well, I have training in hypnosis and I have a diplomate in that area. I have specialized training in a number of areas --

suicide prevention, things of that sort. However, I also have had training in polygraphy.

Q In what school?

A That's at the Gormac School in 1971, I believe.

Q What's your professional experience?

A Well, while I was in -- at Temple University, I played a role in their mental health clinic for the students. I also taught at their graduate school. And in 1961 when I left Philadelphia, I went to Camarillo State Hospital in Camarillo, California. And I spent three years there, where I worked in training psychiatric residents. After that I moved to Oregon and directed the Delani (ph) Mental Health Center. And the year after that I joined Kaiser Permanente and opened their mental health clinic there and remained there for 12 years. And following that I went into private practice full-time.

Q In what field?

A Well, clinical work. And later on in the forensic realm.

Q Do you -- with regard to your education in polygraphy, how often have you practiced applying -- examining subjects with the polygraph?

A Well, I've -- I've administered about 3,500 tests.

Q Do you have -- are you affiliated with any schools of polygraphy?

A Yes. I direct the Western Oregon University School of

Polygraphy. It's tied in with the state system in Oregon.

And -- and obviously, it's a university.

Q And which -- the students that you teach, where -- let me back up. How many students do you teach?

A How many what?

Q How many students have you taught?

A Oh. Oh, I have no idea. It's been going on for nine years. We have -- we try to keep a minimum of 10 students per course and we do two courses a year.

Q Have you done any consulting work?

A Yes, I've consulted with law enforcement agencies of various sorts; did some consulting with the FBI, with Department of Defense, and other county and state organizations; and I -- I'm going to have to look at my resume, I don't know what the others are. But the -- that's about it, I suppose.

Q Are you licensed by any licensing body?

A I'm licensed in psychology in Oregon and polygraphy in Oregon.

Q To what professional organizations do you belong?

A The American Society of Forensic Sciences, American Psychological Association, American Association of Police Polygraphers, American Psychological Association, Oregon Psychological Association, Law and Psychology. And that's

about it.

Q Does your resume also reflect the number of grants awarded, awards presented, seminars presented?

A Yes. Grants are about half a dozen, and -- did you say awards?

Q Awards, yes.

A Yeah. About half a dozen awards as well.

Q Have you ever been qualified as an expert witness in any court case?

A Yes.

Q How many of those have been criminal cases?

A Vast majority.

Q And about what have you been admitted as an expert? In what -- pertaining to what subject?

A Some in relation to polygraphy and some in relation to criminal cases where psychological problems were evident. Again, cases where there's a question of -- after a -- a guilty finding in a homicide case, whether the person would be dangerous in a present situation. I've also worked with law enforcement and testified in -- in certain cases involving law enforcement people, in the cases of use of force, things of that nature.

Q I may have missed it; how many cases were you called as a polygraph expert in a criminal case?

A Oh, I -- I don't -- yes, I do. I -- I could -- no, I can't. I haven't kept track of it all along. I have testified in over 400 cases. How many are polygraph would be strictly an estimate, so I would guess 150 or thereabouts; 100, 150.

Q Have you ever presented any seminars with regard to polygraph?

A Seminars, yes. And I think there are about -- I can make it exact -- about 35 regarding polygraphy.

Q Have you presented any papers at any professional meetings with regard to your subjects?

A Well, I've presented roughly 175 times, as I recall, and probably 140 or so are related to polygraphy.

Q Do you submit any articles to trade journals pertaining -- in relation to polygraphy?

A Trade journals?

Q Trade journals or peer --

A Professional journals?

Q Professional journals.

A Yes. And I think there are maybe about 60 of them.

Q Have you ever presented any articles for publication in polygraphy? The Journal of Polygraphy, I believe, or --

A Yes, quite a few.

Q Have you ever submitted any chapters in books?

A Yes, about four or five.

Q Have you been listed as the lead author of any books regarding polygraphy?

A Yes. Three, and a fourth is probably more a monograph. So three books.

Q How many seminars have you attended in regard to polygraphy?

A That would be about 50.

Q Have you ever testified before any state legislatures?

A Yes. Yes.

Q In regard to what?

A It would be in regard to admissibility -- excuse me, not admissibility. In regard to licensure in that particular state. And --

Q Regarding licensure of what?

A Polygraph licensure.

MR. COLLINS: I'd move for the admission of Dr. Abrams as an expert on the subject of polygraphy, Your Honor.

MR. McCOY: I'm not going to oppose that offer.

THE COURT: He may be allowed to so testify in that area.

BY MR. COLLINS:

Q Dr. Abrams, you're familiar with the history of polygraphy, or the lie detector test; correct?

A Yes.

Q And could you describe your understanding of the history of the various techniques used, or that fall under the rubric or the title of polygraph?

A Well, simply, it's -- it's -- polygraphy's been around for about 100 years, and -- more than 100 years. And basically, it started with a simple interview technique where -- with a blood pressure cuff on. That was years ago. And they would raise the -- the blood pressure and then lower it. When the person's arm couldn't tolerate it anymore, watch a -- simply asking a -- a series of questions back and -- with answers, so it was sort of a interview-like technique. And shortly thereafter it was changed to a -- to specific questions. At that time it became basically a -- an R and I technique, relevant and irrelevant, and those -- and those types of tests. Those were the only questions involved, and they compared the relevant questions with the irrelevant.

In roughly 1947, John Reed developed the control question technique. And I gather there's been enough discussion about the control question, but basically, it was a matter of coming up with a probable lie and having the person respond in the negative to it so they were denying it, and yet you were quite sure that the person was lying. These, however, the way they were set up, overlapped with the relevant issue. So if it was, "Did you rob a bank" -- the question of a bank robbery in '98,

the question would be, "Did you ever steal anything" as a control question. And Backster in the early '60s, I believe, came up with the notion of using a bar so it excluded that overlap. So the -- then the control question or probable lie was then prior to 1995, "Did you ever steal anything?" So it wouldn't overlap with that one.

And over the years the government has been doing some work with the directed lie. And I can go into that if you want to go into that at that point, and the research that's been done in the area.

Q Well, let's just back up a little bit. You mentioned that there was a development with the comparison or the control question technique.

A Right.

Q And that was the probable lie --

A Right.

Q -- in using that to compare with relevant questions?

A Correct.

Q And was there a research done with regard to that theory of the application of the polygraph?

A Great deal of research.

Q Did there come a time when there started to be a development towards different theories about the -- applying the control question format?

A Well, other than Backster making the barred -- using the barred approach. But the directed lie was something that was used by the government, but it was used not in specific testing but more in screening of individuals. The government has to be certain, obviously, there's no leakage. So typically every several years, everybody takes a screening test. And the unions were very much against the use of a -- control question because it was probing into the individual's personal right, was too intrusive. And so they used that and they used the relevant-irrelevant technique to try to avoid that. And they still use this in screening -- the directed lie in screening tests. And they do not use them in specific tests. And they still use the relevant-irrelevant. In the new techniques with espionage situations, where they feel that individuals have possibly been trained to beat the polygraph, now they're using the directed lie and they're continuing to use the relevant-irrelevant.

Q When did this -- aside from the directed lie, are there other theories about the application of the control question technique? Are there variations underneath that that are not the directed lie --

A Oh, there -- there -- there are variations, but they're basically the same.

Q Using --

A There's -- there's a -- the Reed technique, which is called the MGQT now. They revised it a bit. But that has a different pattern of control and relevant questions, different from the zone comparison which is Backster's technique. And there -- there are various methods, but -- but for the most part, roughly two-thirds of the polygraphists use the Backster approach zone comparison.

Q The zone comparison test is the one that's used by most practitioners of polygraph?

A Unquestionably, yes.

Q To your knowledge, when did the directed lie question format of the test arise as a proposal for use in the administration of polygraph examinations?

A Well, a man named Fuse, F-u-s-e, in 1982 indicated that he had -- that it had been evolving for 15 -- 17 years, and they had been using this as a screening device, and that he found it was a very effective device with multiple-issue tests. He went on to say that one had to be very careful not to put too much emphasis on the directed lie, or it would dampen the response to the relevant question. And they did not use that with any discussion between charts so --

Q Could you explain that --

A Yeah.

Q -- particular phrase that you --

A A -- a test -- a test may consist of four repetitions. Each repetition would be considered one chart. So during the pretest portion of the examination, the directed lie and the other questions are explained, and then they're never brought up again. And he warned against that. Now, I should say though that also, if you put too much emphasis on the relevant question, it will have a dampening effect on the comparison questions. So you have to be very careful in how you're doing that. There's a very delicate line, a very delicate balance between the control and relevance. And if you put more emphasis in almost any way on one than the other, you're going to bias the test results.

Q So when you use the phrase "discussion between charts," that's what -- to what you're referring, that one test is administered, the next test, the next test, the next test --

A Right.

Q -- or chart, and there's no communication, discussion between the --

A Ideally, there is no communication. And Department of Defense, which teaches all the government people at this point, says there's to be no discussion between tests. But even the discussion wouldn't be so bad as long as it -- if it weren't biased in one direction. But if you bias it in one direction, you can almost guarantee to get a reaction. So it's not just

the discussion alone, it's how it's discussed and what's discussed. And then if you open up a discussion with the individual, thereafter start chatting with you about various things. And if they talk about the relevant questions or -- they're stirring up, they're creating more stimulus to the relevant questions, and they're liable to come out deceptive even if they're not.

Q Are you aware of any studies done in the latter part of -- field studies done on the directed lie comparison control question format regarding that subject?

A Well, there -- there are only two. And in 1988, Honts and Raskin did a study on 25 confirmed cases, and they're confirmed in a -- a rather different manner than others. Most of the time confirmation comes from people making admissions. So you can confirm a deceptive chart if someone confesses. You can confirm an innocent test, if someone -- someone else confesses, thereby clearing the person you're testing. So -- but in this case they use not only confessions, they also use physical evidence and they also use retractions by victims.

Now, there were 25 individuals. Eleven of those individuals in that study were sex offenders. And when it comes to retractions, recantations, children are very likely -- children who have been abused are very likely to change their mind and to -- which would mean that -- and I don't know this,

because I don't know how it broke down -- but my suspicion would be that there are probably -- some of those people who are sex offenders who have been proven to be truthful probably were reprove -- proved by recantation. And it's very likely if that's the case, the child actually was telling the truth but just recanted. And if I could just read this --

Q Hold on before we get to that. You mentioned that there were two field studies done.

A Yes. Well, let me finish with this, if I may.

Q Okay.

A Well, let me just read this first, because --

Q Well, no, no, let's get to --

A Okay.

Q -- the test.

A Okay, the -- the other problem with this test was that -- with this study was that there were two control questions and one directed lie used. And that's a very different situation, of course, in this one, and that has to be kept in mind. And the interesting thing about the results on that is that the directed lie resulted in 95 percent accuracy. However, there was one false negative. The probable lie was 90 percent accurate with two false positives. So what -- what it shows is that when you go from a directed -- you go from a probable lie to a directed lie, you get this movement going in the direction

of -- of truthfulness. Emphasizing the directed lie moves -- makes truthful people have a -- a stronger score, less false positives, but at the same time it means that deceptive people move in the direction of truthfulness as well. So this study demonstrated that, among other things. And you were asking about the second study?

Q Well, let me ask you about the -- that --

A Okay.

Q -- was a field study with regard to the application of one directed lie introduced in an otherwise comparison of the traditional --

A Right.

Q And so we can define the terms, a false negative refers to what?

A False negative is a deceptive person coming out as truthful.

Q And a false positive is --

A Is a truthful person being seen as deceptive.

Q Okay. Was there another field study of which you're aware that was conducted on the same format, technique used in Dr. Raskin's --

A Well, similar, but it was done in a different manner. This was one in 1991 that I did. And I had 10 confirmed subjects. Six were deceptive, four were truthful. And these -- this was

done as part of the actual test, and I didn't want to really add the directed lie question till the end. When I added it -- it on, it demonstrated that with the control questions, the -- it was clear for the truthful and deceptive, just where they were. But once you added the direct lie, the truthful people had even higher scores. But so too again did the deceptive. They moved in the direction of truthfulness.

So just like Raskin and Honts's study, this same thing occurred, where when you add a directed lie, what you get is a tendency to get more truthful responses from the deceptive as well as the truthful.

Q Did you publish your results of your field study?

A Yes.

Q In what publication?

A That was in the Polygraph Journal.

MR. COLLINS: Approaching the witness with Plaintiff's Exhibit 1, which has been admitted, Your Honor.

BY MR. COLLINS:

Q Is Plaintiff's Exhibit 1 a copy of that --

A Yes, it is.

Q And that was published in 1991; correct?

A 'Ninety -- yes, '91.

Q And what were the conclusions drawn by you?

A Well, the conclusions are that the directed lie -- now,

when I did that, I did it exactly as Raskin does it; in fact, I copied it from a tape of his, from a particular case. And I worded everything related to the directed lie in exactly the same manner. My conclusions were that when you present a directed lie, you open the door to the risk of getting false negative results.

Q That being a deceptive person being found truthful?

A Correct.

Q You testified that the Department of Defense uses a directed lie?

A They do.

Q And the -- in the screening area?

A Right.

Q Is that the same directed lie format that Dr. Raskin follows?

A No, because they do not have questions -- they do not ask questions between charts.

Q Are you familiar of any other analysis done -- published analysis done of the directed lie control question technique?

A Yes, I am.

Q And would that be an article written by Dr. Matte?

A Yes.

Q And where was that article published?

A That was published in Polygraph.

Q And is that a -- an article that you and others in the field of polygraphy -- or is that magazine or that journal a journal relied upon by yourself as well as others in the field of polygraphy?

A Yes.

Q And you rely upon the contents of those to formulate your opinions about the ability or the appropriateness of using particular techniques?

A And learning new approaches and such, yes.

MR. COLLINS: Approaching with what's been previously admitted as Plaintiff's Exhibit 2.

BY MR. COLLINS:

Q Plaintiff's Exhibit 2, the article which you're referring?

A Yes.

Q And what did Dr. Matte analyze?

A Well, basically, he analyzed literally the -- how the directed lie worked. And he indicated two things. One is that the way it is described to the subject opens the door to the individual using countermeasures right at the directed lie. And in doing that, if they were to go undetected, they would easily -- could easily dampen the response to the relevant questions. The second thing was that, considering the fact that there was discussion between charts and that this was

repeated with each directed lie being discussed, and the result of that would make the directed lie so important even to the deceptive person that he would be much more likely to react to that than the relevant question. And so he felt that it was a -- almost a -- a setup for someone to pass a polygraph examination, even someone who was deceptive.

Q Are you familiar with any other analyses regarding the direct lie question?

A Yes, I am.

Q And what would that be?

A That's the -- the statement by Andrew Dollins in 1998. And he's with the Department of Defense. And what he was doing was presenting the findings of Department of Defense and -- and their research and their evaluation of research outside of Department of Defense.

Q If I may -- that was published where?

A In Polygraph.

MR. COLLINS: I'm sorry, I'll switch with the copies here.

MR. McCOY: Counsel, is this 11?

MR. COLLINS: This is 11.

MR. McCOY: Thank you.

BY MR. COLLINS:

Q Handing you Plaintiff's Exhibit 11. Is that the article to

which you're referring, the Polygraph article to which you're referring?

A Yes, I am.

Q And when was that published in the Polygraph Journal?

A '98.

Q The date, do you recall?

A Well it's the -- it's Volume 2, so it would have been somewhere around April.

Q And does this -- in the heading, does it refer to the purpose for which this information has been submitted to Polygraph?

A Yes. Directed versus probable lie comparison questions.

Q In the editor's note, does it state why this information was provided?

A Well, these are all --

Q I'll direct your attention to page 89.

A Yes. You want me to read that, are you saying?

Q Does it state for what purpose it was submitted to Polygraph?

A Well, it provides information to polygraph practitioners and researchers on what has been done and what the results are of various research and what the Department of Defense stand is on some of that research.

Q And this is a matter that's relied upon by people like

yourself and other individuals in the field of polygraphy, this journal?

A Yeah. The Department of Defense has a very large research department. And they have expanded and are doing a great deal, including teaching all the government examiners. And so they undoubtedly have the best polygraph school with the most money in it and most -- the best facilities. And so they are in fact leading the way for polygraph in general.

Q In this issue of Polygraph in 1998, did the Department of Defense issue any statements regarding the directed lie versus probable lie comparison --

A Yes.

Q -- question test?

A Yes.

Q And what was that statement?

A Okay. On -- well, to begin with, they said that it is used to some degree in screening of -- in screening examinations. To be exact, has been proposed and is currently used during some screening examinations. Again, the screening examinations are like testing CIA employees every several years to make sure they're not involved in any -- involved -- they don't have anything going with any other countries of a negative nature to our country. And then he went on to describe the findings insofar as specific testing. Now, specific testing is a test

like this one, where there's a specific situation rather than preemployment or screening or things of that nature.

Q And the situation to which you're referring is the *Walker* case?

A Yes. And he indicates specifically, "It has not, however, been verified that a specific issue examination using direct lie comparison questions is as effective or accurate as one using probable lie comparison questions."

MR. McCOY: I wonder if I could be directed as to where the witness is reading from, just so it's clear.

THE WITNESS: Page 92, the upper left-hand corner.

MR. McCOY: And where did you begin, please? "It has not..."

THE WITNESS: Yes.

MR. McCOY: Thank you.

BY MR. COLLINS:

Q Did the article refer to stimulation between tests?

A Say it again?

Q Did the -- that article refer to the between-chart discussion?

A No, there's no discussion about that. It's just automatic with the Department of Defense. They do not discuss anything between charts, and it's not acceptable.

Q Does the article on page 92 below -- under the heading

Stimulation Between Tests, does it contain any reference to discussion between charts?

A Oh, I didn't even notice that. I haven't read that for a while.

Q The sentence believing -- "Some believe..."

A "Some believe that questioning the examinee between question series enhances the examinee's physiologic reactivity, others believe questioning an examinee" -- "questioning an examinee between question series is unethical and manipulative. The Institute would like to support controlled systematic investigations regarding the question of stimulation between PDD tests." But the Department of Defense is very, very strongly against questioning between charts.

MR. COLLINS: Move for the admission of Plaintiff's Exhibit 11, Your Honor.

MR. McCOY: No objection.

THE COURT: Admitted.

(Plaintiff's Exhibit 11 admitted)

BY MR. COLLINS:

Q Have you testified in court regarding the directed lie question format?

A Yes, I have.

Q Did you testify in the case of *State of New Mexico versus Meade* (ph)?

A Yes.

Q And what was the test that was administered in that case?

A It was a directed lie test.

Q By whom?

A Dr. Raskin.

Q The gentleman seated at defense table?

A That's correct.

Q And what was the result in that case?

A Well, the result was that -- I -- I can tell you the result; give me a second to decide how I should do this. It was during -- it was on the -- during the cross-examination of Dr. Raskin. And immediately after that cross-examination, the -- the defense attorney requested a side bar to plea.

Q Did you testify in the case of *Anderson versus Samrock* (ph) in New Mexico?

A Yes, I did.

Q And what was the test -- the form of the polygraph test?

A That was a directed lie, and it was administered to the plaintiff, who claimed that a police officer had used excessive force.

Q And who was the examiner?

A Dr. Raskin.

Q And what happened in that case?

A The jury found in favor of the police officer.

Q Did you testify in the case of *United States versus Gilliard*?

A Yes, I did.

Q What was the test administered in that?

A It was a directed lie.

Q Now, when you say the directed lie, is there any other name used to the test applied by -- that Dr. Raskin uses?

A Well, not really, because he uses the same format each time, and -- as far as I know, and has in every one of these -- well, it has -- he -- it has in the last two cases. I believe it was in the *Meade* as well.

Q And is it --

A It might have been a little different in *Meade*.

Q Has it been referred to as the hybrid?

A Yes, it has. That was in the *Gilliard* case.

Q And against whom did you testify?

A In the *Gilliard* case?

Q Yes.

A That was against Honts. This was a case in which a physician was accused of defrauding Medicare. And there were 102 charges against him. And they were attempting -- Honts was attempting to get that particular -- and -- and it was there in that case, that it was called the hybrid. Hybrid because it needed to be separate from the test that the government uses.

The test that the government uses is simply called the directed lie. The hybrid test -- it has to be separated some way because of this major difference of discussion between charts. In any event, in this hybrid test, Honts had found him truthful with very high scores. And the -- we -- a hearing took place and the court decided that there simply was sufficient research to admit it at that time.

Q Insufficient research?

A Right. He said there were only two studies.

Q And that would be the 1988 study and --

A And my study.

Q Did you testify in the *Montana versus Gordon* case?

A Yes -- yes, over the phone, actually.

Q Against whom did you testify?

A Yes.

Q Against whom?

A For the prosecution.

Q And who was the examiner, polygraph examiner?

A Raskin.

Q And was that the directed lie test format --

A Yes.

Q -- the hybrid?

A Yes.

Q What happened in that case?

A Well, in the end, the man pled guilty, and -- it was a homicide case, and he pled.

Q Dr. Abrams, do you consider yourself a friend or a foe of polygraph?

A Oh, very definitely a friend.

Q And is there a particular technique, however, that you don't consider yourself a friend of?

A Well, the -- I am against the directed lie as it is now. I don't know what it would be in the future. But the hybrid directed lie has been shown not only in these cases but in quite a few others to have been in error, and always in the direction of false negatives.

Q That being, the deceptive being found truthful?

A Right. And the -- the reason that I am testifying is because I feel that it does and has done great harm to polygraphy, particularly since some of these are high-level cases and -- may I give an example or --

Q Sure.

A Okay. The *Hoffman* case was unquestionably one of those. And in that case Honts had done the testing, Raskin had then reviewed the charts. Both of them evaluated the direct lie tests and the results and found him truthful when he denied this double homicide. And apparently as Raskin was on TV announcing that the man was truthful, it was almost the same

time that the police had gotten a confession. The -- Dr. Raskin then said, "Well, he is a very bright man and he used hypnosis to beat the test." And despite prior statements where hypnosis can't be used to beat the test. But --

Q You mean Dr. Raskin previously stated that hypnosis cannot be used?

A Yes. And I am an expert in -- in hypnosis and have been for years, and because of that, some of my -- some of my polygraph work involves people who are experts in hypnosis. That is, they have been accused of committing some sexual crime while the person is under a hidden hypnotic state. And they have used all manner of hypnotic techniques to try to beat the test, but it seems like the more they try to beat it and to try to use hypnosis or any of those other methods, the more reactive they become. And because of my being able to discuss hypnosis with them, I was able to get confessions and hold them, and an explanation of what they had done and how they had done it. And these are sometimes professional people who are quite bright and quite -- quite capable, use self-hypnosis themselves, even to the extent of any surgery, so they're very good hypnotic subjects. And I would question, actually, the explanation that the test was beaten because hypnosis was used.

In fact, the Utah Polygraph Association evaluated those charts, and they were reported at the American Polygraph

Association. And -- now, this -- this has to be recognized that this is after the fact, but despite that, they either came up -- all of them either came up with inconclusive or deceptive results.

Q On Mr. Hoffman's test?

A Right, despite the hypnosis.

Q And that was in 1985; correct?

A Probably, I don't know. I could check.

Q Is it correct to say that you refer to the Department of Defense for some of their research?

A Yes. But there's a lot of research they don't make available and the government doesn't make available. But at least that summary in that article indicates what their stance is.

Q Do you know if the Air Force Office of Special Investigations uses the directed lie control test?

A I think this is a -- there are -- do you want me to answer that directly, because it's difficult. May I --

Q Well, maybe I'll just back --

A -- (indiscernible)?

Q Have you -- do you know an individual by the name of Yankee?

A I do.

Q William J. Yankee?

A Yes, I do.

Q And do you converse with him on a regular basis?

A Not on a regular basis, but this was at the time of the *Gilliland* [sic] case, when Honts was saying that the directed lie on specific tests was used a great deal by the government. And in fact, he was saying they were following their lead, Honts' and Raskin's lead, on this. And that simply is not true.

Q Why is that?

A Well, it's not true because, one, Department of Defense does not accept that, and also because these -- this list here of two, four, six, eight, ten, twelve, roughly, government agencies were -- some of them were contacted, and they indicated they don't use the directed lie, let alone the hybrid directed lie. And the Department of Defense would not train anyone or accept anyone using that type of approach because of discussion between charts, and because, obviously, they don't -- from this 1988 -- excuse me, '98 article, they simply don't accept it as a valid approach. They're saying it's not as valid as the probable lie.

Q Have you conducted any surveys of your own about the directed lie test?

A No, I haven't.

MR. McCOY: The answer was "no"?

THE WITNESS: The answer is "no." I direct --

MR. McCOY: Thank you.

THE WITNESS: -- I did a survey on the -- maybe you're thinking of the findings of truthfulness and deception with police and nonpolice examinations.

BY MR. COLLINS:

Q Did you do such a survey that you've just now described?

A Yes.

Q And what was the purpose of that?

A Well, we wanted to get an idea of -- since -- since most of our students are law enforcement, we wanted to get a -- some understanding of what the difference was between the findings in law enforcement and the findings in a -- of a private examiner in an ex parte test. And this is in part due to the issue of the -- the concept of the friendly examiner. And so I surveyed what amounted to, or at least I got responses on 3,088 tests. And comparing the law enforcement tests, they found 56 percent truthful, compared to private examiners in ex parte tests, which found 27 percent truthful. And the reason for the discrepancy isn't -- is -- is only that police get a different kind of subject than private examiners do. Private examiners get a lot of the -- more people who are deceptive. And it's sort of a "there's nothing to lose, let's try it" kind of situation. But they are -- the ex parte -- excuse me -- the ex

parte test done by private examiners was, 27 percent were found truthful.

Q Did you -- are you aware of any surveys conducted by Dr. Honts with regard to confidential tests and nonconfidential tests?

A Well, this wasn't a survey, per se, but what he did list was list in the *Gilliard* case what his statistics were. And his ex parte statistics were 55.4 percent he said passed, which I assume means came out truthful, which is twice as much as what these individuals that I randomly chose from the northwest polygraph examination obtained. It was twice as much. And he himself spontaneously, for whatever reason, explained that as to why he had such a high ratio of truthful subjects, and he said, "I -- I suppose it's because I charge more."

Q Dr. Honts did?

A That's what he said.

Q Were you asked to evaluate polygraph charts prepared on Mrs. Constance Walker?

A Yes, I was.

Q And were you able to do an evaluation?

A I was.

Q What method did you use to evaluate -- score that?

A Well, I scored them the way they are typically scored, comparing the comparison questions, in this case the directed

lies, with the relevant questions that abutted it or that --

Q And what -- did you use any particular scoring method?

A I used the seven-point scale.

Q And what's that?

A Well, for each sensor, you can have a plus 3, plus 2, plus 1, zero, minus 1, minus 2, minus 3. Minuses refer to deception; that is, there was a -- a larger reaction on the relevant. The plus scores in this case indicate a larger reaction to the hybrid directed lie.

Q The plus scores or the reaction to the relevant question is greater than the comparison question; is that correct?

A No. The plus scores are when the comparison question, directed lie in this case, is greater -- greater than the relevant question. Pluses were truthful and minuses were deceptive.

Q In your training of other polygraphers, are there any particular areas that you recommended that not be used as a basis -- subject for questioning?

A You mean types of test, or are you talking about --

Q Types of questions, subjects to be tested?

A I -- I think I understand you, but let me try it. We teach to be very wary of confirmatory tests.

Q What's that?

A Well, that's where you have victim, usually -- not always

the case -- and you want to test them. And there -- and it's not nearly as accurate. So if you have a rape victim, then it's not nearly as accurate because of the emotional aspect of the whole test. So we -- we suggest that they avoid questions of that -- avoid tests of that nature.

Q Are there any other types of subjects that you recommend not inquiring on?

A Well, intent questions, that's much weaker, and again, subject to error. So if -- if you had -- if I may use this example, because it's common -- if you have a father accused of sexually molesting his daughter and he admits to having touched her vaginal area for cleaning reasons or medicating, the problem there is that as he did that, he -- he certainly did touch her there, but he's claiming that he didn't do it for sexual reasons. I don't have enough trust in people to believe they can compartmentalize to that degree, and so I'm afraid that people who are actually telling the truth might be found deceptive because of that whole emotional area.

Q So intent is somewhat hard to differentiate?

A It -- it is, because it's a mind kind of thing versus a concrete act. "Did you shoot John Smith?" That's easy. If someone denies penetrating a child, that's easy, because that's a concrete act. They know they did it. With the intent question, "Did you touch your daughter for sexual reasons," it

all is a matter of what's going on in their mind. And if they begin to think, well, "Maybe -- maybe I did, maybe there was some aspect of it there," that becomes very weak. And so we do recommend against it. We do also recommend against the directed lie. There are 13 polygraph -- accredited polygraph schools. Only one of those teaches it for use. The other schools will teach it so they all least recognize it, but recommend against using it. And there -- just one small school in Phoenix that maybe has a school every couple years, uses that. But the Department of Defense does not teach it. College school in -- in Canada, Police College School, does not teach it. And --

Q The technique used by Dr. Raskin, the hybrid?

A Yes.

Q Back now to the examination. Did you -- were you able to come up with a score on the evaluation of Constance Walker's charts?

A With a lot of difficulty, yes.

Q Why?

A Well, the -- the respiration -- incidentally, respiration is a -- probably in almost everyone's case, least effective. It's difficult to score, but in this case it was almost impossible to score because it was so erratic. And so from question to question it varied. There were also a number of

deep breaths. Following the deep breaths there was an apnea often, or something akin to it. And apnea, where there's a literal stoppage of breathing. And when you get a large breath, it not only affects the respiration and the breathing that follows it, which destroys the question, but it also affects the blood volume and raises that up very often, so what might seem to be a reaction is really an artifact that's due to that deep breath. And in some instances, many instances, it dramatically affects the GSR; but I didn't find that so much in this case. I found that the blood volume was affected and the -- the respiration certainly was. But it was -- it was a messy test.

MR. COLLINS: If we may, Your Honor, at this point to illustrate Dr. Abrams' testimony, to project the examination so Dr. Abrams can point out to the Court those areas that --

THE WITNESS: Could we do --

MR. COLLINS: -- he had concerns with.

THE WITNESS: Could we do chart 2 first?

THE COURT: Yes.

(Side conversation)

MR. McCOY: Your Honor, we might want to move so we get a good view.

THE COURT: You may move, and we can dim lights. I think by cutting the switch it won't cut all the lights off.

THE WITNESS: Yes.

MR. McCOY: Is it possible to move the chart further back?

MR. COLLINS: I think we've set it up so that it's maximum magnification. But we'll try.

THE COURT: Would Court Security check and see, if we cut a light, and if you have enough light on?

(Side conversation)

THE COURT: It works, all right.

UNIDENTIFIED VOICE: Yes.

MR. COLLINS: (Indiscernible) see if you can move behind (indiscernible).

THE COURT: You will have to stand by a mike though when you talk.

MR. McCOY: All right, Judge, thanks.

MR. COLLINS: Dr. Abrams, why don't you, if you want, step down and use this microphone. Madam Clerk, will the --

THE CLERK: As long as he doesn't stand too close to that machine it'll be fine. But if stands really close to that machine, I'm going to pick up that hum.

MR. COLLINS: Do you think -- and if he stands right here, will that work?

THE CLERK: If --

THE COURT: You can test it and see.

THE WITNESS: Can that be clarified a little bit? It's a little bit fuzzy.

BY MR. COLLINS:

Q And for the record, Dr. Abrams, you're reviewing which chart?

A This is actually chart 2, because I wanted to show a particular reaction. I want -- I wanted to show a particular reaction there.

Q You might want to move that up closer. And where -- would you highlight for the Court the area that you're wishing to focus on?

A I can if I can get this working. Here we are. This is a question that is really not relevant. It's not one that's used in the scoring. But what you see here is a deep -- see, I guess you've gone over these before, but let me say it again. The upper two are respiration. This is thoracic respiration, about the chest. This is abdominal respiration. This is the galvanic skin response here, the skin's resistance to electricity. This is the cardiovascular or blood volume response here. This is the plethysmograph. I haven't seen Dr. Raskin score that before. It's always been there but it's never been scored. But this time he had a couple of points as a total score on that one.

In any event, what I wanted to point out is, if you take a

deep breath, there is going to be a reaction that follows, almost inevitably. You take a deep breath and you exhale, you're going to hold your breath for a while, because you don't need that oxygen. And so what happens is what's called an apnea here, a literal stoppage of breathing associated with these deep breaths.

Now, if that were a question that were to count, you simply couldn't use that. This is all disturbed. Also, I don't think it did a great deal, but you don't know; I don't think it did a great deal with the galvanic skin response or electrodermal response. But here I believe this erratic response here in the cardio, it's conceivable it was a movement, but I suspect it's really due to that deep breath that's there. And the reason that I bring that out is because you're going to see the same thing later on. In fact, here is a -- not as -- not as great, but here's a -- a fairly deep breath there which is a number of times greater than the breaths that preceded it. And there's a -- the result is some flattening here. There's also a change in the blood volume. All of those are artifacts.

Again, this the third time. Here is another deep breath. And this one you see, like this one here, is flat at the top, which mean it's topping out, it can't go any further. And here again, you see that same apnea. And here again, you see that same distortion.

Q If we might, for the chart, there is -- the first deep breath after -- let's call it the irrelevant question --

A You mean this --

Q -- D --

A -- original, first one.

Q The second one, because that's one the --

A Right.

Q -- irrelevant question.

A Right.

Q That is in relation to which question?

A It -- I really can't make that out from here. I don't know whether that's irrelevant -- I don't know what it is.

MR. McCOY: Could that be D2?

THE WITNESS: It -- it could be D2, it -- yes, I guess it is. Well, that's a control question. Now, to take that deep breath and score that would be very inappropriate.

BY MR. COLLINS:

Q And why is that?

A Because that's an artifact. It's due -- this suppression here or apnea here is simply due to the deep breath. You can't score that. And --

Q And so when you say -- but that's a directed lie question, that's not a scorable question; correct?

A No, that's a very scorable question, because you compare

your relevant and your directed lie. And if -- if someone is going to score this, when in fact it's not a reaction but an artifact, you're going to get a -- a positive response to the directed lie, one that's scorable, because it can't compare to the relevant that follows, because you don't have that artifact in there. And so --

Q So --

A -- all you can do in that case is simply not score -- the only appropriate way is not score the respiration, not score the respiration with the relevant, because you have nothing to compare it with. You have this disturbance here, undoubtedly associated with the deep breath, and so you can't compare this blood volume here. And you don't even know what this does. This -- this may be drawn up, but it's about equal to this one on the relevant anyway, so the whole question has to be excluded.

Q Now, when you take away the first control question, D2 in this instance, to what then can you compare the relevant questions to?

MR. McCOY: Your Honor, at this point I want to introduce a -- an objection as to *Daubert*. This goes to the weight of the evidence as opposed to --

THE CLERK: Mr. McCoy, could you get closer to a mike?

MR. McCOY: Thank you, Madam Clerk. Just for the

record, I want to make a -- an objection that the evidence that counsel's proffering now goes to the weight of the evidence as opposed to the admissibility, and for those purposes it is irrelevant to this proceeding.

THE COURT: I disagree. I think reliability, validity, all these things are factors as to whether the test is admissible evidence at all. Certainly there's a weight factor, and we're not here to determine the ultimate question on the truthfulness or deceit but the admissibility of it. I understand the difference.

MR. McCOY: Well, I would just ask for a continuing objection to questions about Ms. Walker's polygrams. And just -- for those reasons stated. And then I won't interrupt again.

THE COURT: You've made your objection.

MR. McCOY: Is there any objection to me getting a continuing objection to that?

THE COURT: You don't have to repeat the same objection, no.

MR. McCOY: Thank you. Thank you.

BY MR. COLLINS:

A Now, at the --

Q Well, back up. My --

A Go ahead.

Q -- question was, if D2 is thrown out as a control question, that being the one where you notice the big --

A Right.

Q -- peak, to what then are the relevant questions, or can they be compared --

A Well, this -- this relevant question can't be counted either. That -- that's -- there's only one -- there's a comparison made, so there's one score between this directed lie and this relevant question. And since you can't use this, since this is an artifact, then this relevant question has to be canceled out along with it. And I can't say what this one here is, but I don't think it's a relevant question. I think it starts with a direct lie here. So this is a directed lie, this is a relevant you compare it with, these two just have to be excluded from the test.

Q The following question would then be the next relevant question, and Dr. Raskin used the same order throughout: R1, R2, R3, R4; correct?

A For the relevants, yes.

Q Yes.

A And I think he rotated the directed lies.

Q Then the second relevant question would be relevant question 2; correct;

A Yes.

Q And to which control question would it be compared?

A Well, actually, because it's between relevant 2 and relevant 3, this particular control here -- excuse me, this directed lie right here, would be compared to both of these two.

Q Now, is there something that you note about that directed lie on that chart, chart 2?

A Well, there's a lot. First of all, once again on that directed lie, you get a deep breath. Now, an examiner must inform the individual if they are doing anything in the test that is creating problems. I mean, if they keep taking deep breaths, they're destroying the data, and the examiner must inform them. We try to avoid making it obvious be -- that's it in the -- that it's respiration, because frankly, once they know that respiration is being measured, there's a tendency to control it. So what you typically do is say, "You -- you're -- you keep taking these deep -- deep breaths, and every time you do your whole body moves. And that makes me very suspicious. So you've got to stop doing that, because it may be that you're using countermeasures, and I don't know that. So this isn't going to help you. So you've got to avoid the deep breaths if you can, because of the movements."

Okay. Here you have a deep breath and here you get the same thing you got. Over here on the question that had no

relevance, over here on the first directed lie, where there's a suppression after the deep breath. Over here you have a good healthy apnea, complete stoppage of breathing of five, ten, almost fifteen seconds after that deep breath. You also get, once again, here's a disturbance in the cardio. So since you can't use that, since this isn't artifact, and it may affect -- we don't know about -- it -- it doesn't seem to be affecting the cardio very much. But to be safe you have to disregard that. And if you do that, you must disregard the relevant questions on either side, because you don't have anything to compare it with.

The rule is, at least at the federal level, you do not jump over. There may be a directed lie over here somewhere, but you -- you can't compare this relevant with this directed lie. It should about that particular relevant question. And Backster, where Raskin went to school, that's the case. You deal only with the -- the comparison question that is next to the relevant. If there were a -- a comparison question on either side of this relevant, then you could go over here and score it. But there isn't. That's another relevant.

Now, the second thing that is puzzling is, there's some sort of a -- an examiner error, I suppose. Because this is the place where the question supposedly was asked.

Q Could you state for the record, where does -- the question

typically marked on the polygraph exam?

A Well, you see, going to a different one without the circle, there's a little horizontal -- little vertical line here, then a horizontal line going across, and then it comes down. That's the begin -- that first vertical line is the start of the question. The second vertical line coming down, making that a little box, is the end of the question. And then there's a single line afterwards right there. That's where the answer is. And beneath that answer there's either a plus or a minus which indicates what the answer is.

Q A plus being "yes," a "no" being negative -- a slash, the --

A Correct, yes. Now, this down here is puzzling. We -- it's examiner error, I suppose. This is where the computer indicates the question starts, right at this line here, and ends here. But here we have an arrow which says, well, it really starts here -- if I can get this to work -- it really starts here at this arrow, not where the computer says it starts. Now, that's an interesting point, because if it starts where the computer says it starts, it's right here. It's after this response on the GSR has occurred. And it's already moved up here prior to the question, so you can't -- you can't count that. You can't count a -- a reaction that occurs prior to the question, because people can have a -- a strange -- a sudden

thought that would cause a reaction. Because the GSR is very sensitive. So it has to be after the question, in fact, about one second or so after the question, so the individual has at least an idea of which question is coming up.

Now, if that were correct, if the computer were correct, then there would be no reaction to that question at all. And the -- if -- if in fact that person reacted to it, even though they're already responding here, you would expect another reaction here afterwards. That doesn't happen. So if this -- this simply were zero here because it occurred before the question, you've got the GSR on this side, GSR on this side, both relevants, they would end up being plus 2 and plus 2. It would be plus 4, which is a lot of points in this particular test.

So it would -- it could motivate an unethical examiner to put a notation in there that it -- it started back here and this GSR should count. I don't know how clear I am. But given that Dr. Raskin is probably reasonably ethical, I would say that somehow or other, it was just error that caused the computer to react there, but it is a little worrisome.

Okay. So what you end up there with is, you lose all of this and therefore you lose the relevant on the other side and the other side here, because you can't compare the respiration with it. There's not a great reaction. There certainly is

here with this -- yeah, right, there's no reaction here to the (indiscernible), but there is here, so it goes down and then up. So you can't compare these two, because you've got an artifact here.

So the best way of handling it is to throw out these three, both -- the control on this side and the control on the -- the -- excuse me, the relevant on this side and the relevant on this side. And you've already thrown out the relevant in that -- in this situation with a deep breath. So basically, on the first three questions, the first three relevant questions, you get zero. And I don't have the charts handy as to how Raskin scored them, but this is in part because you got a subject who's taking deep breaths as a regular breathing. It's too messy to score. But three out of the four are -- are just not worth anything.

(Side conversation)

Q The -- is there another chart to which you wish to refer?

A Yeah, let -- let me just take a look and see what happened.

Q This is not the --

A But it has -- the total score on chart 2 is a plus 2, apparently. Is that correct? Is that chart 2 or --

Q Well, why don't we focus our attention on these charts --

A Okay.

Q -- first, and then we'll get into the --

A Okay. The -- the last one, and this must be the directed lie here, other than it's being rather irregular and such -- okay, this must be the relevant. There's a good -- I assume this is the relevant and this is the directed lie right here. Okay. Looking at the electrodermal or GSR, there's a good response there; small response here on the directed lie. So that would be worth a plus 2. A plus 2 -- excuse me, a minus 2. A -- if on the electrodermal response is it's -- if it's twice as large, it's worth a 1. If it's three times as large it's worth a 2, and four times as large -- higher, it's worth a 3. This one -- I -- I don't give many 3s. This one is much higher than this one here and certainly ought to be worth a minus 2. This is a movement down here, but it's -- it's late, so it doesn't affect what's happening here. So on the relevant, there is some rise in here. And here -- there's -- there -- there's a lesser rise and it's going down. This is probably worth a minus 1. And the -- there's some suppression here, there's some -- some -- it's too messy in there. So that would be worth a minus 3, which was in the direction of deception for chart 2.

Q Is there other information on other charts to which you -- that you wish to have --

A Well, I -- I don't know how much time you want to take. I know this has been going at -- a long time. I can go through

all four of the charts and literally score them, but I can tell you that my scores on these four charts, when you eliminate the very consistent movements, when you recognize the instrument failures that have occurred, when you recognize the deep breaths, the movements, erratic breathing, these are terrible charts. But my findings are, they're strictly inconclusive. And I have absolutely no doubt that if I sent them out to various experts the results would be the same, because it's just too obvious.

And the interesting thing is, on some of these where it's just like that, where there's deep breaths, Raskin scored those as plus 2. That's a very dramatic stoppage of breathing and it would be very good, except for the fact there was a deep breath there. That's a dramatic apnea there, stoppage of breathing. But it's because of that deep breath. And it's -- it's consistent, and that's -- that's how you make that determination, deep breath, apnea. You can't score those.

Q Can we take a look at chart 1?

A Let me just get my -- well, these are clear -- this is clear anyway. Can you -- is this the focus here?

UNIDENTIFIED VOICE: Yes.

BY MR. COLLINS:

A That's better. Okay, what you notice immediately is, once again, on the control question -- the directed lie, not the

control question --

Q The other way.

A There we are, that explains it. Okay. First thing, looking -- just looking at what is going on here, first thing you see again is a deep breath. And I assume -- I don't have to assume, because I heard that the pretest and the test, there were no warnings of stopping the deep breaths. Again, it's on the directed lie. So this has probably caused this rise. This apparently is some failure in the instrumentation there, and I've noticed it a number of times. And this -- is very possible that Raskin scored this as a reaction. It's not. Again, it's an apnea. Again, it's due to the deep breath. This is probably, and even this, might be due to it. But if we just cross this out and -- and the cardio out because it's been so consistent -- consistently affected by the respiration, that leaves you just with the galvanic skin response.

This is the highest point here, right in here, and you compare it to this one here. There's not -- this is better because of the duration and it's -- it is certainly higher. But it's not twice as high. So I could give that a zero. But that's all you get out of that is -- is a zero because of the distortions.

Q And to be -- for the record, D2 is the one to which you were referring where the deep breath was?

A Right.

Q And the question the -- next to it was R3, relevant question 3; correct?

A R2 and R3. So this one affects what's happening here. This is a nice rise in GSR, compared to this. This is at least a minus 1. But both of those are being compared to that D2, where there's a deep breath. So you can't compare the pneumo on either side of it. You may perhaps compare the GSR, but the -- this -- this you can't count on as being a reaction because of that deep breath.

And I started in the middle because I was trying to pick out the deep breaths. And once again here on the other D4, the other directed lie, another deep breath.

Q Is that D4 or R4?

A That's -- I'm sorry, that's D3. So this must be R4. These are hard to make out. Okay. A deep breath there, so it -- it may be responsible for -- it may be responsible for some of this large reaction on the GSR and it may be responsible for some of this rise here. You don't know -- you just know that -- that it does have an effect. There's a little suppression here, not the apnea that you saw before, but a suppression. So you cannot count -- you cannot count the respiration on either side here, because this time it's -- it's in the respiration but you can't count it, because it's an

artifact. The -- it -- it doesn't matter with the GSR because they are equal anyway in size. So that's a zero.

There's a problem with this cardio. I haven't the slightest idea why the sensitivity is increased. Because if you increase the sensitivity, you would get a much larger reading, much like this one down here in the plethysmograph, which isn't even be count -- isn't even counted. All it would take would be to increase that sensitivity. And this makes it very difficult to read because it -- even a tiny response like this one could be meaningful.

But there is a -- there is a -- a bit of a response here. This -- this one is -- this one is -- is rather late. And so basically it's flat here, and on this relevant, where the deep breath is, there is a rise, but you can't count that, even though it's -- it may be a better rise than what you're getting on the directed lie. But you can't count it because of that deep breath.

So really, that -- that whole -- the two of them pretty much have to be zeroed out too, because the -- the -- no, just this one has to be zeroed out because this is a deep breath on the relevant. So these two cannot be counted. So that has to be thrown out. You -- and here on this relevant, you've got a deep breath, and this is clearly a reaction to the deep breath, so you can't count this one either.

And what you're left with is at the very beginning there are no more deep breaths. There's no deep breath on the first directed lie, so this is relatively normal. And there's no difference between the breathing here on this directed lie. Okay.

Q It's working, just turn --

A No difference here between the directed lie here and the relevant, so that's a zero. This is fairly normal breathing for a change, which is rare. The DI has a large -- a pretty large reaction. You could be rigid about it and say it's not twice as much. I think Raskin gave that a zero; I might be prone to give that a plus 1, because it's a pretty large reaction. Not twice as much as it should be. And the -- the cardio is -- is so -- there's so little sensitivity there. You're comparing this little bit with this little bit, so that would be a zero. And so this chart doesn't have much either, I'm afraid.

Q The -- you mentioned that sensitivity was changed. Do you notice sensitivity being adjusted?

A Sensitivity --

Q Sensitivity on the blood pressure line there.

A No, it hasn't been changed. It should have been changed. There's no reason why it should be such a small tracing. It's very tiny, and therefore because it's tiny, it's hard to

compare these differences. If it were larger, the differences would be enlarged, and you could see a better -- get a better picture. It's -- I don't know why the sensitivity is not --

Q Let's take a look at chart number 4 then, just --

A (Indiscernible). No, this is 3, the one he didn't use. (Indiscernible) in here.

Q I think you have it upside down.

A It's hard enough. Yeah.

Q It's upside down.

A Yeah, that's -- you have to turn it.

Q Yeah, it's upside down.

A Yeah. Now, chart 3, Raskin elected not to use. I assume it's because of some problems with the instrument again.

Q And I think you've made your point already. Do you notice any aberration in the breathing pattern in chart number 4?

A Well, right up here, you see a deep breath, and that's on the -- I think that's a directed lie.

Q Any other aberrations in the recorded -- you noted on that --

A But -- but if you look down, there's -- there's a deep breath, and there's again a reaction, probably to the deep breath.

Q And that's on the blood pressure line?

A Right. And there's -- now, that -- that -- that

respiration is really messed up after that deep breath. I don't see any other -- this is a somewhat large one, but it's only about twice as large as the others. It may be responsible for some of this that's going on. But it -- it's hard to tell. Okay. The -- see, I assume this is a directed lie here.

Q No, that's not.

A Okay. All right. So directed lies, one, two, three, the fourth one. Okay. This one, again, you cannot compare to the relevant over here. And to this one, the respiration leaves you nothing to compare with. That's an artifact. You can't compare this. And so what you're left with is maybe the GSR, and they're pretty much the same, so that would zero that whole one out. The --

THE CLERK: I'm really picking up a lot of the hum on that machine.

THE WITNESS: Are you? I'm sorry.

THE CLERK: Thank you.

THE WITNESS: I'm having trouble seeing which is the directed lie and which isn't. Okay, they --

THE CLERK: Would it help to stand offside of that?

THE WITNESS: It would help if I could get right up to it, maybe. Let me get the -- hold it for one second.

(Indiscernible).

THE COURT: If you need a light, we'll turn it on

temporarily.

THE WITNESS: Well, I can see these, which
(indiscernible) 3. Chart 3 there, again, is right on the
cardio, is that same --

BY MR. COLLINS:

Q Chart 3 or chart 4?

A Chart 3, which we aren't showing. The one he -- he decided
not to use. That has that same problem with the
instrumentation, for some reason, that deep, dark line.

UNIDENTIFIED VOICE: That's better, I can't
(indiscernible).

THE WITNESS: Okay. All right, now -- this is a lot --
this is helpful. Okay. So on -- on D1, which is the one with
the deep breath, we have to -- okay, if I use my nail, I can do
that. Okay. This one we have to throw out, and with the
relevant question that's next to it. Now, here, it looks like
from here on we can make some evaluations. Here on -- okay,
this is relevant 1 here, and this is relevant 2. Okay,
relevant 1 we can't use. So going to relevant 2, it's compared
with the directed lie here. It's -- it's almost twice as much.
That might be worth a minus 1, I don't know. I might have just
not scored that one.

Here the -- there's a -- a little apnea here and here,
but not -- not much. Here's a pretty good response. Again,

it's very likely due to this deep breath, but I think we'll -- I just gave it that, and I made this a minus -- a plus 1 here and this a minus 1. The cardio on that relevant is better than this one here. You can see the -- how the rise is just sort of flat here, and this goes up and then comes down. So that's where it's a minus 1. So in this particular question I ended up with a minus 1. Now, minus 1, again, is indicative of deception.

Now, here on this one, this is relevant -- this is relevant 3 and relevant 4. We've made this comparison here so now we're on relevant 4 with directed lie 3. Okay. It's simple enough. You just measure this one, and is it twice as much? Not quite. So this would be a zero. This is a relevant, this is a directed lie. Nothing much here on the cardio, which is blood volume. It goes down, in fact. And here, there's a little bit of rise. Here's a rise. And so this would certainly be a plus 1 on this one.

And nothing much on this. A little erratic in here. There's a couple suppressions in here. So I might give this a plus 1 here. So what we've got is plus 1 and plus 1, so that would be a plus 2. And the --

BY MR. COLLINS:

Q Final one, chart 5.

A Okay, this should be -- right where this movement is, the

reason --

Q And that's in -- that's --

A That's a -- a directed lie.

Q And that would be the first directed lie?

A Yes. Now, the reason this is a movement, and it's undoubtedly a movement, a movement probably of her arm, maybe with the cuff on, it --

Q Do you notice a notation that Dr. Raskin may have made --

A No, no. That's my notation.

Q Oh.

A No, it's my M for movement. And no, there's no notation at all by Raskin. But -- when you get a smooth rise and then maybe a drop. But when you get a sudden rise like that, something is going on and there's some movement, and that's simply what that is. So you can't compare this cardio with the relevant at all. Even though the relevant is flat as can be, what you've got is a movement. And so you can't use it. So that's a zero. The electrodermal, GSR response, they're basically equal. The -- again, this has nothing to do with it, but it's -- it's flat here on an irrelevant question, but again, it's -- it's erratic breathing that's taking place.

There's -- there's not much there, and I would -- I would zero that one. There's a little bit of a -- a -- a little bit of a suppression there, but there's some suppression here too.

So that amounts to a zero.

Okay, the next one is -- this one is relevant, and this one is a directed lie. Again, his instrument is acting up. There's nothing here, there's nothing here on the blood volume. This one is easily twice the directed lie, which makes this a minus 1. There's nothing on the breathing here, but here something is happening. Once again, here's a bit of a -- a deep breath, but it's not affecting the blood volume down here. These -- I -- I -- I think this is scorable and I think that's a plus 1. So you've got a plus 1 on the respiration, minus 1 on the GSR, so you end up with a zero.

These are inconclusive tests, and there's no more in here than that. Again, this is -- okay, this is the -- this is the relevant here, compared to this directed lie here. This is just about -- I don't think it's the instrument. I have some problems with my hands and I can't get much pressure out of them. Okay.

This one is twice as much as the directed lie here. That's worth a minus 1. This directed lie is flat. This is a rise here. That's a plus 1. I still like the pneumo over here on this side on the directed lie. And so -- let -- let me say again, (indiscernible), this is a minus 1, this is a minus 1 compared to this. This is a plus 1. So you have two minus 1s and a plus 1, you end up with a minus 1.

And finally, this should be -- okay. Here where all these movements are -- incidentally, there are movements over in here on -- that's on the plethysmograph, though. Okay, on this -- this is a relevant, and this is the directed lie. These two are equal in size. That's a zero. The blood volume, there is a bit of a response here. It's small, but so too are the tracings. They're too small. So when you get something as small as this and there's nothing much here, you've got to give it a score. It's almost something versus nothing. And there's absolutely no reason for these to be so small. They can be enlarged easily and read more easily.

This is a nice suppression here of 3, but you get a suppression here of 3 also. So this cancels this out. This cancels this out. Down on the -- here, there's too much mess to -- excuse me, not down there. But here this is a little response, and I'm not even sure I gave that any credit. It's so small, but it's -- it's small because the -- it -- sensitivity is poor. So this versus nothing. That whole thing would be worth about plus 1.

So throughout the entire test, I got low scores maybe -- and I have it over there, but maybe a minus 2 at time, plus 1 at others. It does not equal a plus or minus 6, it's inconclusive. All of those breathing reactions make me even suspicious of some naive attempt at using countermeasures. And

the person should have been warned about the deep breaths and made to stop, and also that sensitivity on the cardio should have been increased. In -- and there's -- there are problems with the instrument and there -- especially that one time, there are problems with the examiner keeping track of the numbers.

So it's an inconclusive test, and I don't think there's any -- it doesn't mean she did it, doesn't mean she didn't do it. There's absolutely no way of knowing from this test. It's worthless.

Q Are you familiar with the scores that Dr. Raskin assigned?

A Yes. If you --

Q If we may disconnect you from that contraption and turn on the lights. Drawing your attention to what's been marked as Plaintiff's Exhibit 10, the chart; is that the scoring system that Dr. Raskin used?

A Yes, it is.

Q And in chart number 1, what did he assign to the respiration?

A Plus 2.

Q And that's in -- for relevant question 3 and relevant question 4; correct?

A Yes.

Q And what would your scores have been?

A Well, tell you what my scores would have been. I have zero all the way across, and on relevant question 3 I have a deep breath, which affected the relevance on either side of it. So I have absolutely no scores on the respiration on that particular one.

Now, I -- I should tell you, I've done this before with Dr. Raskin somewhere in the South, and watched him score tests. And he takes -- when he can't use one control because there's a problem with it, he will go all the way across the test and use another control. The rule is that you have to use a control that is next to -- that abuts the relevant. And anything else would be inappropriate procedure.

Q You --

A Now, I don't know how scored these, but he -- not the way I did, I'm sure.

Q In the same chart number 1, he gives one score for relevant 3.

A I have his score for the cardio on relevant 3, which is a plus 1.

Q So you agree with that --

A Right.

Q -- plus 1?

A Right.

Q Chart number 2 he scored respiration -- he showed results

on relevant 1 and relevant 2.

A There are deep breaths that affect the scores on relevants 1, 2, and 3. He cannot score those plus 1 on those first two questions because they're artifacts, they're not reactions.

Q Did you assign scores to any of the other readings?

A On the GSR, on the very bottom, he scored a minus 1, I scored a minus 2, because it was three times as large as -- the relevant was three times as large as the control.

Q How about for --

A And on the bottom for the -- for the blood volume, I have a minus 1 on 3 and 4, and somehow or other he has a plus 1 for those two. And I could easily go back to those. There's --

Q Chart 2 or another chart?

A This is chart 2.

Q For cardiovascular, he has --

A For cardio -- I'm sorry, I'm looking at the plethysmograph. I'm not used to that being in there. Okay. He has a minus 1 for cardio on relevant 3, as I do. And he has a zero on relevant 4, where I have a minus 1.

Q And for the plethysmograph, the chart -- that's the only chart for which there seems to be reaction. Do you have --

A No, I did -- I simply didn't score them. I've never seen him score them before, and he -- he scored them this time. And because sometimes with a plethysmograph, you can have a sign of

reaction the opposite of the cardio, where it goes down rather than up. But some people can adjust it so it goes the same direction. And I don't know what he's done with it, so I have just ignored it. And you -- he can keep those two points in there. It's not going to make any difference.

Q Chart number 4, which he scored, respiration, he has plus 1 on each relevant question.

A Well, I agree with him on relevants 2 and 3. I have a plus 1. The first one is a deep breath, and once again, it's an artifact, you can't score it. The last one, I have -- a -- a zero. So I -- I -- I agree with two out of the four.

Q And for cardiovascular, he has plus 1 for relevant questions 1 and 2 and 4, and a negative 1 for relevant question 3.

A Okay, I agree with him on 1 and I agree with him on 4 and I agree with him on 3 where he has a negative. Relevant question 2 I don't agree. I have a zero where he has a plus 1. I also have a minus 2 on the GSR and relevant 3, where he has a zero.

Q And finally on chart 4, respiration for relevant 1 is plus 1, relevant 2 and 3 are plus 2, and relevant 4 is plus 1.

A Okay. I agree with the two center ones at plus 2 each on respiration. However, on the other two, I have minus 1 for each one, and -- which means I saw a larger suppression or whatever it was on the -- on the relevant than on the control.

Q And for electrodermal, he has zero across the board. Do you have --

A I'm not sure how, but I've got two minuses for relevants 2 and 3 on that one.

Q When you say you're not sure how, what --

A I meant -- I'm sorry, I meant I'm not sure how he got it.

Q Okay. And cardiovascular?

A I have -- I agree with him on one, which is a plus 1. And I don't agree with his plus 1 on the second relevant. I have a zero. We both agree on the minus 2 on -- on relevant 3, and we agree on the fourth one, which is zero for both of us.

Q And your total score was?

A Well, I have a total score of minus 4, inconclusive, compared to his -- I think he had a plus -- I don't know what he got -- I thought it was a plus 17 that he had.

Q I believe it was, correct. The Department of Defense scores tests in a different fashion, correct, than --

A Well, they -- this is not their -- and it's not a zone comparison style. But the similarity is that if you score the relevant question to the control abutting it, then the -- basically the score would be the same.

Q Does the Department of Defense follow a procedure where, if one is inconclusive or negative, that one --

A I know what you're saying. When they do a multiple-issue

test -- this is not a multiple-issue test. This is really just one issue. And when they do a multiple-issue test, like, "Were you the driver of the getaway car? Did you have a gun when you went in there? Did you shoot the clerk," that sort of thing, three different areas, if someone comes out deceptive on one of those four, then they are considered deceptive for the test. Because it doesn't mean they did all of those things, but it does mean they were found deceptive in that one particular -- on that one particular issue. To mix relevants or -- and make -- come up with a total score is simply incorrect, it wouldn't make sense. I mean, a person could be the driver and appropriately come out deceptive on that; but he wasn't in there shooting the gun and he didn't have a gun. To combine them would be like combining apples and oranges. It makes absolutely no sense. So the -- the DOD doesn't really do that. They just -- if someone fails any one of them, they fail, because they were deceptive on one part of that test, in that robbery.

Q In your testimony you used the phrase, "a naive attempt at countermeasures." To what were you referring?

A I -- I'm sorry, say it again?

Q In your testimony earlier, you referred -- you used the phrase, "a naive attempt at countermeasures." What -- to what were you referring?

A That these might have been attempts at countermeasures?

Q You used "a naive attempt." Use --

A Oh, naive attempt, I'm sorry. Well, when you get sophisticated people, they are more able to use countermeasures effectively. I mean, Raskin and Honts have done a lot of research on it and they've demonstrated that you can press your tongue down and create a reaction. You can bite your tongue and create a reaction. But -- and you can count backwards from 100 by sevens and create a reaction. Now, these -- I have my students do that themselves so they can see what it looks like. But the interesting thing -- and I did a study on countermeasures too. People can use countermeasures and you, observing them the whole time, you cannot detect it, if they're sophisticated. And you can't -- you don't necessarily -- you can't necessarily detect it on the chart.

Now, there are a couple of times I pointed out movements. I don't think those were countermeasures, I think she just moved her arms at spots. But you can see where there is a -- a movement. But when someone does it in those particular ways, by biting their tongue or just pressing their tongue down, it looks like a reaction. There are ways of countering that. There is a motion detector, which is very effective at countering it. And so it really lets you know when someone is using countermeasures, even though you can't see it on either

the chart or in the person.

But Raskin indicates that the fact that they know the method or read about it on the Web -- because it is on the Web, there are pages and pages available on the Web on how to beat the polygraph -- and so we have to be even more careful now. But he contends that the person has to actually be trained to -- by someone to utilize these countermeasures effectively -- counting down from 100, biting one's tongue, pressing one's tongue, because those were the things that they used in their study.

But -- and I -- this is a long way in answering your question, I'm sorry. The -- when I said naive countermeasures, that breathing was so irregular so much of the time, so many deep breaths -- but again, she wasn't warned -- but you might be a little suspicious that she was trying to disrupt the test because of that. But I didn't see it anyplace else, I only saw it in the breathing. And that is typically a naive way that people use to try to beat the test. You know, you even beat the test if you come out inconclusive.

MR. COLLINS: No other questions, Your Honor.

THE COURT: Mr. McCoy. We're going to take one afternoon recess.

MR. COLLINS: Your Honor, the concern is, Dr. Abrams has to catch a flight out tonight. If we could press forward.

MR. McCOY: Well, I wouldn't mind a break, whether I take a break now or in a few minutes. I am going to be making a request for *Jencks* information. Apparently he scored the tests. We'd like to see his score sheets. There's some other information that has been provided to me by the government, and I'd like to have that before I cross-examine on -- so I think it's going to be necessary for me to -- I mean, there was a lengthy presentation about the scoring, and I'm not equipped to cross-examine him until I see it.

THE COURT: Does the government have any *Jencks* Act information?

MR. COLLINS: Dr. Abrams did not turn over anything to me. I was not aware that he had anything --

THE COURT: Well, you might inquire. We'll go on the record here and see if he has any (indiscernible).

MR. COLLINS: If he has anything, I'll turn it over.

THE COURT: Well, we need to determine how much time we're going to allow for the recess. Let's determine now whether he has any.

MR. McCOY: How about 10 minutes, and then we can resolve any problems at the end of that and then get going.

THE COURT: All right. Except I'm not going to stretch it out. You have an expert there, and this is not the trial of the case. But I'll let you look at the material.

MR. McCOY: Okay.

THE COURT: We'll start with a 10-minute recess.

THE CLERK: This matter is in recess for 10 minutes.

(Recess at 3:50 p.m., until 4:01 p.m.)

THE CLERK: All rise. His Honor the Court, this United States District Court is again in session. Please be seated.

THE COURT: Everyone has had a chance to take a deep breath. We'll continue.

MR. McCOY: Don't know if the breath was deep enough, Judge, but it's the best we got.

THE COURT: Well, we're not measuring it. Are you ready for cross-examination?

MR. McCOY: I am, Judge. I just need to get something.

CROSS-EXAMINATION

BY MR. McCOY:

Q Good afternoon, Dr. Abrams. My --

MR. COLLINS: You might want to pull the mike.

BY MR. McCOY:

Q My name's Kevin McCoy. We've not met before, have we?

A We have not.

Q All right. We have not had an opportunity to speak?

A That's correct.

Q And I was just provided with a copy for the first time minutes ago, the scoring sheet you used when you evaluated Ms.

Walker's polygrams; is that correct?

A I would assume so. I -- I don't know, I assume that you were given them at this time. I -- I would have no idea.

Q See no reason to doubt my representation that I just got it?

A Not at all.

Q Thank you. There's been some discussion here about scoring, the second half of your testimony. What scoring method do you use?

A I use the seven-point scale.

Q All right. And where is that published?

A Where is it published?

Q Yes.

A It's been published in some of the work that Backster has handed out and in his materials. It's a pretty straightforward approach that's been used for years at this point.

Q Did you bring it with you?

A No.

Q Okay. Has it been subjected to scholarly research?

A I'm sure it has. The -- I'm sure it's the same approach, if you're talking about the seven-point scale, that Raskin uses. There was one article that -- by --

Q I'm not interested in what Mr. Raskin uses. I'm --

A Okay.

Q -- interested in what you're using, sir.

A Okay. It's the same -- you asked about a -- was it subject to scholarly review. There was a paper done by -- I think his name was Webber (ph), which -- who described a variety of these approaches, one of which was the seven-point scale.

Q When was that?

A Oh, I have no idea. Some years ago.

Q What publication did it appear in?

A I -- I think it was in Polygraph.

Q All right. Was it peer reviewed?

A Yes, I would assume so.

Q Do you know?

A There's no way I know what happens there, but I know all my work is peer reviewed and I assume that that was peer reviewed.

Q All right. So if I want to determine how your scoring system works, I would need to look at that article; is that correct?

A That, or ask me.

Q Okay. As I understand it from your resume -- Mr. Collins was kind enough to give me a copy of your resume some weeks ago -- you're the director of the Oregon University School of Polygraphy?

A Yes, Western Oregon University School of Polygraphy. It's on the grounds of Western Oregon University.

Q And you've essentially held that position since 1990?

A Yes.

Q And that isn't an accredited polygraph school; correct?

A Accredited by the American Polygraph Association, also by some of the -- the school author- -- educational authorities.

Q Local to Oregon and perhaps to the Northwest?

A Right.

Q All right. It's one of the 12 accredited polygraph schools in the United States and Canada; correct?

A One of the 13.

Q There's 13 now? All right. And at the school, do you -- you indicated that you run courses twice a year?

A Correct.

Q And typically, 10 or 15 students a session?

A No, we try to limit it to 10.

Q I see.

A There are times, especially in the winter months, when we get a lesser number, and on occasion we've allowed an extra person or two to come in.

Q All right. And that's where you teach the skills to people who want to be competent polygraph operators?

A That's correct.

Q And the course takes approximately how long?

A Right now, it's seven weeks. It will be going to eight

weeks. However, there is work that they have to do, an internship it's called, afterwards. And prior to coming into our course, they have to read and study the textbook and then they will be tested on it. So that will determine their final score and also whether they will graduate.

Q And I understood you to tell Mr. Collins that you are actually a proponent of the polygraph?

A Yes, I am.

Q All right. And you advocate the use of polygraph examinations for the treatment and control of sex offenders?

A It's something that I was previously involved in and did work on the development of. And yes, I am in -- I'm not involved in it anymore, but --

Q Right, but --

A -- I was.

Q -- I guess the question is, you advocate the use in those contexts?

A Yes, the appropriate use.

Q Right. And you advocate the use of polygraphs for people who are on probation, again the appropriate use?

A Probation for sexual offenses.

Q Just sexual offenses?

A Yes.

Q All right. And as a proponent for the polygraph

examination, you've testified in court before; correct?

A I have several times. Not more than two, I don't believe.

Q Not more than two.

A As far as I recall.

Q All right. Do you believe that polygraph examination is founded in the scientific method?

A It -- it -- it wasn't in the beginning.

Q No, we're talking today, sir.

A Today.

Q A polygraph exam that --

A I -- I think --

Q -- you administer.

A -- I think so, yes.

Q All right. And that the psychophysiological principles that underlay the polygraph, the polygraph that you administer, there's a basis in science for those?

A Yes.

Q And that that basis is valid?

A I believe that.

Q And you would be prepared to testify that that's true?

A Yes.

Q All right. And you know and you've pointed to some of the literature that there's a fair amount of scientific review of the literature of polygraphs; correct?

A That's right.

Q In fact, you've proffered to us your 1991 article; correct?

A Yes.

Q Tell Judge Roberts what that article was about.

A Well, I was trying to determine if the directed lie could overly influence a test result, and to cause it to be strong enough to cause -- possibly cause false negative results.

Q Uh-huh (affirmative). When you said that you testified you think one or two times about the polygraph in court, that's not true, is it?

A No, your question wasn't whether I testified. You took -- asked if I testified on the use of periodic polygraph tests with sex abusers.

Q Well, maybe why don't I ask the question again.

A Okay.

Q Have you ever been asked to establish a foundation under *Daubert* for the admission of a polygraph examination?

A Yes.

Q And have you done that?

A Yes.

Q How many times have you done that?

A I'm going to guess, without looking at my resume, roughly six or so, I suppose, five.

Q Okay. In fact, you did it as recently as 1997 in Seattle;

isn't that right?

A In the *Pitner* (ph) --

Q Yes.

A -- case? Yes.

Q And in that case you were the proponent of the admission of an FBI agent's polygraph of a government witness?

A Yes, but I was on the side of defense.

Q I understand that. Isn't that --

A Okay.

Q -- what you were trying to do?

A I'm sorry?

Q Isn't that what you were trying to do was to get that polygraph exam admitted?

A That's what I was asked to do, was to evaluate those to see if it should be admitted, yes.

Q And you testified in support of it, didn't you?

A I did.

Q All right. The government was opposing you in that particular instance, were -- weren't they?

A Yes.

Q But the judge admitted the polygraph for a limited purpose; isn't that right?

A For a limited purpose, yes.

Q So you are familiar with the principles that surround

polygraphs in the *Daubert* standard?

A Yes.

Q Indeed, you have sponsored seminars on the subject, have you not?

A Yes.

Q And you've taught other polygraph operators how to go about testifying at those hearings?

A No, it never got that far. I -- I got as far as -- this was in -- recently a Northwest Association meeting. It -- it only got as far as telling them the progression of the laws starting from *Frye* and then going on from there. I did not tell them how to testify. I would have been happy to do that, but I didn't.

Q Do you remember being in San Diego, 1997?

A Yes.

Q And do you remember giving a lecture or a presentation on *Daubert* and polygraph admissibility?

A I remember going in to talk about and play the role of how polygraph could be kept out because of the weaknesses in polygraphy. I was the devil's advocate.

Q I got it. And was there the angel's advocate at that seminar?

A Was there a --

Q The angel's advocate?

A The angel's advocate?

Q Yes.

A Of course. That was Gordon Barland.

Q All right. Now, when you testify about the polygraph examination, you have agreed that they -- it has been tested scientifically?

A Yes. Now, sir, when I testified; you're not talking about that talk anymore?

Q No, I'm talking about when --

A Okay.

Q -- you testify -- you don't testify at a talk, do you?

A I did in that case.

Q All right.

A I mean, it was supposed to be a -- a mock trial.

Q All right. All right. When you testify in support of a polygraph examination, you testify that it meets relevant scientific standards?

A Yes.

Q That it's subject to appropriate peer review?

A Yes.

Q That there is a recognized rate of error?

A Yes.

Q All right. And that there are efforts within the industry to maintain standards?

A There are.

Q All right. Including the efforts to main -- ensure that your school is accredited?

A That's correct.

Q And that it meets standards that are required for competent polygraphers?

A Oh, yes.

Q All right. So there's no doubt in your mind that if you had given Ms. Walker a polygraph exam, the kind that you give, and that she passed it, you'd be willing to testify in support of its introduction into court?

A Of course.

Q All right. But you have a problem with this test?

A I have a problem with both this test and the directed lie.

Q Uh-huh (affirmative). And the problem that you have with this test is the talking that occurs between the tests?

A Well, the problem I have is the scores do not indicate truthfulness. That's my main problem.

Q Okay. So you're not concerned about the fact of any conversation that occurs between the running of the charts?

A No. My first concern is that the scores do not indicate that. My second concern is there is inadequate research. My third concern is that the way the directed lie is handled puts too much emphasis on the directed lie and not enough on the

relevant. And finally I'm concerned about the fact that there's discussion between the charts.

Q Okay. And that capsulizes all the concerns you have about this?

A Probably.

Q All right. Let's talk about the conversation between the charts. Could you point me to any scientific literature that supports your position that there's concern about talking between the charts?

A There -- there's certainly concern outside the scientific literature.

Q I'm not interested in outside --

A You mean -- you're asking --

Q Sir -- excuse --

A -- wait a second.

Q -- me for interrupting. I'm not interested in outside the scientific literature.

A Okay. But I'm trying to understand your question. Are you saying is there research that indicates that discussion between charts will negatively impact on the test?

Q I'm asking you whether there is research that expresses concern about talking between the charts that impacts the validity of the test?

A There -- there's a study -- a study that is coming out by

Matte that does that. But since it's not out yet, I'm sure that's not pertinent. My study indicates that not necessarily the discussion between charts, but rather the discussion of the directed lie between charts does it.

Q Let's just talk about the talking between the charts right now. We'll get to your study in a minute.

A Okay.

Q Does your study, your 1991 study, does it address talking between charts?

A Not that specifically.

Q All right. Your study in 1991 was focused on the directed lie?

A That's correct.

Q Okay. What scientific literature is there that addresses the subject of talking between charts as an impact, deceptive or nondeceptive, on the polygraph result?

A Okay. I assume that actually there isn't any, but it's so blatantly obvious, and I think it's something that no one has really undertaken to study.

Q You assume that there's none?

A May I go on and -- may I explain that a bit?

Q You assume that there is none, is that your answer?

A I assume that there's no research on it because it's so blatantly obvious that nobody has tested it. And perhaps you

don't understand my objection, because you didn't ask about that, to discussion between charts, because that was the last of my concerns. But it is a concern. And what it is, is once you get into a chat with the individual, talk with the individual, they can go off on all kinds of things which can destroy the effectiveness of the test. If they start talking about the relevant questions, they're going to get emotionally involved in that, and that's very likely to create a deceptive response that would be inaccurate.

Q I understand that that's your opinion --

A Yes.

Q -- and that's what you're testifying to, to give today.

A That's one of the things.

Q All right. What I'm looking for is, I'm looking for scientific literature to support your opinion that --

A Okay.

Q -- you can rely on that says what you say is true.

A There -- as -- as I said, there is none that I am aware of.

Q So there answer is, there is none that supports the proposition that talking between the charts impacts the results?

A Right.

MR. COLLINS: Objection; mischaracterization of the witness' testimony.

THE COURT: Witness can answer for himself. Overruled.
Did you have a chance to answer the question?

THE WITNESS: I -- I missed the question in the process.

BY MR. McCOY:

Q Do that again. I appreciate your patience with me, sir.
My question is, I understand you to be telling us that there is
nothing in the scientific literature that indicates one way or
another that talking between the charts impacts the test
results?

A There's nothing that I'm aware of that talking in and of
itself has any impact.

Q You say that this strikes you as blatantly obvious. What
do you rely on when you make that statement that it is
blatantly obvious that it impacts the test?

A Thirty years of experience in polygraphy.

Q And in 30 years of your exper- -- you have published
before?

A Yes.

Q You have serious concerns about the directed lie test?

A Yes.

Q And yet you've never published about this aspect of the --

A Well, I did in that '91 article.

Q Uh-huh (affirmative).

A Oh, you're talking about -- you're talking about the

directed lie and I'm responding to that, yes, I did in '91. Nothing published about discussion between charts.

Q Okay. Let's exclude your directed lie article in 1991, the one where you question it for the first time.

A Where I questioned it and did research on it the first time.

Q Okay. The quality of the research with that 1991 article wasn't very good, was it?

A It wasn't that. There was research that you can -- there's always criticism you can have about research.

Q Uh-huh (affirmative). It wasn't anything that you could extrapolate from, is it?

A Extrapolate from? I think I can.

Q Okay.

A I think it demonstrated that if you put emphasis on the directed lie, you're going to have both the truthful and the deceptive move in the direction of truthfulness. And that's what I was attempting to determine, if that in fact were the case.

Q Well, this isn't the first time you've testified about the 1991 study, is it?

A It may not be. I don't -- I don't recall.

Q All right. Do you remember testifying in Augusta, Georgia in a case involving *United States versus Gilliard*, don't you?

A Yes. Uh-huh (affirmative).

Q And you were asked this question: "You've expressed a good deal of concern, good bit of concern about talking between tests?" Your answer was: "Definitely."

A Yes.

Q That would be consistent with what you're saying today. Right. All right, that is your opinion, that could affect the results between the tests.

A Undoubtedly.

Q That was your opinion?

A Unquestionably.

Q Okay. And you also said it was the opinion of the DoDPI?

A Correct.

Q What information do you have published by the DoDI [sic] that supports your opinion or supports your claim that they have the same opinion as you do?

A I don't know of anything published. I'm going to have to look at that article again. I think what they said -- it's the '98 article. I think what they said was there's a difference of opinion about discussion between charts.

Q Who said that?

A DoDPI.

Q Okay. Where?

A Where, in the --

Q Uh-huh (affirmative).

A -- Psychology Journal --

Q Okay.

A -- in '98.

Q Can you provide a copy -- do you have a copy with you?

A Uh-huh (affirmative).

Q Is this the one that was just produced today?

A Yes.

Q Okay.

A Would you like me to read this?

Q I'll get to that in a minute. Do you remember telling the lawyers in the *Gilliard* case that it's been so long, you couldn't remember whether it had been written or studied?

A That was -- what I remember is the issue was, if you talk about a particular -- either the control or the relevant, between -- between charts, you're going to cause a reaction on one or the other, yes.

Q Uh-huh (affirmative).

A And then when you're saying do I remember -- it's been so long that I don't remember, where I -- where I indicate -- I'm not sure what I indicated. But I am not sure of any research that demonstrates that perhaps except my own in '91, which showed that in using a directed lie and discussing it as Dr. Raskin does, it caused a response in the direction of

truthfulness --

Q Okay. (Indiscernible) --

A -- for the deceptive as well.

Q And what you're referring to is what's been identified as Defendant's Exhibit D11; correct?

A I don't know, what -- is that the --

MR. McCOY: I'll approach the witness.

MR. COLLINS: Defendant's D11?

MR. McCOY: I meant, excuse me, Plaintiff's --

MR. COLLINS: Yes.

MR. McCOY: -- 11.

(Side conversation)

BY MR. McCOY:

A Well, this is what we were talking about. What I was just talking about now was my article, right. What -- what you were just talking about a minute ago was my article and whether it demonstrated that talking between charts can cause an impact.

Q And your answer was "no"?

A And it -- no.

Q All right.

A My answer to that was, discussing issues between charts -- discussing anything between charts can cause an impact on the test. Discussing and putting more emphasis on either the comparison question or the relevant question can very well

cause a reaction in that particular direction.

Q Right. And I'm looking for studies, sir, that support your opinion.

A And I indicated that my 1991 study demonstrated by adding Raskin's comments in there caused the subject to respond both to truthful and the deceptive, more in the direction of truthfulness.

Q But you've acknowledged that there were problems with that study?

A There are problems in all studies.

Q But in your study there were significant problems; correct?

A I don't think there were significant problems. I think --

Q There --

A -- there were problems.

Q All right. There were 10 subjects?

A Correct.

Q All right. And the directed technique was not properly administered?

A It was administered at the end of the test and only one time, and that's true because I didn't want to risk any problems with these -- with these field tests.

Q Okay. So this wasn't much of a problem as far as you were concerned. It's a problem just like any other test has problems or any other study?

A Well, it -- it is a problem, but it's -- was the best I could do at that time, and I have hopes of doing it again and doing complete tests with each person.

Q Do you remember being asked this question and giving this answer: Would you agree that your study represents -- and we're talking about your 1991 study -- would you agree that your study represents too small a sample to make general relate -- general relation -- generalizations from? And your answer was: "Worse than that. It's that the directed lie is only -- only occurs one time at the end of the test, and that certainly weaks it -- weakens it, and it's indicated in the paper." "In fact, you only used 10 subjects?" "That's correct." "Of those 10 subjects you only used the directed lie on one of the three charts that you ran on each subject?" "That's correct." And you understood there were people who opposed publication of that study because it was so small?

A No, that's not -- there weren't people. There was one person who opposed it, and that was Honts, who is a -- who uses the directed lie just like Raskin does. And of course he opposed it, because it's against what he's working with. There were two other Ph.D.s who did accept it and it was published.

Q And you characterized it as a pilot study and you hoped that someone else would do studies?

A And I would hope to do some myself.

Q All right. But so far none have replicated it; correct?

A That's correct.

Q Okay.

A None that I know of.

Q Well, if you knew them, you'd bring it to court, wouldn't you?

A If I know them, I would bring them to court. But I don't -- but they may be there. So my saying "no" doesn't mean they don't exist.

Q Mr. -- you have conversations with Mr. Collins about getting ready for court?

A Of course.

Q All right. And he wanted you to come armed and to do his work for him?

A He -- he wanted me to be prepared. I don't know what you mean by do his work for him.

Q Well, being prepared would include looking for studies that would support your position. Am I correct?

A No, I just brought what I had. It was --

Q Okay.

A -- a matter of searching for information.

Q And you just brought what you had and you didn't do any research to update, to see if there was anything that further supported your position in the field?

A No, I didn't. And I -- but I knew the research that did exist, for the most part.

Q And that research hasn't changed since 1991 --

A That partic- --

Q -- at least that you know about?

A That particular research, that's right.

Q Now, you've mentioned Dr. Matte?

A Matte, yes.

Q Matte, sorry.

(Side conversation)

MR. McCOY: Approach the witness, and hand you what's been identified as Plaintiff's Exhibit 2.

BY MR. McCOY:

A Yes. That's Dr. Matte's work.

Q What does that report tell us? Why is that useful to us today?

A Well, I think it's useful for a number of reasons. But, one, he goes through the various research that's been done related to the directed lie. And then he attempts to evaluate the directed lie and what it accomplishes, and he points out two separate things and opens the door for indicating to the subject that the directed lie is the one they should aim any countermeasures at. And the other thing is that he points out the fact that with -- with the presentation made, that this --

this question is important because it allows the examiner to determine if the individual is still functioning as they should when they tell a lie. He feels that that puts so much emphasis on the directed lie, even to the extent it might become more -- it might become stronger than the relevant question to the deceptive subject. Therefore it opens the door for false negative results.

Q All right. Is Dr. Matte someone that you rely on?

A I have had contacts with him. He's a -- an author -- author of a -- a very good text. He keeps up with his research and I would think in those terms he is a -- an authority in the field.

Q Do you have professional respect for him?

A Yes.

Q All right. Now, this paper, Plaintiff's 2, Dr. Matte's article, it's not original research, is it?

A No, it's not.

Q It's a survey of other research that's in the area dealing with directed lies?

A And the evaluation of that research and what the implications of it are.

Q Okay. And of course, whatever validity should be associated to his conclusions depends on the quality of the information that went in; correct?

A That's correct.

Q So if there is information regarding some of the studies that he reviews, that he inaccurately portrays, then you must discount what he has to say?

A Well, not everything he has to say, but you have to take that into consideration if that's the case.

Q Okay. This -- but you point to Dr. Matte as further support for your position that there's concerns about directed lies?

A There are concerns by Dr. Matte and by, obviously, Department of Defense. And they have made their findings known that it -- it is not as accurate or as effective as the directed -- as the probable lie.

Q Well, do you know where Dr. Matte got his Ph.D.?

A Actually, I don't.

Q Do you know what he got his Ph.D. in?

A Psychology, I believe. I don't know what kind of psychology.

Q Okay. Where does he live? Do you know?

A He's in Buffalo, New York.

Q Would your opinion change if you learned that he got his Ph.D. from Columbia Pacific University?

A I don't know what Columbia Pacific is.

Q Would your opinion change if you learned that the

university where he got his Ph.D. is a mail-order university?

A I would be disappointed.

Q Okay. Would it cause you to be less trustful of some of the things he says?

A I -- I think that always leaves a bad impression on someone.

Q Uh-huh (affirmative).

A And -- and I think for good reasons. However, he has written an excellent book. He's produced a -- a good many things. He writes well, he's very bright.

Q Uh-huh (affirmative).

A And I think on that basis I would still respect him, but I would certainly be --

Q Otherwise --

A -- disappointed.

Q -- be disappointed?

A Yes.

Q All right. All right. The article that Dr. Matte starts off with, it's about something called the zone comparison test?

A Yes.

Q That's the test that you favor?

A Yes, I favor the federal use of the zone comparison.

Q And the zone comparison test is a probable lie test?

A Correct.

Q All right. And it was developed by Cleve Backster?

A That's right.

Q And you know Mr. Backster?

A Yes, I do.

Q And he was invited to comment on Dr. Matte's scholarly report here?

A He -- there was one aspect, I'm not sure if this were it, it was related to this -- I don't think it was this one. But in any event, he was in -- he was asked about whether Honts indicated that he had taught that it was appropriate to have discussion between charts during polygraph tests. And if that's what you're talking about, I'm familiar with that and I'm familiar with Backster's response.

Q Well, it says here, the author wishes to thank his -- express his sincere appreciation for the critical review received by yourself and also Cleve Backster. Correct?

A Yes.

Q All right. You know that Mr. Backster didn't graduate from college, did he?

A That's right. He's, however, a very brilliant, creative man, and there's no question of that.

Q Okay. But at least Dr. Matte, if he is a doctor, he's surveyed the research and formed some opinions which you agree with?

A I -- yes, I agree with those that I just mentioned, those two points.

Q Are there any that you disagree with?

A I -- I don't know, I don't know which ones you're talking about. And I'm thinking of those two.

Q All right. I'm interested in whether there's anything that you don't endorse in this report.

A I don't recall it --

Q If you want to take the time to read it, we'll do it right now, sir.

A Sure, as long as I can get out of here at 5 to catch my plane.

Q I --

THE COURT: Ask a specific question. We're not going to take time to go -- this is not the trial of the case, as you pointed out.

MR. McCOY: Well, I agree, Judge, but this is a hearing on a critical piece of evidence where I just --

THE COURT: Then ask the critical question.

MR. McCOY: All right.

BY MR. McCOY:

Q The question is, sir, is there anything in here that you disagree with?

A Again, I don't remember it well enough. And I'm not sure

whether this is a critical piece of evidence, by the way, but if you feel it is, then I guess it is.

Q In your 1991 study you criticized Dr. Raskin -- or I guess the '88 Horowitz study; correct?

A I criticized him for the '88 Horowitz study?

Q Uh-huh (affirmative).

A I'm --

Q Not sure I'm at the right -- the Honts study, I'm sorry.

A Okay.

Q This is the one with the 25 --

A Yes, of course.

Q And would you explain to Judge Roberts what your criticism of that was?

A Well, there are a number. First of all, there are -- I think I already did this. There are 25 subjects, and 11 of them were sex offenders. And they relied on some rather different ways of determining ground truth. And one was confessions, which is the usual; two is physical evidence, and that's not quite usual, and one has to be very wary of how one interprets that evidence and be very objective about it; and the other is, which I've talked before about, is that some of the victims retracted their statements.

Q Right, and it's your concern that the retract -- because of the nature of sexual abuse and the dynamics that go in --

between children and adults, that retraction is not necessarily a reliable indicator of ground truth?

A That's right.

Q Okay. And so did you go look at the original data to find out how many recantations were involved?

A As I indicated, I have no knowledge of who recanted and what kinds of cases they were or -- or how many. But I think since children recant so much and you've got 11 abusers in there, I assume that some of them -- and that's an assumption -- assume that some of them very well could have been molested children who were actually telling the truth. And that would affect the data, because it would mean some of the confirmed truthful people were in fact not truthful.

Q So the answer is no, you don't know?

A That's correct. And that's what I said before.

Q If you found out that only two of the cases involving the alleged sexual abuse, if there were only two that recanted, would that change your opinion?

A Two of the --

Q Eleven.

A -- total --

Q Uh-huh (affirmative).

A -- 11? Would it change my opinion?

Q Yes, sir.

A Well, it would -- I have no idea how many it would be, but it would --

Q No, I'm just asking you if --

A -- it wouldn't be -- it wouldn't --

Q -- that information were given to you --

A -- it wouldn't be as extreme as if it were eight.

Q So then --

A So two would have some impact, which would mean very likely, but not necessarily, that two of the people who were seen as truthful could very well have been deceptive.

Q Are you prepared to tell us whether your opinion on the efficacy of the study changes based on that new information?

A That's -- that's one of the problems. It would be better, but still it would be two that would be altering 25 cases.

Q I guess your answer is that you're unwilling to change your opinion; is that correct?

A I -- I'm saying I don't know for sure and if that is true, it certainly would still influence it, but not as much as if it were five or ten.

Q Has the U.S. Government ever approached you and asked for information as to how you administer polygraph exams so it could improve its testing procedure?

A I have talked before the government, the Department of Defense and the FBI, and that's all I can think of offhand.

And all of those were related to sexual abuse testing.

Q Okay. And were you asked to improve the testing procedures that the government was employing?

A No.

Q Okay. Has the government ever used the results of your 1991 study as a basis for not using the directed lie method?

A Not that I'm aware of.

Q Is it true that the United States Government teaches the directed lie method as one of the methods for administering a polygraph examination?

A Not the Raskin directed lie. That is only taught in one school, and they do not test it, and as you heard from the -- their findings, they don't find it to be more valid or more effective.

Q But it is true then that the U.S. Government does teach the directed lie method as one of the methods for administering a polygraph; isn't that correct?

A Yes. But you must recognize, there's a difference between the two and they're separate, and that's why it was called the hybrid. They teach the government method, not the Raskin method. And that's an important difference. It is not used by the government. Directed lie is, not the Raskin directed lie. It is not used to a great extent, even the directed lie.

Q Okay.

A But certainly not the Raskin directed lie.

Q Okay. What we have is -- we are talking generically about the comparison question technique or the control question technique, are we not?

A We're talking about one of the types of comparison.

Q Right. And one of the types of comparison question techniques is the probable lie technique?

A Correct.

Q And another -- and that's what you refer to as the zone comparison test?

A That's one of the names for it.

Q All right. And this is the thing that was developed by Mr. Backster?

A Correct.

Q All right. And that's the comparison technique that you are in favor of?

A Yes, not the scoring but the approach. Yes.

Q All right. Your problem is with the directed lie approach.

A My problem is with the Raskin directed lie approach because of the emphasis between charts.

Q Okay. And yet you are still unable to point us to any studies that demonstrate that talking between charts affects results?

A There are none that I'm aware of --

Q Okay.

A -- of talking between charts. I'm talking about -- as it seems to be difficult to understand, I'm talking about the emphasis of one versus another of the questions between charts. A discussion of charts is a problem because of other reasons.

Q All right.

A I certainly would advise the students --

Q All right.

A -- but -- at all. But this is different. The directed lie the government uses, they don't use discussion between charts. My objection, I could even tolerate the discussion between charts; my problem is that when you spend an inordinate amount of time talking about the time directed lie, the Raskin directed lie, between charts, that is going to create a problem and has created a problem. And I think the one area of evidence that we haven't talked about is what the D -- the Department of Defense has provided --

Q Are you finished with your answer yet?

A I think that's part of it. Is the data that the Department of Defense has provided where so many errors have been shown in the results of these Raskin directed lie tests.

Q Are you finished?

A I am now.

Q All right, thank you. Do you know who Gordon Barland is?

A I do.

Q Tell us who Gordon Barland is?

A He is with Department of Defense, used to be a student of Raskin's, and later went off to -- and had a private practice in Utah, then went off to -- at -- to Department of Defense. And I think that he might be head of research there now. I'm not certain.

Q And would you disagree with him if he told you that the research that he is aware of personally and the research of others at the institute, which I believe to be the DoDPI, has shown that the directed lie control question test is at least as accurate as the conventional probable lie control question test? Would you agree or disagree with that?

A I would -- first of all, you can't say -- if you're saying directed lie, meaning the government's directed lie, and you're saying it's for -- for espionage or screening, I would agree with that. And I don't know the research. But if he says -- stated that that's the case, I would believe it. But he's not talking about the Raskin directed lie.

Q What if he was talking about the Raskin directed lie?

A I would be very surprised.

THE CLERK: Mr. McCoy, could you either stand at the microphone or be seated at counsel --

BY MR. MCCOY:

Q What if he was talking about the Raskin?

A Well, I would be astounded, in fact.

Q Okay.

A Because he's very much against that approach.

Q You're aware of the case law that developed in the context of the admissibility of the polygraph after *Daubert*?

A Yes.

Q For instance, you under -- you know about the *Crombie* opinion?

A Yes.

Q And you know about the *Galbreth* opinion?

A Yes.

Q And so you know that Dr. Barland -- and at the *Galbreth* case, what was at issue was a Raskin directed lie test, don't you?

A He wasn't supporting that, I am sure.

Q Let me read it to you again.

A Uh-huh (affirmative).

Q *The United States of America versus William Galbreth*, 94-197 MV.

MR. COLLINS: Your Honor, he's asking questions which -- of the witness for which the witness may not have a basis of knowing the transcript to which he's referring.

THE COURT: If the witness lacks a basis or foundation

to answer, he'll so indicate. You can't testify for him, Mr. McCoy. Go ahead.

MR. McCOY: No, I won't do that, Judge.

BY MR. McCOY:

Q You testified that you would be surprised if he testified as follows: "The research that I am aware of, both by others and by the institute, have shown that the directed lie control question test is at least as accurate as the conventional probable lie control test." Would it surprise you to learn that Dr. Barland testified to that under oath at the *Galbreth* case?

A He was on the opposing side, I'm sure. And it would surprise me to say that -- if he said that, unless he's referring to the directed lie, not the Raskin directed lie. If he said that and was referring to Raskin's directed lie, I'd be very surprised.

Q Okay. And if in connection with Raskin's directed lie he said that he had done several studies to reach his conclusion that it -- the Raskin directed lie test is at least as accurate in the -- as the conventional lie control question, that likewise would surprise you?

A If it were phrased in those terms it would surprise me, yes.

Q Now, Dr. Barland is someone that you respect?

A Yes.

Q A leader in the field?

A Yes. He's a researcher and --

Q All right.

A -- polygraphist.

Q Dr. Raskin is a leader in the field as well?

A There's no doubt of that.

Q Okay. And you have no question about his credentials?

A I have no question about his credentials.

Q All right. And you don't think he's in here deliberately falsifying a test or anything like that, do you?

A That test is a problem to me. It was not done well. And Dr. Raskin's changed his opinion so many times from -- from one case to another, one testimony to another. And in the -- in some cases he has -- like for example, the *Cordova* case, he has, one, hurt polygraphy, but two, he was described in very negative terms by the court for his testimony there.

In the *Meade* case -- in the *Meade* case, when U.S. -- excuse me, when *New Mexico versus Wilson* was brought up, he indicated that he did test her. The question -- the test was did this woman molest any of the 11, 12 children in this elementary school; he -- and the -- the prosecutor asked if he had found her truthful; he found her truthful with very high scores, 95 percent chance of accuracy; and they said, "Well, you know she

confessed?" And he said, "Yes, but I only tested her on one of the girls," and on -- he might -- I'm not -- I think he said one of the girls. And I have that tape, which I could have brought. But in any event, then the prosecutor said, "Yes, but your question was, did you test her -- did you ask her" -- and this -- these were his questions -- "did you molest any of the 12 girls in the school?" And he -- he paused for a long time and then he said, "Oh, that's right. Yeah, I just remembered." And then he said, "In fact, I was the one who referred her to a psychologist who assisted in the -- in getting the confession from her." And it was almost at that point that the defense attorney decided to make a plea. And in another case that followed, Raskin condemned the attorney for doing that.

Q Okay. So you would disagree with Judge Taylor in the *Cordova* case when he described Dr. Raskin as a pioneer psychophysicologist, nationally known scholar in forensic polygraphy, and generally acknowledged as the nation's foremost polygraph expert? You would disagree with that?

A You have to put the -- you have to read the whole thing, because there's a lot of sarcasm.

Q I know there's a lot in there. I want to know whether you agree or disagree with that, sir.

A That -- that he said that?

Q Yes.

A Yes. I know he said that.

Q And you disagree with that?

A That -- that this is the case, that he is a well-known authority? No, I don't disagree with that.

Q You would disagree with a judge in Utah who described him as one of the nation's foremost authorities in the early -- area of polygraphs?

A His research has been quite impressive.

Q In the hearing where Dr. Barland testified, in the *Galbreth* case, you would disagree with the judge there that characterized Dr. Raskin as perhaps the world's leading expert in the field of anonomic (ph) physiology and on the polygraph technique?

A I don't think I would disagree. I don't know enough about his background in that area to know.

Q All right. Or the *Crombie* judge that described him --

MR. COLLINS: Your Honor, I think we've -- if he's made a point, he's made it. He's beginning to repeat it and it becomes cumulative. I don't see --

MR. McCOY: I have been very courteous, Judge --

MR. COLLINS: -- what the issue is, regard to --

MR. McCOY: -- in not interrupting this witness while he blasted us. And I could have done it and I decided not to. So I think the exercise is fair play.

THE COURT: I'll allow a limited amount of examination here. I don't feel it's really productive all that much on the issues before me, but go ahead.

MR. McCOY: And I could have argued that the answers were nonresponsive, it just is not worth it here.

BY MR. McCOY:

Q But you're aware of the judge in *Crombie*, you've read that opinion, haven't you?

A I have.

Q All right. And there he was described as eminently qualified expert in the field of the polygraph. And you agree with that too?

A I believe that's true.

Q Now, the test that you think should have been administered in this particular case is a zone control test.

MR. COLLINS: Ambiguous -- to what is he referring to?

MR. McCOY: The only -- the one at issue, Ms. Walker's test.

MR. COLLINS: Objection; the relevance to his opinion as to what test should have been applied. We only have one test applied. He was not asked to administer a test in this case, Your Honor.

MR. McCOY: And my response, Your Honor, is the Court is being asked to conclude that the zone control test is the valid

test and that the directed lie test is not the valid test. And I want to explore that issue.

MR. COLLINS: Your Honor, the government's not asking the Court to make a ruling on the zone comparison test. The test at issue here is the directed lie test.

MR. McCOY: But the entire presentation has been that --

THE COURT: Objection's overruled. Go ahead.

MR. McCOY: Thank you. Approaching the witness.

BY MR. McCOY:

Q Would you for our benefit formulate probable lie questions that would be suitable for a test if you were asked to test Ms. Walker?

MR. COLLINS: Objection; relevance, Your Honor. He's asking him to exercise -- engage in an exercise. The issue here is --

THE COURT: I'll sustain that objection.

MR. McCOY: Do you understand, Judge, that they're positing the zone control test is the superior test, and because it was not given this should not be --

THE COURT: This question is not --

MR. McCOY: -- (indiscernible).

THE COURT: -- what should be given, it's whether what was given is admissible.

MR. McCOY: Okay. And my -- and with all due respect to

the Court, and I don't wish to argue with the Court and I'll stop -- it's just that I want to be able to confront the witness about the zone control test and what a properly conducted zone control test is, so that I can demonstrate our view, which is in fact, the direct lie test is the superior test. And this is the only witness that's been produced to talk about the zone control test.

THE COURT: The objection sustained stands. Your question goes beyond that purpose.

MR. McCOY: All right. Thank you.

BY MR. McCOY:

Q When did you arrive in Anchorage?

A Late last night, I guess it was.

Q All right. And what is your financial --

A Or the night before.

Q Beg your pardon?

A Or the night before, I was here. I've been here two days.

Q And what's your financial arrangement with the government for your testimony?

A Consultation is 150 an hour and 2,000 a day, plus the expenses.

Q How much have you consulted with him?

A Not a great deal. I don't think that's amounted to very much. That also includes my evaluation of the charts and

reading any materials. There wasn't a great deal of that. So it's maybe five hours' worth at the most.

Q So 5 times 150 plus \$2,000?

A Per day.

Q Right. And were you paid 2,000 for yesterday or just today?

A We really didn't discuss that. My --

Q What's your expectation?

A -- my -- my coming in was to be of assistance, but I really didn't do much yesterday. So I guess we're still going to dicker about that. So it'll be either two days or one day.

Q Okay. Want to return to the scoring for a minute, sir, if I could. And you described the scoring system that you used as the seven-point. Is that what you said?

A Seven-point scale. Now, I -- I do have a problem now that I have to straighten out. It's -- it's almost 5, and --

THE COURT: Do you have a plane --

THE WITNESS: Yes, at 6.

THE COURT: -- to catch? What --

THE WITNESS: And I'm a little concerned about that.

Now --

THE COURT: Mr. McCoy, can you finish up in a question or so?

MR. MCCOY: I expect to be done within 10 minutes, Your

Honor. It's going to be a moment.

THE COURT: Dr. Abrams, can you go from here directly to the airport?

THE WITNESS: I have to go to the U.S. Attorney's Office and get my things and then hopefully one of them will give me a ride there and --

THE COURT: You should be able to make the plane.

MR. McCOY: Yeah. I would finish in 10 minutes.

THE COURT: I'm sure you will.

BY MR. McCOY:

Q Returning to the scoring, sir, the -- there's been some reference to the Department of Defense scoring rules?

A The -- I -- I called it the federal scoring versus the Backster scoring.

Q With regard to the federal scoring, where are they published?

A They've been published numerous times, and I can't give you a -- a citation on those.

Q If -- could you find it if I asked you to at another -- recognizing your time constraints, is --

A Could I -- no, in -- now, no, but I could certainly --

Q You'd be --

A -- fax it back to you.

Q You'd be prepared to do that?

A Or -- or I -- yes. And I could also tell you what they are, because I don't think they're much different from what Dr. Raskin uses.

Q All right. I -- what I want to know is where they're published.

A They are published.

Q All right. If a deep breath occurs following a question but the reaction occurs before the deep breath begins, can't you score the reaction that preceded the deep breath?

A Yes, but you have to -- yes, you can. You have to be a little wary that there isn't some preparation for the deep breath that might be occurring too, because if they're about to do that they may hold their breath for a second or do a whole manner of things. But -- but yes, basically you can. In fact, I think there was one case there where I did give credit on one of those situations right before the deep breath --

Q Okay.

A -- as I recall.

Q And your testimony under oath today is that the government does not use the directed lie control test?

A The government -- we've been through this. The government does not use the Raskin directed lie test. They -- they use their directed lie test.

Q But it is a directed lie test?

A Sure. But they're different.

Q Okay.

A They -- one has nothing to do with the other.

Q And that's your position?

A There's no question about that. They're so different in a very major area. And --

MR. McCOY: Those are all the questions I have at this time, Your Honor. Thank you, sir.

THE COURT: Any redirect?

MR. COLLINS: No. I will give Dr. Raskin the opportunity (indiscernible).

THE COURT: All right. Be sure that you have any exhibits -- he doesn't walk away with any of the exhibits.

MR. COLLINS: Yes, I (indiscernible).

THE WITNESS: They're all here, I believe.

THE COURT: Does the government intend to offer additional evidence?

MR. COLLINS: I don't believe so, no, Your Honor.

THE COURT: Is there going to be rebuttal evidence?

MR. McCOY: Your Honor, I expect about two hours' worth of rebuttal.

MR. COLLINS: Will that be Dr. Raskin's testimony, Your Honor?

MR. McCOY: It will be with --

THE COURT: I suppose it will.

MR. McCOY: Yeah.

THE COURT: It looks like 10:30 tomorrow would be the time we'd have to start. I have --

MR. McCOY: Excellent. Excuse me for interrupt -- before the doctor leaves; the transparencies are staying?

DR. ABRAMS: How about if I leave the actual black and whites?

MR. McCOY: And the transparencies (indiscernible).

DR. ABRAMS: And the transparencies?

MR. McCOY: That would be real helpful, yeah.

DR. ABRAMS: Well, I'll leave the transparencies then. Okay. Then I won't have to shuffle through this.

MR. McCOY: (Indiscernible).

DR. ABRAMS: They're just as good. You can make these (indiscernible).

MR. McCOY: Is that satisfactory to you?

DR. ABRAMS: Now, you wanted me to send you something. Give me your card.

MR. McCOY: I will. Oh, yeah. 10:30's fine. I have court in front of Judge Holland at 9:15 and I should be done by 10:30.

THE COURT: Mr. Collins, are you available at 10:30?

MR. COLLINS: Tomorrow is --

THE COURT: Thursday.

MR. McCOY: Thursday.

MR. COLLINS: I should be, yes, Your Honor.

THE COURT: This hearing's continued until that time.

MR. McCOY: Thank you, Your Honor.

THE COURT: We'll be in recess.

THE CLERK: This matter is in recess until tomorrow morning at 10:30. This court now stands adjourned, subject to call.

(Proceedings concluded at 5:01 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Teresa K. Combs, Transcriber

Date

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