

1 IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,

2 PENNSYLVANIA

3 - - -

4 COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

5 vs. No. CC 200613042

6 ESAD LEMO, SUPPRESSION HEARING TRANSCRIPT

7 Defendant. HEARING DATE:
8 January 21-22, 2009

9 Recorded by:
10 Deborah L. Rowe, RMR, CRR
11 Official Court Reporter

12 BEFORE:
13 Hon. David R. Cashman

14 COUNSEL PRESENT:

15 For the Commonwealth:

16 Janet Necessary, A.D.A.
17 Office of District Attorney
18 401 Courthouse
19 Pittsburgh, PA 15219

20 For the Defendant:

21 Christopher Patarini, Esq.
22 Office of the Public Defender
23 4th Floor, County Office Bldg.
24 Pittsburgh, PA 15219

25 **COPY**

Appendix C

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I N D E X

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3

WITNESS:

DIRECT CROSS REDIRECT RECROSS

4

William Palmer

5 14

5

Doris Pejic

23 32, 56

6

Natasha Garrett

68 74

7

Dawn Friend

75 80 90

8

Bruce Wright, M.D.

91 98 109

9

Carol Sue Johnston

113 146 164

10

- - -

11

COMMONWEALTH'S EXHIBIT:IDENTIFIED ADMITTED

12

1 - consent to search form

12 13

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2 - Miranda rights warning form

13 13

14

3 - CD of taped statement

13 13

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- - -

16

DEFENDANT'S EXHIBIT:IDENTIFIED ADMITTED

17

A & B - records in Serbo-Croatian and
English regarding Defendant

167

18

19

C - psychology certificate for Defendant

84

20

D - certificate from Special School for
Educated Children in Sarajevo

85

21

22

E - records from Institute for Special
Children

129

23

F - school records

136

24

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1 P R O C E E D I N G S

2 - - -

3 January 21, 2009

4 11:20 a.m.

5 - - -

6 6 (In open court, Defendant present with
7 counsel:)8 8 THE CLERK: Your Honor, that is the time and
9 9 date set for the pretrial motions in the case of the
10 10 Commonwealth versus Esad Lemo. Do we have any testimony?

11 11 MS. NECESSARY: Yes.

12 12 THE CLERK: All those offering testimony in
13 13 this matter, at this time please stand and raise your right
14 14 hands to be sworn.

15 15 15 (The witnesses were duly sworn.)

16 16 MR. PATARINI: Your Honor, I believe my
17 17 interpreter should be sworn in as well as my client.

18 18 THE COURT: Yes. They should be sworn in.

19 19 19 (The Defendant's interpreter, Frank Keran,
20 20 was duly sworn.)21 21 THE CLERK: Your Honor, the interpreter and
22 22 the Defendant have been duly sworn.23 23 THE COURT: Okay. Miss Necessary, are you
24 24 ready to proceed?

25 25 MS. NECESSARY: Yes, Your Honor. We have, as

1 I understand it, two pretrial motions. One, a motion to
2 suppress the statement; and secondly, I believe a motion in
3 limine.

4 THE COURT: All right.

5 MS. NECESSARY: The Commonwealth is prepared
6 to call witnesses as to the motion to suppress.

7 MR. PATARINI: Your Honor, I don't know what
8 witnesses the Commonwealth is going to call, so I'm asking
9 the Commonwealth witnesses be sequestered as to the
10 presentation and the interrogation.

11 MS. NECESSARY: We'll do that. Lieutenant
12 Palmer would be my first witness. I have two expert
13 witnesses, Dr. Wright and Dr. Friend. I ask that they
14 might be allowed to remain.

15 THE COURT: They don't deal with the
16 questioning of the witness in terms of the interrogation,
17 so they can stay.

18 MR. PATARINI: She has not made that a
19 motion, but my expert is also in the courtroom.
20 Dr. Johnston is also in the courtroom.

21 MS. NECESSARY: That's fine, and we would ask
22 for -- I don't think there are any, but we would ask for
23 sequestration of any other witnesses.

24 THE COURT: So ordered.

25 MR. PATARINI: We have no other witnesses.

1 THE COURT: Okay.

2 MS. NECESSARY: Your Honor, the Commonwealth
3 also has retained the services of an interpreter, should
4 one be needed, and we would ask that she be permitted to
5 stay.

6 THE COURT: All right.

7 MS. NECESSARY: The Commonwealth calls
8 Lieutenant Palmer.

9 - - -
10 LIEUTENANT WILLIAM PALMER, a witness herein,
11 having been duly sworn, was examined and testified as
12 follows:

13 DIRECT EXAMINATION

14 BY MS. NECESSARY:

15 Q Would you state your name, please, and spell your
16 last name?

17 A Yes. William Palmer, P-a-l-m-e-r.

18 Q How are you employed?

19 A As a Lieutenant with the Allegheny County Police
20 Department.

21 Q How long have you been a police officer?

22 A I'm in my 16th year with the Allegheny County
23 Police. The last twelve years I've been assigned to the
24 detective division. In the last nine years I've been
25 assigned to the homicide unit.

1 **Q** And how long have you been a Lieutenant?

2 **A** About a year.

3 **Q** Lieutenant Palmer, back in August, August 13 of
4 2006, what was your position with the Allegheny County
5 Police?

6 **A** I was a homicide detective.

7 **Q** All right. And were you called out to participate
8 in the investigation of the death of Jazminka Lemo?

9 **A** Yes.

10 **Q** Where were you called first to go?

11 **A** I was detailed to Mercy Hospital. It was reported
12 that the driver of the vehicle that struck the victim in
13 this case had been transported to Mercy Hospital.

14 **Q** And so you went to deal with the driver?

15 **A** Correct.

16 **Q** And who was that?

17 **A** Esad Lemo, the Defendant.

18 **Q** Is that the Defendant who's present here in court
19 today?

20 **A** Yes, sitting at defense counsel table.

21 **Q** What did you do upon your arrival at Mercy
22 Hospital?

23 **A** I had some interaction with a Whitehall police
24 officer. The Defendant, Esad Lemo, was receiving treatment
25 in an emergency room bay. It was a minor injury, an

1 abrasion to his forehead.

2 **Q** Approximately what time did you first have any
3 interaction with him?

4 **A** Approximately 9:20 p.m.

5 **Q** And what did you do at that time?

6 **A** At that time I introduced myself to the Defendant,
7 Esad Lemo. I told him I was a detective with the homicide
8 unit. I told him I was investigating the collision that
9 had killed his ex-wife.

10 At that time because of the possibility that there
11 was drugs or alcohol in his system, I asked for his consent
12 to draw blood for that purpose.

13 **Q** Now, at that time were you aware that there might
14 be a possible language barrier?

15 **A** Yes. I had learned that he spoke broken English
16 and that he was Bosnian.

17 **Q** And at that time did you have a translator?

18 **A** No.

19 **Q** All right. So did you feel you were able to
20 communicate with him as far as giving a blood sample?

21 **A** Yes.

22 **Q** And what did you do at that point to get that?

23 **A** I presented him a consent to search form, and at
24 that time he informed me that -- Esad Lemo informed me that
25 he could not read English. So I read aloud the form, the

1 consent to search form. He seemed to understand what I was
2 saying and in his writing said yes to the appropriate form,
3 saying that he consented to a blood draw.

4 MR. PATARINI: Your Honor, I object to his
5 opinion that he seemed. That -- there would have to be a
6 factual basis. I mean just to say that he reads him
7 something and he marks yes on a piece of paper, his opinion
8 base is not qualified at that point.

9 MS. NECESSARY: I think he can give that
10 opinion based on his observations.

11 THE COURT: Overruled. Go ahead.

12 BY MS. NECESSARY:

13 Q All right. So at that point he signed the consent
14 to search form?

15 A Correct.

16 Q And I take it the hospital personnel drew blood?

17 A Yes.

18 Q All right. What did you do then?

19 A Again, I did not engage him in any conversation,
20 but I sat back and observed as the procedure was going on,
21 and he was still being examined by hospital personnel.

22 There was a time where I overheard his statements
23 made. He looked at me and started having -- he started a
24 conversation, complaining how depressed he was, that he had
25 just lost his job, over -- he explained to me he was a

1 landscaper and was over the amount of money that he was
2 being paid that he lost his job.

3 I remember a time that he looked over and -- Esad
4 Lemo looked over, saw that his pants had been cut, and he
5 began to complain to the nursing staff that those were \$30
6 pants, and he couldn't afford to lose that clothing, and he
7 was agitated and angry about that.

8 **Q** I take it he was speaking English at the time?

9 **A** Yes. I understood him.

10 **Q** All right. Now, did you have any other
11 conversation with him at the hospital?

12 **A** No. Minutes later he was discharged from the
13 hospital.

14 **Q** What did you do then?

15 **A** He accompanied me and Detective Tom DeFelice back
16 to Allegheny County Police headquarters for an interview.

17 **Q** Now, you were at Mercy Hospital?

18 **A** Yes.

19 **Q** And you were going to Point Breeze for the
20 interview?

21 **A** Correct.

22 **Q** Did you make any preparations in order to do the
23 interview at the County Police headquarters?

24 **A** Yes. I had contacted my sergeant and told him
25 that a translator would be needed so there was no

1 miscommunication during this interview.

2 **Q** And what time did you get back to the County
3 Police headquarters?

4 **A** Shortly before 10:00 p.m.

5 **Q** What did you do when you got there?

6 **A** We awaited a translator. I believe around 10:30
7 my sergeant arrived with Doris Pejic, who was fluent in
8 Bosnian and English.

9 **Q** And where was the Defendant at that time?

10 **A** In an interview room.

11 **Q** Okay. Once you got the translator, what did you
12 do?

13 **A** Again, introduced myself in the interview room. I
14 presented the translator with a Miranda warning waiver
15 form, made her familiar with that form so that she could
16 translate it.

17 I then presented the form to the Defendant, Esad
18 Lemo. I read aloud in English each line, and I was -- it
19 was repeated in Bosnian by the translator, Doris Pejic.
20 And the Defendant did acknowledge that he understood his
21 rights and did waive his rights and agreed to speak to us.

22 **Q** And did he execute the form or sign the form?

23 **A** Yes.

24 **Q** Once you did that, what did you do then?

25 **A** Then the interview began. We spoke of what had

1 happened in Whitehall. He gave his story. At the end of
2 that we asked him to make a tape recorded statement as to
3 his statement, and he agreed to do that.

4 **Q** And did you ask the translator to translate into
5 Bosnian everything that you asked him or that you needed
6 him to know?

7 **A** Yes.

8 **Q** And from your viewpoint, did he appear to
9 understand what was being asked of him?

10 **A** Yes.

11 **Q** Did he appear to be under the influence of any
12 drugs or alcohol?

13 **A** No.

14 **Q** Did he appear to you to be at all reluctant to
15 speak with you and talk to you about the incident that had
16 occurred?

17 **A** No.

18 **Q** All right. Now, you say he agreed then to place
19 his statement on tape?

20 **A** Correct.

21 **Q** And as part of that, did you explain his rights to
22 him a second time?

23 **A** Yes.

24 **Q** And how was that done?

25 **A** In a similar fashion. I read each line from that

1 same form aloud in English. The Bosnian translator read it
2 in the native language. He answered, and it was translated
3 back to me, his answer.

4 Q And he in each case, as it was translated to you,
5 agreed to give up his right to remain silent, right to an
6 attorney?

7 A Yes.

8 Q And he agreed to speak with you?

9 A Correct.

10 Q Now, you then did a taped statement?

11 A Yes.

12 Q And he spoke again to you?

13 A Yes.

14 Q I'm going to show you what I've marked for
15 identification as Commonwealth's Exhibits No. 1 and 2 --
16 that's 1 -- which I'm showing to counsel.

17 And I'm going to ask if you can identify -- this
18 one is 1. No. 1?

19 A Exhibit 1 is the consent to search form that I
20 filled out at the place, date and time and what the search
21 was for. The Defendant, Esad Lemo, signed his name and
22 checked yes to each of the questions if he understood the
23 rights that have been explained to him and, having those
24 rights in mind, wished to consent to the search. It's also
25 signed by me, the Defendant and a witness, my partner, Tom

1 DeFelice.

2 **Q** And that was at the hospital?

3 **A** Correct.

4 **Q** All right. And Commonwealth's Exhibit No. 2?

5 **A** Yes. This is the rights warning waiver form that
6 was read aloud by me at the County Police headquarters
7 advising the Defendant of his Miranda rights.

8 **Q** And that form was actually read twice by you?

9 **A** Yes. And twice by a translator.

10 **Q** And I'm going to show you what I've marked as
11 Exhibit No. 3, which is simply the CD of the statement.
12 You reduced this to a CD?

13 **A** Yes.

14 **Q** Okay.

15 MS. NECESSARY: Your Honor, I would offer
16 these into evidence at this time.

17 MR. PATARINO: No objection.

18 THE COURT: They'll be admitted.

19 MS. NECESSARY: Does the Court wish to see
20 the forms?

21 THE COURT: Yes.

22 MS. NECESSARY: Actually I think I marked
23 this one incorrectly. This one is No. 1. I think I marked
24 it No. 2.

25

1 BY MS. NECESSARY:

2 **Q** And finally, Lieutenant Palmer, when you spoke --
3 at all times when you spoke with Mr. Lemo, did he appear to
4 you to show any confusion about what you were saying to him
5 through the translator?

6 **A** No.

7 **Q** Did he ask any questions indicating that he was
8 unsure of what rights were being explained to him?

9 **A** No.

10 **Q** And did he appear to you to be able to understand
11 what was being said to him?

12 **A** Yes.

13 MS. NECESSARY: Thank you. Cross-examine.

14 THE COURT: Mr. Patarini?

15 MR. PATARINI: Thank you.

16 - - -

17 CROSS-EXAMINATION

18 BY MR. PATARINI:

19 **Q** Detective, you had no previous contact with my
20 client, Esad Lemo; is that correct?

21 **A** Prior to arriving at Mercy Hospital?

22 **Q** Right.

23 **A** That is correct.

24 **Q** You're not familiar with his educational
25 background?

1 **A** No.

2 **Q** You're not familiar with what country he came
3 from?

4 **A** You mean prior to arriving at Mercy Hospital?

5 **Q** Right.

6 **A** Correct.

7 **Q** You didn't know whether he was a native of the
8 United States or whether he was from another country?

9 **A** Prior to my arrival at Mercy Hospital, that's
10 correct.

11 **Q** Right. And as far as his speaking to you, he was
12 answering your questions the best he could; right?

13 **A** Throughout the evening, yes.

14 **Q** Yeah. He was trying to cooperate with you. As
15 you stated, he was trying to cooperate the best he could in
16 the language that he was speaking?

17 **A** I believe so.

18 **Q** Now, you stated that he said to you that he could
19 not read; is that right?

20 **A** Yes.

21 **Q** And when he said to you that he could not read,
22 what you did is you read him the English translation of
23 what was on the consent to search form; correct?

24 **A** I read -- it was English, and I read aloud.

25 **Q** Word for word?

1 **A** Yes.

2 **Q** And as the consent -- the waiver of the rights
3 form, you read that word for word also; correct?

4 **A** In English, yes.

5 **Q** And that was translated by I believe her name
6 is -- do you pronounce her name Pejic? Is that the correct
7 pronunciation?

8 **A** I don't know if it's correct, but that's how I
9 pronounce it, yes.

10 **Q** So it's P-e-j-i-c. Now, you formulated an opinion
11 that a translator would be helpful in obtaining a waiver
12 from my client; correct?

13 **A** Correct.

14 **Q** You also decided that you would like to have a
15 statement from my client; isn't that correct?

16 **A** Yes.

17 **Q** And at the time that you were talking to my
18 client, he appeared that he was cooperating with you;
19 correct?

20 **A** Yes.

21 **Q** And you made preparation in having the interpreter
22 there for the reading of the waiver; correct?

23 **A** Correct.

24 **Q** And you had the interpreter there for the
25 questioning?

1 **A** Yes.

2 **Q** And you had the interpreter there for the tape of
3 the questioning?

4 **A** Correct.

5 **Q** Now, when she read the statement to my client, you
6 didn't understand what she was saying; right?

7 **A** When she read the rights warnings?

8 **Q** Right.

9 **A** Correct. I did not understand that.

10 **Q** When the interview was taking place without the
11 tape, you didn't understand what she was saying?

12 **A** When they were conversing in Bosnian, I did not
13 understand.

14 **Q** Right. You did a question and an answer before
15 you went on tape?

16 **A** Yes.

17 **Q** And then you went on tape, and it was the same
18 thing. You would ask a question. She would ask the
19 question in Bosnian. He would respond -- Serbo-Croatian.
20 He would respond in Serbo-Croatian?

21 **A** Yes.

22 **Q** That's the correct name for the language. It is
23 Serbo-Croatian. Now, at that particular point in time, any
24 time that she spoke in Serbo-Croatian, you didn't
25 understand what she said?

1 **A** Correct.

2 **Q** Any time he spoke in Serbo-Croatian, you didn't
3 understand what he said; correct?

4 **A** Correct.

5 **Q** And as far as his asking her any questions, you
6 don't know what questions he asked of her; correct?

7 **A** No.

8 **Q** And you don't know even if she got the words right
9 when she read the same to him; do you?

10 **A** Correct.

11 **Q** When you told her your rights -- when you told him
12 his rights through her, you used this language -- and I'm
13 reading this from the transcript of the tape. "You have
14 the right to speak to an attorney and have him present
15 before and during questioning." Isn't that what you said?

16 **A** Can -- I'll refer to the transcript just to make
17 sure.

18 **Q** Sure. That would be on the second full page of
19 the handwritten transcript.

20 **A** Yes.

21 **Q** Then you stated, "If you can't afford an attorney,
22 one would be appointed free of charge before and during the
23 questioning -- during any questioning if you so desire"?

24 **A** I didn't use a contraction. I said if you cannot
25 afford an attorney.

1 **Q** I apologize. "If you cannot afford an attorney,
2 one would be appointed free of charge before or during any
3 questioning if you so desire"; correct?

4 **A** Correct.

5 **Q** Well, just to complete it, you stated you have a
6 right to remain silent; correct?

7 **A** Yes.

8 **Q** Anything you say can and will be used against you
9 in a court of law?

10 **A** Yes.

11 **Q** You never stated to him on the tape with a
12 translator that he had the right to stop talking -- to stop
13 answering questions at any time; isn't that correct?

14 **A** Correct.

15 **Q** You never said that to him with a translator?

16 **A** No.

17 **Q** When you covered the rights that we just spoke of,
18 there was no explanation given on the tape; correct?

19 **A** Explanation?

20 **Q** Right. You didn't go into explaining each word
21 and what these rights, in fact, meant; did you?

22 **A** No. There was just the reading of the Miranda
23 warnings.

24 **Q** That's right. You did not explain to him what was
25 going on? You didn't explain to him what a Judge was or

1 what a lawyer was; did you?

2 **A** No.

3 **Q** It was just the words of the waiver?

4 **A** Correct.

5 **Q** And the tape of the statement is a good
6 capsulization of what transpired on that particular night?
7 Is that fair to say?

8 **A** Yes.

9 MR. PATARINI: I have no further questions of
10 this witness.

11 THE COURT: Miss Necessary?

12 - - -

13 REDIRECT EXAMINATION

14 BY MS. NECESSARY:

15 **Q** Did Mr. Lemo through the interpreter ever ask you
16 for the meaning of any words or for further explanation?

17 **A** No, he did not.

18 MS. NECESSARY: Thank you. That's all I have
19 for this witness, Your Honor.

20 THE COURT: Mr. Patarini?

21 MR. PATARINI: I have no questions.

22 THE COURT: Detective Palmer, when you had
23 the blood drawn, did he make any objection to having the
24 blood withdrawn?

25 THE WITNESS: No. He did not.

1 THE COURT: He cooperated with the personnel
2 at the hospital so it could be drawn?

3 THE WITNESS: Yes.

4 THE COURT: Thank you.

5 MS. NECESSARY: Your Honor, I noticed that
6 the interpreter is not interpreting anything that Mr.
7 Lemo -- I mean I just -- for the sake of the record, I
8 would like to know if Mr. Lemo is waiving that. Since he
9 is here, he would have a right to have everything
10 translated to him. He has an interpreter. I wouldn't want
11 there to be any problem with him saying later he didn't
12 understand what was going on.

13 MR. PATARINI: Well, the things that I was
14 going to discuss with him or have my interpreter go through
15 with him would be things concerning the exchange, which I
16 believe would be coming up when we are doing the tape. I
17 can have him translate every little word.

18 MS. NECESSARY: It is his trial.

19 MR. PATARINI: To do it that way, then there
20 would have to be a break so my translator can translate it
21 because obviously he cannot translate simultaneous as to
22 the way we're speaking. It's like what I'm doing right
23 now.

24 THE COURT: Well, Miss Necessary, I think you
25 have a good point. Is he waiving his right to have every

1 statement translated?

2 MR. PATARINI: Do we want to put this on
3 record also, Judge?

4 THE COURT: Yes.

5 MR. PATARINI: Mr. Lemo, you have a right to
6 hear every word that is spoken in this trial.

7 (Interpreter translates.)

8 (Defendant nods head.)

9 MR. PATARINI: You have a right to have every
10 word spoken in this trial translated for you by the
11 interpreter that we have provided for you.

12 (Interpreter translates.)

13 MR. PATARINI: Your understanding of all the
14 words that are said during this trial are important for you
15 to aid in your defense.

16 (Interpreter translates.)

17 (Defendant nods head.)

18 MR. PATARINI: Would you like us to interpret
19 every word that is being said during this trial?

20 (Interpreter translates)

21 (Defendant nods head.)

22 MR. PATARINI: He would like us to interpret
23 every word that's being said.

24 THE COURT: Okay. We'll do that.

25 MS. NECESSARY: What about what's been said

1 so far?

2 THE COURT: Call your next witness.

3 MS. NECESSARY: Yes, Your Honor. The
4 Commonwealth calls Doris Pejic.

5 - - -

6 DORIS PEJIC, a witness herein, having been
7 duly sworn, was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MS. NECESSARY:

10 Q Would you state your name, please, and spell your
11 last name?

12 A Doris Pejic, P-e-j-i-c.

13 Q How old are you, Miss Pejic?

14 A Twenty.

15 Q And are you employed?

16 A Yes.

17 Q What do you do?

18 A I'm an operations manager at Bali Fitness.

19 Q And what's your educational background?

20 A I finished high school, and right now I'm at CCAC.

21 Q What are you studying?

22 A Criminal justice.

23 Q Miss Pejic, where were you born?

24 A In Montenegro.

25 Q And is that a part of --

1 MR. PATARINI: Excuse me, Your Honor.

2 (Brief pause.)

3 **Q** Where is Montenegro?

4 **A** It's in Yugoslavia.

5 **Q** Is that now an independent country?

6 **A** It's part of Serbia.

7 **Q** All right. And at what age did you come to the
8 United States?

9 **A** Eleven.

10 **Q** You were eleven years old?

11 **A** Yes.

12 **Q** And I take it then you learned English here in
13 school?

14 **A** Yes.

15 **Q** And are you fluent in your native language?

16 **A** Yes, I am.

17 **Q** And which is?

18 **A** Serbo-Croatian.

19 **Q** Serbo-Croatian, is that sometimes referred to as
20 Bosnian?

21 **A** Yes. Every country calls it their own language.

22 **Q** But that's the same language?

23 **A** Yes.

24 **Q** And I take it you are also fluent in English?

25 **A** Yes.

1 **Q** Now, have you had any experience in interpreting
2 for people before, before this evening of --

3 **A** Yes. In schools.

4 **Q** Okay. In the schools?

5 **A** Yes.

6 **Q** And how did that come about?

7 **A** Just from knowing the teachers, they knew that I
8 spoke the same language as the kids that were coming from
9 the same country.

10 **Q** Okay. And there are a lot of international
11 students at the school that you attended?

12 **A** Yes.

13 **Q** Was that Baldwin --

14 **A** Yes.

15 **Q** -- high school?

16 **A** Yes.

17 **Q** Now, did you -- and you were living where at the
18 time in August 13 of 2006?

19 **A** On Maple Drive.

20 **Q** And that would be in the same area where this
21 incident occurred?

22 **A** Correct.

23 **Q** Now, were you contacted by anyone on the evening
24 of August 13 of 2006?

25 **A** Well, I went outside my balcony, and one of my

1 mom's co-workers and a police officer were calling me to
2 come up the street.

3 Q Had you assisted the police in the past?

4 A Yes.

5 Q So they knew who you were?

6 A Yes.

7 Q And they knew you spoke Serbo-Croatian?

8 A Yes.

9 Q And so did you have any contact with the
10 Defendant, Mr. Lemo, at the scene there in Baldwin or
11 Whitehall?

12 A At the time?

13 Q Yes.

14 A Yes.

15 Q And what was that?

16 A When I was called up, I was interpreting what the
17 paramedics said and how he felt and --

18 Q So the paramedics asked you -- you were asked by
19 either the police or the paramedics to come and assist them
20 in evaluating Mr. Lemo?

21 A Yes.

22 Q And where did that conversation that you had with
23 him take place?

24 A He was sitting on the paramedics' truck, and I was
25 standing right outside.

1 **Q** So were you interpreting the medics' questions to
2 him?

3 **A** Yes.

4 **Q** And were you interpreting his answers to them?

5 **A** Yes.

6 **Q** Now, did you have any trouble understanding him?

7 **A** No.

8 **Q** And when you spoke to him, did he appear to
9 understand you?

10 **A** Yes.

11 **Q** Now, I take it they took him off to the hospital?

12 **A** Yes.

13 **Q** And then later that evening did you receive
14 another call to assist the police?

15 **A** I was at the scene for a while. Then I went back
16 home, and one of my friends called me and said that an
17 officer was looking for me, and that's when I went back
18 out.

19 **Q** And did you then go to County Police headquarters
20 in Point Breeze?

21 **A** Yes.

22 **Q** Okay. Now, did they ask you to then assist them
23 at the police headquarters with the interview with
24 Mr. Lemo?

25 **A** Yes.

1 **Q** Now, did you meet Lieutenant Palmer? I guess it
2 was then Detective Palmer there?

3 **A** Yes.

4 **Q** And did he show you any papers?

5 **A** Yes. He did.

6 **Q** What did he show you?

7 **A** He showed me the rights, and I'm not 100 percent
8 sure what all the paperwork was, but I know for sure there
9 was the rights which we went over.

10 **Q** I'm going to show you what's been marked as
11 Commonwealth's Exhibit No. 2 and ask you if this is the
12 form that Detective Palmer showed you?

13 **A** Yes.

14 **Q** And did he ask you to look it over?

15 **A** Yes.

16 **Q** And did you feel that you would be able to
17 understand that? You could read it?

18 **A** Yes.

19 **Q** And you could explain it to Mr. Lemo?

20 **A** Yes.

21 **Q** And how is this done? How did you do that?

22 **A** Well, I first read it to myself, and the officer
23 read it individually, and I translated it to Lemo.

24 **Q** So you did that orally to him?

25 **A** Yes.

1 **Q** Okay. Now, when you spoke with him, did he appear
2 to understand what you were saying to him in
3 Serbo-Croatian?

4 **A** Yes.

5 **Q** And did he respond appropriately?

6 **A** Yes.

7 **Q** And did he --

8 MR. PATARINI: Objection to that last -- did
9 he respond appropriately? For the purposes of this
10 hearing, this is whether or not he understands his rights.
11 I don't think her -- that the witness as the interpreter is
12 permitted to give an opinion at this hearing that he
13 understood his rights, if that's what the question was
14 directed at. If she meant that it was just logical and
15 made sense, one sentence following another, I have no
16 objection to that.

17 BY MS. NECESSARY:

18 **Q** My question is did he respond to the questions?

19 **A** Yes.

20 THE COURT: Overruled. Go ahead.

21 **Q** Did you ask him if he agreed to give up his rights
22 and speak with the police?

23 **A** Yes.

24 **Q** And he responded to each one of these questions
25 that he was asked?

1 **A** Yes.

2 **Q** Were you present when he signed the form?

3 **A** Yes. I was.

4 **Q** And were you then asked to translate for an
5 interview which was done, an oral interview?

6 **A** Yes.

7 **Q** All right. Now, did you feel you were able to
8 convey the meaning of the English into the Serbo-Croatian
9 that Mr. Lemo understood?

10 **A** Yes.

11 **Q** And did he speak with the police through you?

12 **A** Yes.

13 **Q** And did you respond -- or I'm sorry -- did you
14 interpret the words that he spoke to Detectives Palmer
15 and --

16 **A** Yes. He did.

17 **Q** Did he have any -- did he speak to the police?

18 **A** Through me.

19 **Q** Okay. And at some point was he asked to place the
20 statement on tape, audiotape?

21 **A** Yes.

22 **Q** And did you take part in that as well?

23 **A** Yes. I did.

24 **Q** And as part of that did you translate again the
25 rights form?

1 **A** Yes.

2 **Q** And did he respond that he wished to waive his
3 rights and speak with the police?

4 **A** Yes.

5 **Q** Okay. All right. Now, as -- did he seem to
6 understand what you were asking him?

7 **A** Yes.

8 **Q** And did he -- did he again respond in a way that
9 he was responding to the questions that you asked him?

10 **A** Yes. He did.

11 **Q** Now, did Mr. Lemo appear to you to be under the
12 influence of any drugs or alcohol to your knowledge?

13 MR. PATARINI: Objection. There's no factual
14 basis for her to make such a conclusion. We don't know
15 whether she has any training or any basis to make that --

16 THE COURT: Miss Necessary?

17 MS. NECESSARY: I can ask her -- I can do a
18 basis.

19 **Q** Have you seen people under the influence of drugs
20 or alcohol in the past?

21 **A** Yes.

22 **Q** All right. And are you familiar with the
23 symptoms?

24 **A** Yes.

25 **Q** Slurred speech or --

1 **A** Yes.

2 **Q** And did Mr. Lemo exhibit any of those symptoms?

3 **A** No. He seemed okay to me.

4 MS. NECESSARY: Thank you. Cross examine.

5 - - -

6 CROSS-EXAMINATION

7 BY MR. PATARINI:

8 **Q** Would you tell me how to correctly pronounce your
9 last name?

10 **A** "Page".

11 **Q** "Page"?

12 **A** Yes.

13 **Q** My name in any event is Christopher Patarini. I
14 represent Esad, and I'm going to ask you some questions.

15 **A** Okay.

16 **Q** Now, prior to this evening when you -- in August
17 of 2006, had you ever -- were you ever employed as an
18 interpreter?

19 **A** No.

20 **Q** Were you ever in any type of formal proceeding as
21 an interpreter?

22 **A** What do you mean?

23 **Q** Well, were you ever called upon as a volunteer as
24 an interpreter in any type of legal proceeding?

25 **A** Just in schools.

1 **Q** Just in schools?

2 **A** And if I would be around a scene where there's --
3 like if there's someone stopped by the cops and they didn't
4 understand something, they would ask me to interpret.

5 **Q** Then your experience as an interpreter would be
6 only informal? Would that be fair to say?

7 **A** Sure.

8 **Q** Would that be fair to say?

9 **A** Yeah.

10 **Q** Now, as far as Serbo-Croatian, there's different
11 dialects; correct?

12 **A** Yes. There's different accents to it.

13 **Q** Different dialects and different accents?

14 **A** Yes.

15 **Q** Would you say that you were closer to the Serbian
16 part of Serbo-Croatian language, the dialect you use?

17 **A** To be honest, I mix everything, Serbo-Croatian,
18 Croatian and Bosnian..

19 **Q** And as far as -- are you familiar with the dialect
20 that Mr. Lemo uses?

21 **A** Yes.

22 **Q** Would it be Croatian?

23 **A** Everyone calls it their own language.

24 **Q** Well, would you call it Croatian?

25 **A** Serbo-Croatian, yes.

1 **Q** Serbo-Croatian. Would you say his language is
2 closer to the Croatian side of Serbo-Croatian?

3 **A** Yes.

4 **Q** Now, you were asked to read the waiver form;
5 correct?

6 **A** Yes.

7 **Q** And you read that to the best of your ability?

8 **A** Yes.

9 **Q** And then you were -- and an interview was
10 conducted with the police officers and you and my client;
11 correct?

12 **A** That's correct.

13 **Q** And when that interview was conducted, once again,
14 you tried to translate to the best of your ability?

15 **A** Yes.

16 **Q** Correct? And prior to that interview, you had no
17 contact with my client?

18 **A** Just with the paramedics before that. No.

19 **Q** I'm sorry. I know that you testified you had
20 contact with him on this day, but prior to this day you had
21 no prior contact with my client?

22 **A** No.

23 **Q** You were not familiar with what kind of
24 educational background he had?

25 **A** No.

1 **Q** You were not familiar with what, if any, kind of
2 culture or sophistication he had?

3 **A** No.

4 **Q** You had no idea whether or not he was familiar
5 with any of the criminal procedure aspects in our country?

6 **A** No. I didn't really know him as well.

7 **Q** Now, you do not recall verbatim what you said
8 during the first interview; correct?

9 **A** What do you mean?

10 **Q** Well, there was an interview before you went on
11 tape.

12 **A** Yes.

13 **Q** You do not recall what you said word for word,
14 exact words what you said before you went on tape?

15 **A** No.

16 **Q** The tape is -- would you care to say that would be
17 an accurate -- the tape would be an accurate compilation of
18 what transpired in that first interview; correct?

19 **A** Yes.

20 **Q** You used the same words when you were on tape as
21 you used before you were on tape; right?

22 **A** Yes.

23 **Q** You were using the same ability and same
24 dedication to being as accurate as possible on the tape as
25 you were before the tape; correct?

1 **A** Yes.

2 MR. PATARINI: Now I need to speak to my
3 interpreter.

4 THE COURT: Okay.

5 (Private discussion between Attorney Patarini
6 and interpreter.)

7 BY MR. PATARINI:

8 **Q** Ms. Pejic, were you given an opportunity to listen
9 to the tape?

10 **A** Yes. I was.

11 **Q** All right. And so you are familiar with some of
12 the words that you used, especially in the first part of
13 the tape; correct?

14 **A** Yes.

15 **Q** And the word that you used when asked the question
16 by -- when the police said the question to you, you have a
17 right to speak to an attorney and have him present before
18 and during the questioning; correct?

19 **A** Yes.

20 **Q** Now, what is the correct word for "before"?

21 **A** "Priea."

22 **Q** What is the correct word for "during", just so
23 there's no -- I'm not -- I'll spell it for you.
24 D-u-r-i-n-g. What is the correct Serbo-Croatian word for
25 during?

1 **A** Sada, s-a-d-a.

2 **Q** And what is the correct word for "about"?

3 **A** About?

4 **Q** Yes.

5 **A** Ocemu, O-c-e-m-u.

6 THE COURT: We'll resume at 1:30.

7 (Whereupon, these proceedings were adjourned
8 at 12:10 p.m.)

9 - - -

10 1:46 p.m.

11 - - -

12 (In open court, Defendant present with
13 counsel:)

14 MR. PATARINI: May I proceed, Your Honor?

15 THE COURT: Yes.

16 BY MR. PATARINI:

17 **Q** Miss Pejic, you were asked on direct examination
18 about questions that Mr. Lemo asked of you; correct?
19 Whether or not he had asked you any questions during this
20 interrogation?

21 **A** What do you mean?

22 **Q** Well, you were asked when the questions were being
23 put to him, he answered the questions without asking you
24 any questions; is that correct?

25 **A** Yes. Because I translated to him.

1 **Q** You translated to him?

2 **A** Yes.

3 **Q** But the police were telling him to give yes or no
4 answers; correct?

5 **A** That's correct.

6 **Q** On at least two occasions they say answer the
7 questions with a yes or no answer; correct?

8 **A** Yes.

9 **Q** And when you were translating what my client was
10 saying, you never gave -- on long answers, you did not give
11 a verbatim translation of what he was actually saying;
12 correct?

13 **A** Of what --

14 **Q** Well, the police would ask him a question.

15 **A** Uh-huh.

16 **Q** And you would translate the question, and then my
17 client would speak?

18 **A** That's correct.

19 **Q** Sometimes you would sum up what he said; correct?

20 **A** Yes.

21 **Q** Sometimes you would say what you thought he meant;
22 correct?

23 **A** What he thought -- no. I just said what he said.

24 **Q** Well, when you say that at one point in time when
25 he was talking about a woman from family court or a

1 Catholic Charities, that he thought this woman caused the
2 problem?

3 **A** I mentioned that.

4 **Q** You said that, and that was your impression of
5 what he was saying; correct?

6 **A** I -- exactly the way he said it, that's what I
7 said.

8 **Q** You didn't say it exactly like he said it; did
9 you?

10 **A** What do you mean, exactly?

11 **Q** You didn't say verbatim the words he said?

12 **A** Not word by word, but I --

13 **Q** But there were a number --

14 MS. NECESSARY: May she finish?

15 THE COURT: Let her finish, Mr. Patarini.

16 **A** I summarized what he said to me. I didn't say it
17 word by word, but I summarized it in the way that he was
18 saying it.

19 **Q** Right. You didn't say it word for word, and
20 sometimes when you summarize, you left certain things out
21 that he said?

22 **A** Not that I can remember.

23 **Q** You can't remember. All right. When you were --

24 MR. PATARINI: Your Honor, I would like to
25 ask a few more questions, and then I would like to continue

1 or reserve continued cross-examination after the tape is
2 played in light of the fact that the questions that I have
3 pertain to actual things that were said in the tape. I
4 have them marked, and I can ask them of her after the tape
5 is played, if I may.

6 THE COURT: Okay.

7 MR. PATARINI: If I may ask two more
8 questions first.

9 THE COURT: Okay.

10 MR. PATARINI: Two more questions. And when
11 I ask these questions, I would like to have my interpreter
12 say the words that I am going to say because I cannot
13 pronounce them well enough, and I'm afraid that if I say
14 the words, that they will not be clear for her to
15 understand.

16 THE COURT: That's fine.

17 BY MR. PATARINI:

18 Q Now, you stated that you listened to the tape
19 recently; correct?

20 A Yes.

21 Q And you were trying to be verbatim when you
22 read -- when you said the rights to my client?

23 A I did the best as I can.

24 THE COURT: That surprised me. There were
25 only two questions. Miss Necessary?

1 MS. NECESSARY: Nothing further of the
2 witness at this time, but we were planning on playing the
3 tape next.

4 THE COURT: All right.

5 MS. NECESSARY: May Miss Pejic sit back down?
6 It's about twenty minutes long, Your Honor.

7 THE COURT: Okay. Do you have a transcript
8 for the court reporter --

9 MS. NECESSARY: I do, yes. Not of the
10 Bosnian, of course.

11 (The tape recording was played as follows:)

12 DETECTIVE PALMER: The following is a
13 recorded statement of Esad Lemo. I am Detective William
14 Palmer, P-a-l-m-e-r. Today is August 13, 2006. The time
15 is 11:30 p.m. This interview is regarding the death of
16 Jazminka Lemo that occurred today in Whitehall Borough.
17 Also present is my partner --

18 DETECTIVE DeFELICE: Thomas DeFelice,
19 D-e-F-e-l-i-c-e.

20 DETECTIVE PALMER: And Esad Lemo is not
21 fluent in the English language. So an interpreter in the
22 Bosnian language is also present. Would you please
23 identify yourself?

24 MS. PEJIC: Doris Pejic, P-e-j-i-c.
25

1 DETECTIVE PALMER: Okay. Can you ask
2 Mr. Lemo to identify himself?

3 (Interpreter speaks in Serbo-Croatian.)

4 (Esad Lemo speaks in Serbo-Croatian.)

5 MS. PEJIC: He said he could say the name,
6 but he could not spell it.

7 DETECTIVE PALMER: Ask him to say his name.

8 (Interpreter speaks in Serbo-Croatian.)

9 ESAD LEMO: Esad Lemo.

10 DETECTIVE PALMER: How old is he?

11 (Interpreter speaks in Serbo-Croatian.)

12 (Esad Lemo speaks in Serbo-Croatian.)

13 MS. PEJIC: Forty-five.

14 DETECTIVE PALMER: Okay. Can you ask
15 Mr. Lemo if he remembers being advised of his rights and
16 agreeing to waive those rights and speak to detectives?

17 (Interpreter speaks in Serbo-Croatian.)

18 (Esad Lemo speaks in Serbo-Croatian.)

19 (Interpreter speaks in Serbo-Croatian.)

20 (Esad Lemo speaks in Serbo-Croatian.)

21 MS. PEJIC: Yes. He remembers.

22 DETECTIVE PALMER: Okay. Can you tell him
23 I'm going to advise him of his rights one more time?

24 (Interpreter speaks in Serbo-Croatian.)

25 (Esad Lemo speaks in Serbo-Croatian.)

1 DETECTIVE PALMER: You have the right to
2 remain silent.

3 (Interpreter speaks in Serbo-Croatian.)

4 DETECTIVE PALMER: Anything you say can and
5 will be used against you in a court of law.

6 (Interpreter speaks in Serbo-Croatian.)

7 (Esad Lemo speaks in Serbo-Croatian.)

8 DETECTIVE PALMER: You have the right to
9 speak to an attorney and have him present before and during
10 questioning.

11 (Interpreter speaks in Serbo-Croatian.)

12 (Esad Lemo speaks in Serbo-Croatian.)

13 DETECTIVE PALMER: If you cannot afford an
14 attorney, one will be appointed free of charge before or
15 during any questioning if you so desire.

16 (Interpreter speaks in Serbo-Croatian.)

17 (Esad Lemo speaks in Serbo-Croatian.)

18 DETECTIVE PALMER: Do you understand each of
19 these rights I have explained to you? Yes or no?

20 (Interpreter speaks in Serbo-Croatian.)

21 (Esad Lemo speaks in Serbo-Croatian.)

22 (Interpreter speaks in Serbo-Croatian.)

23 (Esad Lemo speaks in Serbo-Croatian.)

24 MS. PEJIC: Yes.

25 DETECTIVE PALMER: Having these rights in

1 mind, do you wish to speak to me now? Yes or no?

2 (Interpreter speaks in Serbo-Croatian.)

3 (Esad Lemo speaks in Serbo-Croatian.)

4 MS. PEJIC: Yes.

5 DETECTIVE PALMER: Okay. Can you ask
6 Mr. Lemo to tell us where he resides?

7 MS. PEJIC: Where he lives?

8 DETECTIVE PALMER: Where does he live?

9 (Interpreter speaks in Serbo-Croatian.)

10 (Esad Lemo speaks in Serbo-Croatian.)

11 MS. PEJIC: He lives in Prospect Park.

12 DETECTIVE PALMER: Does he know the apartment
13 number?

14 (Interpreter speaks in Serbo-Croatian.)

15 (Esad Lemo speaks in Serbo-Croatian.)

16 MS. PEJIC: 1600 Parkline.

17 THE WITNESS: Who does he live there with?

18 (Interpreter speaks in Serbo-Croatian.)

19 (Esad Lemo speaks in Serbo-Croatian.)

20 MS. PEJIC: His friend Hiland.

21 DETECTIVE PALMER: And how long has he lived
22 there?

23 (Interpreter speaks in Serbo-Croatian.)

24 ESAD LEMO: Three years.

25 MS. PEJIC: Three years.

1 DETECTIVE PALMER: Does he have a phone
2 number?

3 (Interpreter speaks in Serbo-Croatian.)

4 (Esad Lemo speaks in Serbo-Croatian.)

5 MS. PEJIC: No.

6 DETECTIVE PALMER: Is he employed?

7 (Interpreter speaks in Serbo-Croatian.)

8 ESAD LEMO: No.

9 MS. PEJIC: No.

10 DETECTIVE PALMER: Today has he had any
11 alcoholic beverages, had anything to drink?

12 (Interpreter speaks in Serbo-Croatian.)

13 ESAD LEMO: Yes.

14 MS. PEJIC: Yes.

15 DETECTIVE PALMER: What did he have to drink?

16 (Interpreter speaks in Serbo-Croatian.)

17 ESAD LEMO: Whiskey.

18 MS. PEJIC: Whiskey.

19 DETECTIVE PALMER: How many?

20 (Interpreter speaks in Serbo-Croatian.)

21 ESAD LEMO: Two.

22 MS. PEJIC: Two.

23 DETECTIVE PALMER: Two shot glasses?

24 (Interpreter speaks in Serbo-Croatian.)

25 (Esad Lemo speaks in Serbo-Croatian.)

1 MS. PEJIC: Shot.

2 DETECTIVE PALMER: Any narcotics, drugs?

3 (Interpreter speaks in Serbo-Croatian.)

4 (Esad Lemo speaks in Serbo-Croatian.)

5 MS. PEJIC: He had pills.

6 DETECTIVE PALMER: And it's a pill he
7 explained to us earlier. It's for headaches. Can you ask
8 him that?

9 (Interpreter speaks in Serbo-Croatian.)

10 (Esad Lemo speaks in Serbo-Croatian.)

11 MS. PEJIC: He said he had the one for his
12 headaches, and the other one he doesn't know.

13 DETECTIVE PALMER: Okay. Can you ask him how
14 long has he been in the United States?

15 (Interpreter speaks in Serbo-Croatian.)

16 (Esad Lemo speaks in Serbo-Croatian.)

17 MS. PEJIC: Eight years.

18 DETECTIVE PALMER: Okay. In those eight
19 years he's lived in Whitehall?

20 (Interpreter speaks in Serbo-Croatian.)

21 ESAD LEMO: Yes.

22 MS. PEJIC: Yes.

23 DETECTIVE PALMER: Okay. And his marital
24 status, he's divorced?

25 (Interpreter speaks in Serbo-Croatian.)

1 ESAD LEMO: Yes.

2 MS. PEJIC: Yes.

3 DETECTIVE PALMER: Can he tell us his
4 ex-wife's name?

5 (Interpreter speaks in Serbo-Croatian.)

6 ESAD LEMO: Jazminka.

7 DETECTIVE PALMER: How long were he and
8 Jazminka married?

9 (Interpreter speaks in Serbo-Croatian.)

10 (Esad Lemo speaks in Serbo-Croatian.)

11 (Interpreter speaks in Serbo-Croatian.)

12 (Esad Lemo speaks in Serbo-Croatian.)

13 MS. PEJIC: Fifteen years.

14 DETECTIVE PALMER: And when did they get the
15 divorce?

16 (Interpreter speaks in Serbo-Croatian.)

17 (Esad Lemo speaks in Serbo-Croatian.)

18 (Interpreter speaks in Serbo-Croatian.)

19 MS. PEJIC: He said about two years.

20 DETECTIVE PALMER: And they have children?

21 (Interpreter speaks in Serbo-Croatian.)

22 (Esad Lemo speaks in Serbo-Croatian.)

23 MS. PEJIC: Yes.

24 DETECTIVE PALMER: Can he name them and tell
25 us their ages?

1 (Interpreter speaks in Serbo-Croatian.)

2 (Esad Lemo speaks in Serbo-Croatian.)

3 MS. PEJIC: Sabina Lemo, 14 years.

4 (Esad Lemo speaks in Serb-Croatian.)

5 MS. PEJIC: Sadin Lemo, 13 years.

6 DETECTIVE PALMER: And they live with their
7 mother?

8 (Interpreter speaks in Serbo-Croatian.)

9 ESAD LEMO: Yes.

10 MS. PEJIC: Yes.

11 DETECTIVE PALMER: Just more background
12 information. Can you ask him about their relationship --

13 MS. PEJIC: To their kids?

14 DETECTIVE PALMER: Background of his
15 relationship with his ex-wife?

16 (Interpreter speaks in Serbo-Croatian.)

17 (Esad Lemo speaks in Serbo-Croatian.)

18 MS. PEJIC: When they moved to -- they
19 started having arguments and fights. A lady named Rosa
20 that worked for the Catholic Charity, he assumes that she
21 is the one that got her in to wanting a divorce with him,
22 and that's how they got it.

23 DETECTIVE PALMER: Has it been an abusive
24 relationship?

25 (Interpreter speaks in Serbo-Croatian.)

1 ESAD LEMO: No.

2 MS. PEJIC: No.

3 DETECTIVE PALMER: Has he been accused of
4 being abusive?

5 (Interpreter speaks in Serbo-Croatian.)

6 ESAD LEMO: No.

7 MS. PEJIC: No.

8 DETECTIVE PALMER: Has a protection from
9 abuse order ever been filed by the courts?

10 (Interpreter speaks in Serbo-Croatian.)

11 (Esad Lemo speaks in Serbo-Croatian.)

12 MS. PEJIC: He said no, but they just
13 restrained him from going to their street and crossing.

14 DETECTIVE PALMER: Okay. Does he know the
15 exact order given? What did it prevent him from doing?
16 You're saying being across the street? Is that what it
17 was?

18 (Interpreter speaks in Serbo-Croatian.)

19 (Esad Lemo speaks in Serbo-Croatian.)

20 MS. PEJIC: That he can't go to that street
21 and that he can't see his children.

22 DETECTIVE PALMER: Does he speak to them on
23 the phone?

24 (Interpreter speaks in Serbo-Croatian.)

25 (Esad Lemo speaks in Serbo-Croatian.)

1 MS. PEJIC: When he had a phone, he talked to
2 them, but now that he doesn't, he hasn't.

3 DETECTIVE PALMER: So when was the last time
4 he'd seen his children?

5 (Interpreter speaks in Serbo-Croatian.)

6 (Esad Lemo speaks in Serbo-Croatian.)

7 MS. PEJIC: Yesterday.

8 DETECTIVE PALMER: Was that on the street?

9 (Interpreter speaks in Serbo-Croatian.)

10 (Esad Lemo speaks in Serbo-Croatian.)

11 MS. PEJIC: On the street.

12 DETECTIVE PALMER: Okay. Can you have him
13 slowly and in his own words tell us what happened today?

14 (Interpreter speaks in Serbo-Croatian.)

15 (Esad Lemo speaks in Serbo-Croatian.)

16 MS. PEJIC: Yes.

17 (Esad Lemo speaks in Serbo-Croatian.)

18 DETECTIVE PALMER: Now, if again you're more
19 comfortable slowly going back through that, or if you want
20 to translate that entirely, you can break them down.

21 (Interpreter speaks in Serbo-Croatian.)

22 (Esad Lemo speaks in Serbo-Croatian.)

23 (Interpreter speaks in Serbo-Croatian.)

24 (Esad Lemo speaks in Serbo-Croatian.)

25 MS. PEJIC: He had a couple of drinks and he

1 had the two pills.

2 (Esad Lemo speaks in Serbo-Croatian.)

3 MS. PEJIC: Okay.

4 (Esad Lemo speaks in Serbo-Croatian.)

5 MS. PEJIC: And he was really stressed out,
6 and he had headaches.

7 (Esad Lemo speaks in Serbo-Croatian.)

8 MS. PEJIC: He's then really stressed out the
9 whole day. So he went for a drive to Century III Mall --
10 (inaudible). He doesn't really have a friend that he can
11 be with or talk to or anything, and he felt lonely.

12 DETECTIVE PALMER: Then what?

13 (Interpreter speaks in Serbo-Croatian.)

14 (Esad Lemo speaks in Serbo-Croatian.)

15 MS. PEJIC: Then he came across the street,
16 and he saw her, and it happened.

17 DETECTIVE PALMER: Tell him he needs to tell
18 us what happened.

19 (Interpreter speaks in Serbo-Croatian.)

20 (Esad Lemo speaks in Serbo-Croatian.)

21 (Interpreter speaks in Serbo-Croatian.)

22 (Esad Lemo speaks in Serbo-Croatian.)

23 MS. PEJIC: As soon as he saw her, he lost
24 it, and like he began seeing like black. He didn't see
25 clearly.

1 DETECTIVE PALMER: Tell him did he
2 intentionally run into his ex-wife?

3 (Interpreter speaks in Serbo-Croatian.)

4 (Esad Lemo speaks in Serbo-Croatian.)

5 MS. PEJIC: No.

6 DETECTIVE PALMER: Tell him didn't in his
7 previous interview prior to this tape recording did he
8 admit that he intentionally ran into his wife?

9 (Interpreter speaks in Serbo-Croatian.)

10 (Esad Lemo speaks in Serbo-Croatian.)

11 MS. PEJIC: He said yes. He did
12 intentionally want to run her over because he loved her,
13 and he just couldn't get it the way he wanted to.

14 (Esad Lemo speaks in Serbo-Croatian.)

15 MS. PEJIC: He says like he loves her and
16 everything to the day and now, and it's been like
17 everything is getting to him because he keeps on getting
18 court letters, and he doesn't really understand them.
19 There is no one to help him on his side like his wife had
20 on hers.

21 DETECTIVE PALMER: Today there's no
22 malfunction in the vehicle?

23 (Interpreter speaks in Serbo-Croatian.)

24 (Esad Lemo speaks in Serbo-Croatian.)

25 MS. PEJIC: No.

1 (Esad Lemo speaks in Serbo-Croatian.)

2 MS. PEJIC: He hasn't spoken to her or said
3 anything to her for two years.

4 DETECTIVE PALMER: Okay. But originally he
5 told us the brakes went out in his original statement. Is
6 that correct?

7 (Interpreter speaks in Serbo-Croatian.)

8 (Esad Lemo speaks in Serbo-Croatian.)

9 MS. PEJIC: He said that they did go off, but
10 he intentionally wanted to hit her too. So it was both at
11 the same time.

12 DETECTIVE PALMER: Ask him again. Did the
13 brakes fail? And tell him that this is something that will
14 be determined through a safety inspection. So we need the
15 truth.

16 (Interpreter speaks in Serbo-Croatian.)

17 (Esad Lemo speaks in Serbo-Croatian.)

18 (Interpreter speaks in Serbo-Croatian.)

19 (Esad Lemo speaks in Serbo-Croatian.)

20 MS. PEJIC: He said that the brakes needed
21 some oil, and he did feel like that they went off.

22 DETECTIVE PALMER: But he intentionally
23 steered and accelerated towards his wife; is that correct?

24 (Interpreter speaks in Serbo-Croatian.)

25 ESAD LEMO: Yes.

1 MS. PEJIC: Yes.

2 DETECTIVE PALMER: With what intent?

3 (Interpreter speaks in Serbo-Croatian.)

4 (Esad Lemo speaks in Serbo-Croatian.)

5 MS. PEJIC: He at the most -- like when he
6 saw her, he got really upset because like from other people
7 that live around him they got a divorce, and like he just
8 wanted to like even though they had a divorce, like wanted
9 to be in contact with his wife and his children, like just
10 saying hi to each other and everything because people that
11 he lives around, there's like divorces, but they still like
12 hang out and have coffee together and stay in contact with
13 their children.

14 (Esad Lemo speaks in Serbo-Croatian.)

15 MS. PEJIC: He said like he always wanted to,
16 you know, take his wife, help her out, you know, ex-wife,
17 help her out, take her shopping, you know, help with the
18 kids. And from him hearing, you know, your wife was with
19 this man, your wife was with this guy, I'm like --
20 having strange guys taking her places just bothered him a
21 lot.

22 DETECTIVE PALMER: So what caused him to run
23 into his wife with his vehicle today was her rejection of
24 him?

25 (Interpreter speaks in Serbo-Croatian.)

1 (Esad Lemo speaks in Serbo-Croatian.)

2 MS. PEJIC: Because she didn't want to keep
3 in contact with him or talk to him or anything.

4 DETECTIVE PALMER: Today how long did he have
5 to drive around before this opportunity presented itself?

6 (Interpreter speaks in Serbo-Croatian.)

7 (Esad Lemo speaks in Serbo-Croatian.)

8 (Interpreter speaks in Serbo-Croatian.)

9 (Esad Lemo speaks in Serbo-Croatian.)

10 MS. PEJIC: He said it was about ten, fifteen
11 minutes before he saw her while he was driving around.

12 DETECTIVE PALMER: And she ran when he
13 approached?

14 (Interpreter speaks in Serbo-Croatian.)

15 (Esad Lemo speaks in Serbo-Croatian.)

16 MS. PEJIC: No.

17 DETECTIVE PALMER: Ask him, he mentioned
18 earlier that he planned on killing himself after this?

19 (Interpreter speaks in Serbo-Croatian.)

20 (Esad Lemo speaks in Serbo-Croatian.)

21 MS. PEJIC: He said he felt like that before
22 that happened, and right now he would do it.

23 (Esad Lemo speaks in Serbo-Croatian.)

24 (Interpreter speaks in Serbo-Croatian.)

25 (Esad Lemo speaks in Serbo-Croatian.)

1 MS. PEJIC: He had a brother living here, and
2 he is the one that helped him come to United States. And
3 when they came here, his wife said either choose me or your
4 brother. So his brother left and went to California and
5 hung himself.

6 DETECTIVE PALMER: Any questions?

7 DETECTIVE DeFELICE: No.

8 DETECTIVE PALMER: Ask him if there's
9 anything else he wants to add or delete from his statement.

10 (Interpreter speaks in Serbo-Croatian.)

11 (Esad Lemo speaks in Serbo-Croatian.)

12 MS. PEJIC: He said he would not want to
13 erase or delete anything that he said. He's telling us the
14 truth now, and no matter what happens happens.

15 DETECTIVE PALMER: Okay. This will end the
16 recorded interview. The time is now 11:50 p.m.

17 (Tape recording ends.)

18 MR. PATARINI: I would like to continue
19 cross-examination.

20 - - -

21 CROSS-EXAMINATION

22 BY MR. PATARINI:

23 Q Miss Pejic, after having listened to that tape,
24 you are aware of the fact that -- or more aware of the fact
25 that you did not give a verbatim translation of what my

1 client said to the police on this day in August of 2006;
2 correct?

3 **A** Yes.

4 **Q** You are aware of the fact that on more than one
5 occasion there was an exchange between you and him which
6 you did not explain to the police officers; isn't that
7 correct?

8 **A** Yes. That was when I was asking him what he
9 meant.

10 **Q** And there was an exchange?

11 **A** Yes.

12 **Q** Because it wasn't clear what -- if you knew what
13 he was saying; correct?

14 **A** Correct.

15 **Q** On a number of occasions you heard there was an
16 exchange that was not interpreted; correct?

17 **A** One of the occasions was that I couldn't hear him,
18 not that I didn't understand him.

19 **Q** There are at least three occasions when it went
20 back and forth in which you gave no translation to the
21 police; is that correct?

22 **A** That's -- like I said, that was whenever I was
23 asking him what he said because I didn't hear him.

24 **Q** Or you didn't understand him?

25 **A** If he didn't say it clearly enough, I asked him

1 again without telling the officer that I'm asking him
2 again, yes.

3 **Q** When he gave -- when he gave the explanation as to
4 what was going on in his mind when this incident occurred,
5 you did not -- your words did not include the thoughts and
6 feelings that he had; is that correct?

7 **A** What do you mean?

8 **Q** Well, when -- the question was asked can you have
9 him slowly in his own words tell us what happened today,
10 that's when he gave the longest piece of dialogue in the
11 entire tape; correct?

12 **A** Yes.

13 **Q** That long piece of dialogue was never translated
14 to the police; isn't that correct?

15 **A** That's correct. Because the cops asked me to tell
16 him to say it step by step.

17 **Q** To break it down; correct?

18 **A** Yes.

19 **Q** Break it down. And that's what you did?

20 **A** Yes.

21 **Q** You used the word stressed out on at least two
22 occasions. My client never said the word stressed out; did
23 he?

24 **A** Yes. He did.

25 **Q** What's the words for stressed out?

1 **A** There was a couple words that they used for
2 stressed out. "No-wah-sop." (phonetic) He said that he's
3 been stressed out.

4 **Q** Did he use the word stressed out in the way that
5 he used it, that he was stressed out?

6 **A** Yes. He did.

7 **Q** Did he say he had headaches?

8 **A** Yes. He did.

9 **Q** When he was being asked to give his initial
10 explanation, he started out by saying things were good.
11 That's one of the things he said. We were good at first?
12 Isn't that correct?

13 **A** I believe so.

14 **Q** But you never said that; correct? You never
15 said --

16 **A** I don't think so.

17 **Q** And when you were doing the summary as to the
18 interaction of Dorothy or Zora, he interpreted it as they
19 wanted us to separate; correct?

20 **A** Yes.

21 **Q** That's the words he used? But that's not how you
22 interpreted it; is it?

23 **A** I did the best as I could.

24 **Q** On numerous occasions -- you heard the tape. He
25 said that he was nervous and that his head hurt. You heard

1 that today on the tape; right?

2 **A** Yes.

3 **Q** You never said that in your translation; did you?

4 **A** I believe I did say that he was stressed out and
5 that his head was hurting.

6 **Q** I understand that, but you never said, as he said
7 that you heard on the tape, that he was nervous and his
8 head hurt. You never said that; did you?

9 **A** No. I'm not sure.

10 **Q** And it's on the tape on more than one time, at
11 least three times?

12 **A** I did mention that he was stressed out and had a
13 headache.

14 **Q** You said he was stressed out. My question is you
15 never said the word nervous and my head hurts; did you?

16 **A** The way he said nervous, it's translated in
17 English as stressed out. It's not nervous.

18 **Q** On the tape you heard him say because America does
19 not give me to see my children, I don't know why give her
20 the right. You heard that on the tape, too; didn't you?

21 **A** Yes.

22 **Q** And you didn't say that to the police officers;
23 did you?

24 **A** I believe no.

25 **Q** You didn't say that; did you?

1 **A** I don't think so. Like I said, I summarized a lot
2 of it in the best that he said it.

3 **Q** You summarized it the best you could summarize,
4 not the best he said it? Right?

5 **A** Correct. Because I was the one translating for
6 him.

7 **Q** In fact, during the tape when you heard this
8 today, you were telling him to give shorter phrases;
9 correct? You were told to give him shorter phrases, and
10 you said can you again say with shorter phrases or words so
11 that I can tell them?

12 **A** Yes.

13 **Q** Is that what you told him?

14 **A** Yes.

15 **Q** You were cutting down his explanations? Isn't
16 that what was going on?

17 **A** Yes.

18 MS. NECESSARY: I'm going to object, Your
19 Honor. I think that's an incorrect characterization.

20 THE COURT: Overruled. Go ahead.

21 MR. PATARINI: Thank you.

22 BY MR. PATARINI:

23 **Q** Now, you heard your words on the tape in which you
24 said he said yes. He did intentionally want to run her
25 over. He never said the words on the tape that he

1 intentionally wanted to run her over; did he?

2 **A** He said it a different way, that he wanted to run
3 her over.

4 **Q** My question is simple. He never said the words he
5 intentionally wanted to run her over; did he?

6 **A** No. He said it in a different way, like I said.

7 **Q** Now, you heard the question on the tape the
8 officer put, but originally he told us the brakes went out
9 in his original statement; is that correct?

10 **A** Yes.

11 **Q** Now, you heard that question put by the police
12 officer; correct?

13 **A** Yes.

14 **Q** And then you stated to him at the beginning you
15 said that your brakes failed, and he answered yeah. They
16 failed. That's what he said on the tape; correct?

17 **A** Yes.

18 **Q** However, you then translated that into he said
19 that they did go off, but he intentionally wanted to hit
20 her. That's what you translated to the police officers;
21 correct?

22 **A** Yes.

23 **Q** That's not what he said.

24 **A** That's what he said before, and then he said it
25 right after.

1 **Q** But that's not what he said at that moment when he
2 was asked that question; is it?

3 **A** Nope.

4 **Q** You also heard today the question with what
5 intent. You heard that question towards the end of the
6 interrogation; correct?

7 **A** Yes.

8 **Q** And then that is one of the other portions of the
9 questioning period in which Mr. Lemo gave a long
10 explanation?

11 **A** I can't recall that.

12 **Q** He gave a long explanation about that he thought
13 things would calm down, and he would buy a car and take his
14 wife shopping, take her and the children shopping like
15 other couples?

16 **A** Yes.

17 **Q** You didn't say all those words?

18 **A** I summarized it, but --

19 **Q** Summarized it?

20 **A** But it was the same thing.

21 **Q** The same thing in your opinion?

22 **A** It was the same thing he said. I didn't mention
23 the names that he was naming, but I said that he wanted to
24 take them shopping and all the other stuff, spend time with
25 his ex-wife and his kids.

1 **Q** He talked a lot about his kids in that section.
2 Once again, you didn't say anything about it? Talked about
3 taking them to the pools?

4 **A** I said he wanted to spend time with his kids.

5 **Q** Now, on the tape you heard the detective say -- on
6 the tape you heard the officer say the term you have the
7 right to speak to an attorney and have him present before
8 and during the questioning; correct?

9 **A** Uh-huh.

10 **Q** You on -- on the tape you said -- can you say it?

11 DEFENDANT'S INTERPRETER: Prije i za toga.

12 **Q** Is that what you said?

13 **A** Yes.

14 **Q** You did not say --

15 DEFENDANT'S INTERPRETER: Prije i za vrijeme
16 pitanje.

17 **Q** You did not say that; did you?

18 **A** I did not say vrijeme, but prije means before he
19 questions.

20 **Q** Before he questions. That's all you said?

21 **A** I said before and after. I did not say --

22 **Q** The words you said were --

23 DEFENDANT'S INTERPRETER: Prije i za toga.

24 **Q** That's what you said?

25 **A** Yes. Prije means before. I za toga means after,

1 yes.

2 Q You never said --

3 DEFENDANT'S INTERPRETER: Prije i za vrijeme
4 pitanje --

5 A I said --

6 Q You didn't say --

7 THE COURT: Mr. Patarini, it's difficult
8 enough that we have side conversations going. We're trying
9 to make a record here. Ask your question.

10 MR. PATARINI: I apologize.

11 BY MR. PATARINI:

12 Q One more time. You did not say -- say it --

13 DEFENDANT'S INTERPRETER: Prije i za vrijeme
14 pitanje.

15 BY MR. PATARINI:

16 Q You did not say that?

17 A I did not. I said before or after.

18 Q All right. You also heard the officer say on the
19 tape, "If you can't afford an attorney, one will be
20 appointed free of charge before or during any questioning
21 if you so desire." You heard that on the tape? Correct?

22 A Yes. I did.

23 Q You said --

24 DEFENDANT'S INTERPRETER: Prije i za toga?

25 A The same thing, just like you asked me before.

1 **Q** That's what you said?

2 **A** Yes. I did.

3 **Q** You did not say --

4 DEFENDANT'S INTERPRETER: Prije i za vrijeme
5 pitanje.

6 **A** I just answered no, I did not say during. I said
7 before or after.

8 BY MR. PATARINI:

9 **Q** That's right. In both questions, when you were
10 telling him he had a right to speak to an attorney before
11 and during the questioning, you said before and after?

12 **A** Yes.

13 **Q** When you said that an attorney will be appointed
14 free of charge, you said before and after? Correct?

15 **A** Correct.

16 MR. PATARINI: No further questions.

17 THE COURT: Miss Necessary?

18 MS. NECESSARY: Nothing further, thank you.

19 THE COURT: Thank you.

20 MS. NECESSARY: The Commonwealth calls
21 Natasha Garrett, please.

22 MR. PATARINI: Your Honor, I would like an
23 offer of proof.

24 MS. NECESSARY: Your Honor, Miss Garrett is
25 the interpreter and translator that the Commonwealth has

1 engaged to -- she both reviewed -- she reviewed all the
2 documents that were translated in this case, including the
3 tape, and she will be testifying that in her professional
4 opinion and after viewing the tape that it was an accurate
5 translation.

6 MR. PATARINI: I don't understand what the
7 relevance is of that. If we're talking about the waiver,
8 we're talking about specific words that were said to my
9 client and how my client responded to those words. For her
10 to say anything in her opinion that my client, in fact,
11 understood his rights and made a knowing, intelligent and
12 voluntary waiver, then she would be usurping what the
13 bench -- what the Court is doing at the present time.

14 The Court heard the words. The Court heard the
15 translation. She's just giving an opinion about whether
16 the translation was good or not. And all -- I've never
17 received any opinions from her other than the translations
18 were okay.

19 THE COURT: Mr. Patarini, I think we just
20 spent the last 45 minutes doing precisely that. Proceed,
21 Miss Necessary.

22 MS. NECESSARY: Yes, Your Honor.

23 - - -

24 NATASHA GARRETT, a witness herein, having
25 been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

2 BY MS. NECESSARY:

3 **Q** Would you state your name, please, and spell your
4 last name?

5 **A** Natasha Garrett, G-a-r-r-e-t-t.

6 Q And what is your professional occupation?

7 **A** I'm currently the director of the international
8 student program at LaRoche College.

9 10 And how long have you been in that position?

10 A I've worked there since 2000.

11 Q And do you also have another occupation?

12 **A** Yes. I have been doing freelancing as an
13 interpreter and translator for about eight years.

14 Q And for what language do you do translation?

A I translate from Macedonian and Serbo-Croatian.

16 Q And is that your native language?

17 **A** Serbo-Croatian is not my native language, but I
18 speak it fluently.

19 Q And can you tell us about your background and
20 training and education in translation and in learning the
21 language?

22 **A** Well, I have a -- my degree, my Master's degree is
23 in English language, but right now I'm working on my Ph.D.
24 in cross-cultural communication.

8 All right. And what type of training and

1 education have you had in translation?

2 **A** Well, my degree is in languages and linguistics.

3 **Q** And so -- did you learn Serbo-Croatian in school?

4 **A** No. I've always known it because -- I grew up in
5 Macedonia when it was part of Yugoslavia, and
6 Serbo-Croatian was the official language of the country.

7 **Q** So that was language that you grew up knowing?

8 **A** Exactly. I also had it in school, but I grew up
9 knowing it.

10 **Q** All right. And you have been retained to do
11 translations by various agencies or entities?

12 **A** Yeah. I've worked with over ten agencies in the
13 United States.

14 **Q** And what type of translations do you do?

15 **A** I've done a range of translations, a lot of legal
16 documents, medical translations, depending on the need.

17 **Q** All right. And you've been doing this since 1993
18 I believe?

19 **A** I'd say for the past eight years, eight to ten
20 years.

21 **Q** All right.

22 MS. NECESSARY: Does counsel have any
23 questions on voir dire?

24 MR. PATARINI: No.

25 THE COURT: All right.

1 BY MS. NECESSARY:

2 Q Miss Garrett, at my request did you review some of
3 the documents that were translated in this case to
4 determine accuracy?

5 A Yes. I did.

6 Q And did you also in particular review
7 Commonwealth's Exhibit -- Suppression Exhibit No. 3, which
8 would be the CD of the statement of Esad Lemo?

9 A Yes, I did.

10 Q And you listened to the tape itself?

11 A Yes.

12 Q And you've listened to it in Court?

13 A Several times, yes.

14 Q And did you find the interpreter, Miss Pejic, was
15 able to -- did she convey accurately the questions and the
16 statements of the detective who was questioning Mr. Lemo?

17 A I believe overall she did. I mean we can talk
18 about specific areas, but overall I think she did an
19 adequate translation.

20 Q All right. Now, specifically with regard to the
21 rights that were given, and I don't know if you had a
22 chance to see -- this is Commonwealth's Exhibit No. 2,
23 which is the rights warning form which the detective read.
24 Did she translate those questions and rights -- or rights
25 accurately?

1 A I believe so.

2 MR. PATARINI: I object to that question. I
3 don't know what she's talking about. Is she talking about
4 the rights on that form? If she's never heard her say
5 them, how can she say she adequately conveyed them?

6 MS. NECESSARY: Well, the Detective read
7 them.

8 THE WITNESS: We went over it on the tape.

9 MR. PATARINI: That's my objection. If she's
10 going to comment on the tape, that's fine if she heard it.
11 She didn't hear what the translator said when the
12 translator translated those particular words.

13 MS. NECESSARY: I think she did because I
14 believe the detective read the rights again on the tape.

15 THE COURT: Was that form given to him in the
16 manner in which it is now present?

17 MS. NECESSARY: Yes. I believe it was
18 read --

19 THE COURT: So in both the English and
20 Serbian versions?

21 MS. NECESSARY: Well, that's what I want to
22 ask her, whether or not that was correctly translated.

23 THE COURT: How would she know?

24 MS. NECESSARY: Because she listened to the
25 tape. She listened to the detective read the rights.

1 THE COURT: That's not my question. That
2 form has the rights in English, and it has the rights in
3 Serbian.

4 MS. NECESSARY: No. It doesn't have them in
5 Serbian.

6 THE COURT: Would you let me finish my
7 question?

8 MR. PATARINI: I apologize.

9 THE COURT: Was that given to Mr. Lemo in
10 that form the way that it exists now?

11 MS. NECESSARY: The way that it exists now, I
12 believe -- yes.

13 THE COURT: Okay. Proceed.

14 MR. PATARINI: If I may restate my objection.

15 THE COURT: Go ahead.

16 MR. PATARINI: The form was read to my client
17 by an interpreter. She never had the opportunity to hear
18 that interpretation. She did have an opportunity to hear
19 the interpretation that was conducted on the tape. But she
20 never heard the interpretation that was conducted when that
21 form was read to my client.

22 So my objection would be she cannot give an
23 opinion as to how something was conveyed or understood or
24 appeared to be understood if she never heard it.

25 THE COURT: Okay.

1 MS. NECESSARY: I agree she didn't hear it --
2 Miss Garrett didn't hear it the first time, but she did
3 hear it the second time on the tape.

4 THE COURT: Is that an accurate translation
5 of the English?

6 THE WITNESS: This is not a translation.
7 It's in English and Spanish.

8 MS. NECESSARY: Yes. That's the English
9 version read by the detective and translated by her.

10 THE COURT: Fine. Go ahead.

11 MS. NECESSARY: Okay.

12 BY MS. NECESSARY:

13 Q Okay. And you were able to hear the rights that
14 were translated by Miss Pejic on the tape?

15 A Yes.

16 Q And did Miss Pejic translate the rights given by
17 the detective accurately to Mr. Lemo?

18 A I think she did an adequate translation.

19 Q And what do you mean by that?

20 A I mean that -- I mean there was a longer
21 discussion about whether she translated verbatim, and there
22 were instances where she didn't, but I think she stayed
23 true to the original.

24 Q All right. And specifically when the rights were
25 given at the beginning of the translation -- or the

1 beginning of the questioning?

2 **A** I think she did a good job explaining them.

3 **Q** All right. And where there were differences that
4 have been highlighted by counsel, do you believe that this
5 was an inaccurate translation, or was it an accurate
6 translation?

7 **A** I mean when you do a translation, there's always a
8 degree of accuracy. I think her translation had a high
9 degree of accuracy. There's always -- I mean you can
10 always translate something in several different ways.

11 **Q** All right. And when someone is giving a
12 narrative, is that more difficult to translate than if
13 someone is breaking down question by question?

14 **A** Well, naturally. And also you're doing it
15 verbally. So you have to think quicker.

16 MS. NECESSARY: Thank you. Cross-examine.

17 THE COURT: Mr. Patarini?

18 MR. PATARINI: May I approach the witness for
19 that exhibit, please?

20 THE COURT: Yes.

21 - - -

22 CROSS-EXAMINATION

23 BY MR. PATARINI:

24 **Q** You stated in your opinion that this, this waiver
25 form, was adequately related to my client based on what you

1 heard on the tape; correct?

2 **A** I believe so.

3 **Q** The form states you have a right to speak to an
4 attorney and have him present before and during
5 questioning. Correct? The word during was not stated by
6 the translator. She said before and after; correct?

7 **A** Correct.

8 **Q** The form says if you can't afford an attorney, one
9 will be appointed free of charge before or during any
10 questioning if you so desire. She said before and after on
11 the tape; correct?

12 **A** Correct.

13 MR. PATARINI: No further questions.

14 MS. NECESSARY: Nothing further. Thank you.

15 THE COURT: The Commonwealth calls
16 Dr. Friend.

17 - - -

18 DAWN FRIEND, a witness herein, having been
19 duly sworn, was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MS. NECESSARY:

22 **Q** Would you state your name, please, and spell your
23 last name?

24 **A** Sure. Dawn Friend, F-r-i-e-n-d.

25 **Q** How are you employed?

1 **A** I work for the Commonwealth of Pennsylvania.

2 **Q** And how were you employed back in 2006 and 2007?

3 **A** I was employed at Mayview State Hospital as a
4 forensic licensed psychologist.

5 **Q** And what was your specific position there?

6 **A** Forensic licensed psychologist.

7 **Q** And would you give the Court your training and
8 background in this area?

9 **A** Sure. I became licensed as a psychologist in
10 Pennsylvania in 2005 and had worked for the Commonwealth
11 since that time. I also have a private clinical practice
12 since 2006.

13 **Q** And while you were at Mayview, did you perform
14 testing on the patients who have been sent there?

15 **A** I did.

16 **Q** Psychological and other types of testing?

17 **A** I did.

18 MS. NECESSARY: Does counsel have any
19 questions on voir dire?

20 MR. PATARINI: None, Your Honor.

21 BY MS. NECESSARY:

22 **Q** Dr. Friend, did you come into contact with the
23 Defendant, Esad Lemo, while you were at Mayview or while he
24 was at Mayview?

25 **A** I did.

1 **Q** And approximately when was that?

2 **A** I believe that was sometime in early 2007.

3 **Q** And he had been sent there on a -- I believe a
4 ninety-day commitment?

5 **A** I'm going to go with you on that one. I don't
6 exactly remember.

7 **Q** But he was there for several months?

8 **A** He was.

9 **Q** And did you have interaction with him?

10 **A** I did.

11 **Q** For what purpose?

12 **A** For the purpose of psychological testing and
13 discussing his progress while he was there.

14 **Q** All right. Now, while he was there, did you
15 perform -- what type of psychological testing did you
16 perform?

17 **A** When he first got there -- I'm going to refer to
18 my notes here. I administered a mini-mental status exam,
19 Beck Depression Inventory, and I attempted to do an IQ
20 test, which we were not able to finish.

21 **Q** And at that time did you have an interpreter?

22 **A** I did.

23 **Q** You did?

24 **A** I did.

25 **Q** Why weren't you able to finish the IQ testing?

1 **A** The interpreter was not able to interpret certain
2 words out of context I believe is what was said. Something
3 to the effect of, you know, when you're giving an IQ test
4 and you're asking for definitions of certain vocabulary
5 words or using very limited amount of information that
6 you're asking the client to give you, there wasn't a direct
7 translation between that word and the word in the language
8 that the interpreter was speaking.

9 So I felt that it wasn't going to be a
10 standardized administration and, therefore, wasn't going to
11 be valid. So we did not do the IQ test.

12 **Q** Did you later do a different type of test?

13 **A** Later after talking with Dr. Petris, who is the
14 unit psychiatrist, he and I came up with some questions
15 that we thought Mr. Lemo should know based on his
16 background and where he came from to assess his cognitive
17 ability and look for vocabulary in those sorts of things so
18 we could estimate some type of cognitive functioning.

19 **Q** And what were your findings with regard to
20 Mr. Lemo after you performed this additional cognitive
21 testing?

22 **A** I found him to pretty much be average, right on
23 target with most of the people at Mayview who had average
24 intelligence. He was able to be oriented. He knew where
25 he was. He had basic knowledge of the U.S. culture. He

1 had more knowledge of things in Bosnia. His memory was
2 intact after five-minute intervals. He was able to do
3 basic math skills. He was alert.

4 **Q** And did you test his judgment?

5 **A** I did. I found that his judgment was slightly
6 impaired based on some of the questions. Things I asked
7 him were things like what would you do if you found a
8 letter that was sealed addressed laying on the ground? And
9 he said he would give it to the police, which is slightly
10 inaccurate. You would want to maybe do something different
11 with that, but it certainly wasn't totally off target.

12 **Q** And eventually -- well, let me ask you this. Did
13 you find that there was some cultural barriers to doing the
14 testing?

15 **A** Definitely.

16 **Q** Now, at some point I take it he was discharged
17 from Mayview?

18 **A** Yes.

19 **Q** And you gave your findings to -- or discussed them
20 I suppose with Dr. Petris?

21 **A** I did before he was discharged.

22 **Q** And were you able to determine from his background
23 whether or not he was employed and functioned
24 independently?

25 **A** I believe Dr. Petris had gained some information

1 on him possibly through a social worker. When we had team
2 meetings, we discussed some of those things, and I believe
3 Dr. Petris was the one who had told me that he had been
4 employed for some time and had basic functioning in
5 different areas.

6 MS. NECESSARY: Thank you. Cross-examine.

7 - - -

8 CROSS-EXAMINATION

9 BY MR. PATARINI:

10 **Q** Dr. Friend, after you had done your examinations,
11 I contacted you; correct?

12 **A** I don't recall.

13 **Q** You don't recall me speaking to you and asking you
14 to actually do a full evaluation of my client?

15 **A** I don't recall that.

16 **Q** So standardized testing is bread and butter for
17 psychologists; is that correct?

18 **A** That's correct.

19 **Q** The only standardized testing that you did was the
20 MMSE, which is the mini-mental state exam; correct?

21 **A** That's correct.

22 **Q** And after you did the mini-mental state exam, you
23 found that he had impaired judgment; correct? That's what
24 you entered in your report?

25 **A** Okay. Let me just take a look. What I stated was

1 he completed the MMSE, received a 20 out of 30, which would
2 normally indicate moderate cognitive impairment. However,
3 analysis revealed difficulties laid within the orientation
4 realm, which are questions like what county are you in,
5 what town, building, what unit are you on, as well as math.

6 His concentration was off by the same amount of
7 numbers. He was able to recall two out of three words from
8 memory. He was not able to say no ifs, ands or buts, and
9 the interpreter stated it was difficult to translate that
10 because the same does not exist in Bosnia.

11 **Q** In your report on the front page on higher order
12 functions, you checked impaired judgment; correct?

13 **A** I did.

14 **Q** You checked impaired insight; didn't you?

15 **A** I did.

16 **Q** And in intellectual functioning, there are a
17 number of different levels: Superior, bright, normal,
18 average, low average, borderline and mental retardation.
19 Which is the lowest?

20 **A** Mental retardation.

21 **Q** Which is the one next to the lowest?

22 **A** Borderline.

23 **Q** And what did you check?

24 **A** I checked borderline with a caveat that this is an
25 estimate based on the interview and information that he was

1 in Special Education throughout school.

2 **Q** This was the only standardized testing that you
3 did; correct?

4 **A** What was the only standardized testing?

5 **Q** The mini-mental state exam. That was the only
6 testing you did?

7 **A** That and the Beck Depression Inventory.

8 **Q** Now, when you asked -- when you marked that, that
9 was your best judgment based on the testing?

10 **A** Well, actually this that you're referring to
11 before the narrative are things that we would fill out with
12 information that we're given on the patient at the time
13 that they might come in or directly after they come in.

14 So me checking off intellectual functioning being
15 borderline, again giving that caveat, I had not done any
16 testing with him. So it was based on the caveat that we
17 had an interview and that he was in Special Education
18 classes. So I gave a conservative check mark of borderline
19 intellectual functioning.

20 **Q** It was based on the interview, but it was also
21 based on the MMSE; correct? The MMSE appears right above
22 that particular section in which all these entries are
23 checked?

24 **A** Yes. But they can't be used exclusively. It is
25 together, and it is not unusual for a patient to come into

1 Mayview and in the first few days either not be comfortable
2 or not know what to say. They might have been coached or
3 not.

4 And so it's not unusual to have an interview with
5 a patient and then also to go back and interview the
6 patient again several days or several weeks after being at
7 Mayview when they're more comfortable, which is exactly
8 what I did.

9 **Q** You did no further testing beyond that; correct?
10 I'm sorry. I strike that question. You did no
11 standardized testing after you did the MMSE; correct?

12 **A** That is correct.

13 **Q** The only standardized testing you did was that?

14 **A** That is correct, and the BDI.

15 **Q** I'm sorry. And that goes to depression; correct?

16 **A** Right.

17 **Q** And your findings was that he was suffering from
18 depression; correct?

19 **A** Subjective report, yes.

20 **Q** And it was your decision to mark borderline;
21 correct?

22 **A** It was my decision on the day that I wrote that,
23 which is January 5, '07. I then saw him January 10, '07,
24 and found that he was cognitively intact and talked with
25 Dr. Petris about that. We had determined him to be of

1 average intelligence.

2 Q And that's your opinion for today?

3 **A** That is.

4 Q Now, you were retained by the Commonwealth to
5 testify concerning my client's intellectual functioning;
6 correct?

7 **A** Sure.

8 Q And one of the ways of evaluating an individual's
9 intellectual functioning is to review the history as to
10 whether any further -- any earlier standardized tests were
11 done?

12 **A** If that's available. It was not available to me
13 at the time.

14 Q No one provided them to you?

15 **A** They were not available to me at the time.

16 Q Did anyone provide you with this -- which I have
17 marked Defense Exhibit C. If you want to look at it --

18 | A Sure I'll look at it.

19 (Brief pause.)

20 **A** No. I was not provided with any of that.

21 Q Did anyone provide you with this (indicating)?

22 **A** I have never seen that before.

23 THE COURT: Would you identify it for the
24 record?

25 MR. PATARINI: Yes, sir. Yes, I will.

1 Defense Exhibit C, I've done them with the Bosnian, the
2 original translation on the front with the translation
3 right below it. And the English translation would be
4 psychological certificate, Esad Lemo, birthdate, 23/2/59.

5 Defense Exhibit D has Bosnian on the front, and it
6 has personal certificate, and it's Institution: Special
7 School for Educated Children in Sarajevo.

8 **Q** So if you had records with the results of
9 standardized testing, would that help you give a better
10 overview of an individual that you're trying to evaluate?

11 **A** Generally speaking, yes.

12 **Q** If the person is being tested and he is not
13 being -- he is not charged with a crime at that time, does
14 that eliminate some of the factors that you consider when
15 you evaluate an individual in Mayview?

16 **A** I'm sorry. Can you ask that again?

17 **Q** I'll rephrase it. When you are in Mayview
18 evaluating patients, you know that they are facing criminal
19 charges; correct?

20 **A** Yes.

21 **Q** And on I believe direct examination and
22 cross-examination you suggested they could be coached or
23 they may try to malingering; correct?

24 **A** Sure. Or they could be coached not to tell us
25 anything by their attorney.

1 **Q** Right. When you have records that are prepared
2 when they are children and they are not facing criminal
3 charges, those records don't -- you do not have to make
4 that consideration of those factors; correct?

5 **A** No. That's not accurate. That's not accurate.

6 **Q** Well, do you have to consider that the child is
7 worried about a criminal prosecution?

8 **A** No.

9 **Q** If you have testing that is done concerning IQ
10 tests with the standards in their own language, would they
11 be more reliable than in a foreign language?

12 **A** Definitely.

13 **Q** The language is always a circumstance, and I
14 believe you even said it in your report, that maybe one of
15 the things affecting your opinion or the outcomes of the
16 test is the language? Correct?

17 **A** Affecting the outcome of the test, yes.

18 **Q** Now, you stated that you did an interview, and
19 based on your interview, you thought that he was on level
20 with some of the other patients in Mayview with average
21 intelligence; correct?

22 **A** That's correct.

23 **Q** You prepared a handwritten report which I asked
24 you to give me. Correct? Do you remember that?

25 **A** I don't remember that. I'm sorry. I'm not saying

1 that's not true. I just don't remember that.

2 **Q** Do you have your handwritten report?

3 **A** I do.

4 **Q** I'm going to transgress. In the first paragraph,
5 once again, you commented on the MMSE, and you stated 20
6 out of 30 would normally indicate moderate cognitive
7 impairment. You handwrote that; correct?

8 **A** That's correct.

9 **Q** Then when you went on to the second paragraph,
10 when you make your second evaluation, one of the things
11 that you chose to put in your report is that he knew the
12 distance from his hometown in Bosnia to the capital -- his
13 hometown in Bosnia to the capital of Bosnia. Do you know
14 the distance between his hometown in Bosnia and the capital
15 of Bosnia?

16 **A** I do not, but Dr. Petris is the one who told me
17 the answer to that when we were coming up with some
18 questions that we might ask him about stuff that we thought
19 he might know about.

20 **Q** I understand that, but do you know the distance
21 between his hometown in Bosnia and the capital of Bosnia?

22 **A** I did at the time. I do not right now.

23 **Q** So did you check before you wrote that answer that
24 he got that right?

25 **A** Yes. I wouldn't have asked the question at the

1 time if I didn't know the answer to the question.

2 **Q** You also asked him whether or not -- one of the
3 things that you chose to enter into your report is that he
4 understood the Muslim religion?

5 **A** He had a basic understanding of the Muslim
6 religion.

7 **Q** Did you do any research in the Muslim religion?

8 **A** I did. Again, Dr. Petris and I discussed several
9 questions we could ask about the religion.

10 **Q** Like what's the name of the book?

11 **A** Sure.

12 **Q** Anything else?

13 **A** Prophets' names, different things about the
14 religion. I can't exactly remember the exact questions
15 that I asked him; but the questions I asked him, he was
16 able to state answers that were correct.

17 **Q** He also knew what he had for breakfast. You put
18 that in your report?

19 **A** He did, yes.

20 **Q** And in his math skills, he got three out of six
21 correct?

22 **A** That's correct.

23 **Q** Fifty percent?

24 **A** That's correct.

25 **Q** Once again, you said judgment was slightly

1 impaired?

2 **A** Uh-huh.

3 **Q** Those were the only entries other than his being
4 oriented concerning actual facts that he was being asked to
5 give you; correct?

6 **A** That's correct. I believe Dr. Petris did the
7 rest.

8 **Q** My point is that would never be considered any
9 kind of significant test to evaluate the intellectual
10 functioning of an individual; would it?

11 **A** That is certainly not a standardized IQ test, no.

12 **Q** No. It would not, and there are other tests out
13 there that do not involve using language; correct?
14 Nonverbal tests?

15 **A** There are.

16 **Q** The Raven test; right? You're familiar with that?

17 **A** I'm actually not.

18 **Q** And none of those tests, there are tests out there
19 that have international norms that you can use to make an
20 evaluation; correct?

21 **A** I'm sure there are.

22 **Q** There are. You didn't use any of them; did you?

23 **A** I'm not trained in those areas, no.

24 **Q** You did no nonverbal testing; correct?

25 **A** No.

1 **Q** You did no testing with any standards that are
2 international standards?

3 | A No.

4 **Q** You did no testing using any kind of Bosnian
5 standards; did you?

6 | A No.

7 Q You made -- you were -- you did an evaluation,
8 which was your impression of an individual compared to
9 other individuals in the hospital? Correct?

10 A That's correct.

11 MR. PATARINI: No further questions.

12 THE COURT: Miss Necessary?

13 —————— 1 1 1

REDIRECT EXAMINATION

15 BY MS. NECESSARY:

16 Q Just to clarify, Dr. Friend, we haven't retained
17 you to testify in this case? We subpoenaed you?

18 **A** That's right.

19 Q And this is things that you did while you were --
20 worked for Mayview?

21 **A** That's correct.

22 MS. NECESSARY: Thank you. That's all.

23 THE COURT: Mr. Patarini?

24 MR. PATARINI: I have no further questions.

25 THE COURT: Thank you. Miss Necessary?

1 MS. NECESSARY: Dr. Wright.

2 - - -

3 BRUCE WRIGHT, M.D., a witness herein, having
4 been duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MS. NECESSARY:

7 Q Would you state your name, please, and spell your
8 last name?

9 A My name is Bruce Wright, W-r-i-g-h-t.

10 Q And what is your occupation or profession?

11 A I'm a physician.

12 Q How are you employed?

13 A I'm primarily in the private practice of
14 psychiatry. I have an office in the South Hills. I spend
15 most of my hospital time at St. Clair Hospital where I have
16 an administrative role as the co-medical director of the
17 Department of Psychiatry.

18 Q And you have been retained by the Commonwealth to
19 do evaluations on various aspects of this case?

20 A Yes, I have.

21 MS. NECESSARY: All right. Does counsel have
22 any objection to his qualifications?

23 MR. PATARINI: No, I do not.

24 MS. NECESSARY: Thank you.

25

1 BY MS. NECESSARY:

2 **Q** Finally, Doctor, you are licensed to practice in
3 the Commonwealth of Pennsylvania?

4 **A** Yes, I am.

5 **Q** Doctor, specifically with relation to the last
6 interview you did -- or let me ask you this. Did the
7 Commonwealth ask you to examine the Defendant, Esad Lemo,
8 concerning his capacity to make a knowing, voluntary and
9 intelligent waiver of his Miranda rights?

10 **A** Yes.

11 **Q** All right. And you -- had you previously examined
12 Mr. Lemo for another purpose?

13 **A** I had, an essentially unrelated purpose.

14 **Q** And that was about a year ago?

15 **A** January 22, 2008, was the date of that report.

16 **Q** And when was the most recent examination?

17 **A** December 20, 2008.

18 **Q** And the purpose of that examination was?

19 **A** To provide an opinion on his ability to waive his
20 Miranda rights.

21 **Q** And did you -- where did this examination take
22 place?

23 **A** The Allegheny County Jail.

24 **Q** And did you have an interpreter with you?

25 **A** I did have an interpreter, Miss Garrett, who was

1 here earlier.

2 **Q** So that was Ms. Garrett, all right. And did you
3 have other -- you had I take it a copy of his statement
4 that he had given, the taped statement and other records?

5 **A** I had a transcript of that -- well, I had numerous
6 records, including the transcript of his taped statement.

7 **Q** And you were here today and heard the tape being
8 played in court?

9 **A** Yes.

10 **Q** All right. Now, and were you able to following
11 your examination formulate an opinion as to whether the
12 Defendant was capable of making a knowing, voluntary and
13 intelligent waiver of his Miranda rights?

14 **A** Yes.

15 MR. PATARINI: I'm going to object at this
16 time. I'm sure she's going to flush it out, but I don't
17 believe there's been any foundation for him to make that
18 opinion at the present time.

19 MS. NECESSARY: I'm going to ask him the
20 foundation --

21 THE COURT: All she did was ask him if he
22 formed an opinion. She hasn't asked for the opinion. She
23 hadn't asked him the basis upon which --

24 MR. PATARINI: I thought he was going to give
25 it.

1 BY MS. NECESSARY:

2 Q Were you able to form an opinion?

3 A Yes.

4 Q All right. And could you tell us what you did in
5 order to formulate this opinion?

6 A Well, as I mentioned earlier, I saw Mr. Lemo
7 initially in early 2008 and reviewed numerous records prior
8 to that evaluation. Prior to this reevaluation or the
9 question that was asked of me this time, I reviewed
10 additional records, including a psychology certificate,
11 also referred to as psychologist's report.

12 I reviewed something that was translated as either
13 a confirmation or an attestation. I reviewed an
14 instructor's certificate, a personal certificate from
15 Special School For Education of Children in Sarajevo, and I
16 reviewed a psychological evaluation by Dr. Johnston, Carol
17 Sue Johnston. In additional to that, I reexamined Mr. Lemo
18 on December 20 of 2008.

19 Q And what were your findings with respect to his
20 cognition, his intelligence level?

21 A Well, there's reports that he has impaired
22 cognition kind of impairment, but the degree of the
23 impairment, the magnitude, is not entirely clear. There's
24 some debate about exactly how significant his impairment
25 is, and that's difficult to determine with certainty

1 because of the time the testing was done and language
2 barriers to the testing.

3 Previous IQ -- previous scores from 1974 revealed
4 a verbal scale IQ of 74, nonverbal, 44, and a full scale of
5 55.

6 **Q** What is a verbal -- what's the verbal --

7 **A** Verbal skill was 74. That measures verbal skills.
8 That was in the low normal range. Generally the cutoff for
9 an IQ score outside of normal range is 70.

10 **Q** And what is the significance of a verbal score, a
11 verbal skill?

12 **A** I think it's significant in this case in that
13 we're looking at his verbal skills, his ability to
14 understand words and language. So his score of 74,
15 although low, was still within the normal range. It was
16 low normal.

17 **Q** And what is a nonverbal score?

18 **A** Those are other skills, like designs and other
19 tests that don't involve verbal language.

20 **Q** All right. And did you also examine records from
21 Mayview concerning the testing that was done there?

22 **A** I reviewed the summary completed by Dr. Petris,
23 yes.

24 **Q** And what were findings at Mayview concerning his
25 cognitive abilities?

1 **A** Well, as we just heard from Dr. Friend, their
2 findings were that he had average cognitive functioning and
3 no significant memory problems or distortion of thinking
4 process.

5 **Q** All right. And did they also examine him to
6 determine whether he had an understanding of the legal
7 system?

8 **A** It was their opinion that he did have an
9 understanding of the legal system, yes.

10 **Q** All right. Now, did you also examine him
11 concerning his understanding of the legal system and the
12 various parties involved?

13 **A** In general terms. I wasn't specifically asked to
14 address his competence to stand trial, but we did address
15 some of those issues.

16 **Q** Now, after giving the testing that you did and
17 reviewing the records, you said you were able to form an
18 opinion as to whether he was able to make a knowing,
19 voluntary and intelligent waiver of his rights?

20 **A** Yes.

21 **Q** What is that opinion?

22 **A** Well, my opinion is that he was able to make a
23 knowing, voluntary and intelligent waiver of his rights.
24 He had the capacity to do so.

25 **Q** What are the bases for that opinion?

1 **A** Well, I base that on the totality of information
2 available to me, including the reexamination of him on
3 December 20, 2008.

4 **Q** Was he able to answer at least some of your
5 questions about his ability or what his rights were?

6 **A** He was. In general terms Mr. Lemo often answered
7 questions initially by saying I don't know or I can't do
8 that or I have a weak memory or things like that, but if I
9 asked him a second time or if I repeated the question in a
10 very similar manner, he was then able to give appropriate
11 answers.

12 I don't exactly know how to explain that because
13 it was done with the assistance of an interpreter. The
14 language presumably didn't change. We know he's been
15 described previously as obstinate and hard-headed. I don't
16 know if it was related to that, related to his
17 unwillingness, general unwillingness to participate or the
18 fact that he knew the ramifications of why I was asking
19 these questions.

20 But I think what's important is he was able to
21 appropriately answer questions, although I sometimes had to
22 ask it twice, ask them twice.

23 **Q** And are your opinions to a reasonable degree of
24 medical certainty?

25 **A** Yes.

1 MS. NECESSARY: Thank you. Cross-examine.

2 - - -

3 CROSS-EXAMINATION

4 BY MR. PATARINI:

5 Q Dr. Wright, when you did your interview with my
6 client, you had an interpreter; correct?

7 A Yes.

8 Q And you were asking questions of my client through
9 an interpreter in terms of did he understand his rights?

10 A Yes.

11 Q And while you were asking him if he understands
12 his rights, at the same time you were explaining to him
13 what his rights were?

14 A Well, I know you have notes from the interview.
15 I'm not sure what you're referring to.

16 Q I'll ask you the question again. You were asking
17 him if he understood his rights; correct?

18 A The purpose of my evaluation was to determine if
19 he understood his rights.

20 Q I'll take that as a yes. At the same time you
21 were explaining to him what the legal system involved;
22 correct?

23 A I remember explaining to him what a Judge does. I
24 don't remember explaining to him -- other instances where I
25 explained the legal system to him.

1 **Q** Well, you explained to him what a Judge was;
2 right? "I explained that the Judge runs the trial, and he
3 or she makes sure rules are followed and rights are
4 protected." Right?

5 **A** Yes.

6 **Q** And then you asked him to repeat your words back;
7 right?

8 **A** I don't remember if I asked him to repeat my words
9 or to tell me what that meant.

10 **Q** Do you want to look at your first page of your
11 notes?

12 **A** I asked him to repeat that back to me in his own
13 words.

14 **Q** Right. Then again, "I explained what the Judge
15 does and asked him to tell me in his own words." Right?

16 **A** Yes.

17 **Q** You explained it again?

18 **A** Yes.

19 **Q** And then you got him to try to say it back to you?

20 **A** Yes.

21 **Q** When you asked him what innocent meant, he said he
22 didn't know?

23 **A** He did say that, yes.

24 **Q** When you asked him about the interview, he said
25 they didn't let me finish; correct?

1 **A** He said something like that. I don't recall if
2 that was his exact words. Is that what it says here in the
3 notes?

4 **Q** At the bottom of the second page.

5 **A** Okay. They didn't let me finish, yes.

6 **Q** When you asked him, "Did you have to talk?" He
7 said, "I had to." Correct?

8 **A** He did say that at that point. He gave a
9 different answer at another point.

10 **Q** And when he had an opportunity to explain, he
11 says, "They were very arrogant. The police officer was my
12 wife's lover. He was here the other day and recognized
13 me." That's what he said to you?

14 **A** He did say that, yes.

15 **Q** And when you asked him, "Why did you have to
16 talk?" He said, "I tried to defend myself. If I had -- I
17 try to defend myself to see if I had rights."

18 **A** That's what he said at that point, yes.

19 **Q** When you asked him did he want an attorney, he
20 answered yes? Correct?

21 **A** He did say that, yes.

22 **Q** And you asked him, "Did you have one?" He said,
23 "No. The attorney didn't come."

24 **A** That's what he told me, yes.

25 **Q** Now, the word compel that you used in this

1 particular form was not the words that were used in the
2 actual waiver that was read to him on the tape; correct?

3 **A** I'm not sure.

4 **Q** It never appears there. When you asked him if you
5 have a right to refuse to answer, he said I don't know?

6 **A** He did say that at that point, yes.

7 **Q** When you were asking him you are entitled to talk
8 to a lawyer, his explanation was, "I can get Defendant. I
9 have a right to an attorney before the trial."

10 **A** At that point he did say that, yes.

11 **Q** You were in the courtroom during the testimony of
12 two interpreters, and both interpreters both admitted that
13 he was never told that he had a right to have an attorney
14 during the trial -- during the interrogation; correct?

15 **A** It was unclear to me whether the questions they
16 were referring to were the Miranda rights questions or the
17 interrogation questions.

18 **Q** Well, the questions were you have the right to
19 have an attorney, and the interpreter who said that she
20 read it to him, she said before and after. And when she
21 was asked a question about when you are entitled to have an
22 attorney provided if you can't afford one, she said before
23 and after. Did you hear that testimony?

24 **A** Yes. And I would give the same answer.

25 **Q** That was the only testimony that you heard

1 concerning the actual presentation of the rights; correct?

2 **A** I think there was more testimony about the rights.

3 **Q** Well, the rights had to be presented to him in his
4 language. Is that correct?

5 **A** Yes.

6 **Q** And the individuals that presented to him
7 testified, and you heard them?

8 **A** Yes. I was here when they testified.

9 **Q** The language that you used in your interview of
10 Esad Lemo was not the language that was used during the
11 interview; was it?

12 **A** You mean between the two interpreters?

13 **Q** Right.

14 **A** I can't address that. I don't know.

15 **Q** You asked him do you have to keep talking -- "Do
16 you have to keep talking to the police?" What did he
17 answer?

18 **A** Well, at this point he said yes. At another point
19 he said he could remain silent.

20 **Q** Once -- then you asked him again, "Once you start
21 talking, do you have to continue talking?" And what did he
22 say again?

23 **A** At this point he said yes. But not at another
24 point.

25 **Q** You heard testimony from a police officer and two

1 interpreters that never said to him he had a right to
2 terminate the interrogation. You heard that today; didn't
3 you?

4 **A** I don't specifically remember that question.

5 **Q** When you asked him when are you first entitled to
6 see an attorney, he never said during the interview; did
7 he?

8 **A** Not at that point, but at another point he did.

9 **Q** Could you point to where he said that?

10 **A** He said that -- well, that's in my report. I'm
11 not sure where it is in these notes. In my report he
12 said -- let me find it. Did the police -- page 3 of 5.
13 "Did the police say you can have an attorney with you?"
14 Quotes, "Yes, they did."

15 **Q** They said it. But when you asked him, "When are
16 you first entitled to see an attorney?" He said, "Every
17 three months." That's one answer. Is that --

18 **A** He did say that at one point, yes.

19 **Q** And "When is the first time you could see your
20 attorney?" He once again said, "After three months"?

21 **A** Again, I don't know where you're referring to, but
22 he did say something along those lines.

23 **Q** All right. If you want to look at your notes --

24 **A** I don't disagree with that. I just don't know
25 where you're referring to.

1 **Q** That was when you were trying to be specific as to
2 what the actual rights were because in your own notes you
3 say specific questions concerning Lemo's understanding of
4 Miranda and Lemo's response, specific.

5 **A** I'm sorry. Was that a question?

6 **Q** Yeah. My question is when he was asked about when
7 he could have an attorney, he never said during the
8 interrogation; correct?

9 **A** He didn't use those terms, but he said yes, they
10 did when I asked him at the --

11 **Q** He said that --

12 MS. NECESSARY: Let him finish --

13 **Q** I apologize. He never said he knew he was
14 entitled to have an attorney during the interrogation; did
15 he?

16 **A** I think I've answered that. I asked him did the
17 police say you can have an attorney with you? And he
18 responded yes, they did.

19 **Q** All right. He said that's what they said. Did
20 you try to flush out whether or not he understood that?

21 **A** At one point he said that he thought -- he did
22 talk about the three-month interim -- I'm sorry. I thought
23 you were going to interrupt again. At one point he thought
24 about the three-month interval. But he did say initially
25 that the police told him he could have an attorney with

1 him.

2 Q On at least three separate occasions he talked
3 about when he could have a lawyer; right? He said I can
4 get Defendant -- I have a right to an attorney before
5 trial; right?

6 | , A He did say that.

7 Q He said I have a right to have an attorney every
8 three months?

9 | **A** He did say that.

10 Q And he said they said that. He said that they
11 said that you can have an attorney with him? Correct?

12 **A** At the time, yes. So before the trial every three
13 months and at the time of the questioning.

14 Q He never said to you in his words that he knew he
15 had a right to have an attorney with him during the
16 questioning; did he?

17 **A** Again, I said did the police say you can have an
18 attorney with you? And he said yes, they did. He did not
19 say yes, they did say I could have one with me.

20 Q During the questioning?

21 **A** He did not say that, but he said yes, they did,
22 when I asked him if he could have one at that time.

23 Q You asked him the meaning of "is waived"?

24 **A** I did.

25 Q And he said I'll have to talk to the translator or

1 attorney or Judge?

2 **A** That's what he said, yes.

3 **Q** You asked him, "Why would you waive your rights?"

4 And he said, "I don't know." Correct?

5 **A** At that point he said, "I don't know." But it was
6 my sense that based on other responses that he understood.
7 Although he might not have known what waived meant, he
8 understood the concept.

9 **Q** Now, you had an opportunity to review the records
10 that came from Bosnia; correct?

11 **A** Yes, sir.

12 **Q** And you included the conclusions in the report;
13 correct?

14 **A** I included the conclusions? I think I included
15 some of the conclusions.

16 **Q** Right. The personal certificate from his school
17 diagnosed Defendant as moron mentality, IQ 65? You put
18 that in your report?

19 **A** Yes.

20 **Q** You indicated that he had mild retardation?

21 **A** No. I indicated that they said he had mild
22 retardation.

23 **Q** I'm sorry. I apologize. What I'm asking you was
24 if these are the things that you took out of these reports
25 and included in your reports?

1 **A** I did.

2 **Q** They indicated that he had mild retardation;
3 correct?

4 **A** Yes.

5 **Q** The psychology certificate in 1974 described
6 moderate retardation and then gave WISC scores; correct?

7 **A** Yes.

8 **Q** Now, when you looked at these records, they were
9 records that were prepared in an effort to evaluate him for
10 education; correct?

11 **A** I don't recall exactly that they were prepared for
12 an evaluation or while he was in this educational setting.
13 I just don't recall the exact --

14 **Q** Do you recall that he was sent to a special school
15 for kids with Special Education?

16 **A** Yes.

17 **Q** And you recall that he was classified as mildly
18 retarded?

19 **A** Yes. I already said that.

20 **Q** And you were aware of the fact that in light of
21 the dates on these particular reports, that these reports
22 were done while he was in school; correct?

23 **A** Yes.

24 **Q** He had -- there's no indication he was facing any
25 criminal charges while these reports were being made;

1 correct?

2 **A** That's correct.

3 **Q** In the psychology certificate, the conclusion
4 stated, "easily classified retarded. Tries to show that he
5 has the ability to understand" --

6 **A** I'm sorry. Is this my report or their report?

7 **Q** No. This is their report which you reviewed?

8 **A** I did review that, yes. That sounds familiar,
9 yes, but I don't remember the exact words.

10 **Q** The conclusion: "Easily classified retarded.
11 Tries to show that he has the ability to understand that he
12 can think as others, but it is very strained and difficult.
13 He is qualified for special education school."

14 **A** It does say that.

15 **Q** You didn't put that in your report?

16 **A** I didn't put that -- well, I did make reference to
17 mild retardation and moderate retardation, average
18 moronity.

19 **Q** Now, you were aware of the fact that the only
20 standardized test that was done in Mayview was the MMSE;
21 correct?

22 **A** Yes.

23 **Q** That's a mini-mental state examination; correct?

24 **A** Yes.

25 **Q** Cursory, cursory standardized test; right?

1 **A** Yes.

2 **Q** There's no other standardized tests given at
3 Mayview?

4 **A** That's correct.

5 **Q** The examinations and the test results were
6 conducted in the country in his native language?

7 **A** Yes.

8 **Q** Tests that were done in Mayview were conducted
9 with the aid of an interpreter because they did not -- they
10 could not rely on his understanding of the language?

11 **A** But they were done in his native language.

12 **Q** They were done in his native language with the aid
13 of an interpreter?

14 **A** That's correct, yes.

15 MR. PATARINI: I have no further questions?

16 THE COURT: Miss Necessary?

17 MS. NECESSARY: Just a couple things, Your
18 Honor. Thank you.

19 - - -

20 REDIRECT EXAMINATION

21 BY MS. NECESSARY:

22 **Q** Doctor, did you ask Mr. Lemo whether or not he
23 wanted to talk to the police or he ever wanted to stop
24 talking to the police during the interrogation?

25 **A** I did ask him that, and I asked him why someone in

1 general terms would want to remain silent.

2 **Q** And did he indicate to you what he wanted to do
3 when he was questioned by the police?

4 **A** He said that he wanted to talk to the police
5 because he wanted to try to defend myself. Or he said I
6 tried to defend myself.

7 **Q** All right. And did he -- did you ever ask him if
8 he had the right to not speak or to be silent?

9 **A** Yes, I did.

10 **Q** And what did he answer?

11 **A** I want to find exactly where I reference that.

12 **Q** I think it's page 3, Doctor.

13 **A** Okay. I asked Mr. Lemo why someone would want to
14 remain silent. Surprisingly, he initially said I don't
15 know.

16 I then asked him again the same question, and he
17 said again, "Why would someone want to remain silent?"

18 Quotes: "It would help them to be silent. When he gives a
19 statement, he has confessed. If he didn't give a
20 statement, it would help them because there is nothing."

21 MS. NECESSARY: Thank you. That's all.

22 THE COURT: Mr. Patarini?

23 MR. PATARINI: I have no further questions.

24 THE COURT: Thank you, Dr. Wright. We will
25 take ten minutes.

1 (Whereupon, a recess was taken at 3:25 p.m.)

2 | Page

3 3:40 p.m.

4 (In open court, Defendant present with
5 counsel:)

6 MS. NECESSARY: Your Honor, the Commonwealth
7 rests as to the suppression.

8 THE COURT: Mr. Patarini?

11 THE COURT: All right.

12 MR. PATARINI: The waiver has to be knowing,
13 intelligent and voluntarily made. For it to be
14 intelligently made, he has to know what his rights are.

15 We've heard the tape, and we heard testimony that
16 he was told he's entitled to have a lawyer before and
17 after, but there was never any testimony that he was told
18 that he was entitled to have a lawyer present during.

19 He was told that one would be provided for him if
20 he could not afford one. Once again, it was told before
21 and after, and he was never told that he was entitled to
22 have an attorney present during the interrogation. That in
23 and of itself makes the waiver defective.

24 That does not actually say what his rights are.
25 There was other questioning concerning whether or not he

1 knew of his rights, and Dr. Wright admitted that he talked
2 about different rights, that he talked about things during
3 the interrogation, but those were not the things that were
4 said to Mr. Lemo on the night in question.

5 We would argue that the waiver in itself is
6 defective.

7 THE COURT: Miss Necessary?

8 MS. NECESSARY: Your Honor, the standard of
9 course is a totality of the circumstances. Given the fact
10 that this translation of -- we presented testimony the
11 translation was in total an accurate translation. The
12 Defendant himself to Dr. Wright indicated that he
13 understood that he had a right to an attorney present
14 during questioning.

15 The Defendant never indicated to anyone that he
16 did not wish to speak to the police. The totality of the
17 circumstances indicated that he did and that he understood
18 he had a right to remain silent and that he understood he
19 had a right to an attorney and he knew he did not have to
20 incriminate himself, and that the Commonwealth would submit
21 in the totality of the circumstances makes it a valid
22 waiver.

23 THE COURT: Okay. Are you ready to call your
24 witnesses?

25 MR. PATARINI: Yes, I am. I call Dr. Carol

1 Sue Johnston to the stand.

2 - - -

3 CAROL SUE JOHNSTON, a witness herein, having
4 been duly sworn, was examined and testified as follows

5 DIRECT EXAMINATION

6 BY MR. PATARINI:

7 **Q** Would you state your name for the record, please?

8 **A** Yes. My name is Carol Sue Johnston,

9 J-o-h-n-s-t-o-n.

10 **Q** How are you employed?

11 **A** I'm employed as a senior program coordinator at
12 UPMC. I work in the translational neuroscience program
13 where I also have a title of associate director of clinical
14 resources.

15 **Q** What is your profession?

16 **A** I'm a psychologist.

17 **Q** How many years have you been a psychologist?

18 **A** I have worked as a psychologist since I obtained
19 my Master's in clinical psychology in 1975.

20 **Q** Would you state the highlights of your educational
21 background?

22 **A** In addition to my Master's in clinical psych, I
23 also have a Ph.D. in clinical psychology from the
24 University of Florida, which I earned in 1986. And I've
25 been licensed in Pennsylvania since 1987.

1 **Q** What are you licensed as?

2 **A** As a psychologist.

3 **Q** In your profession and in your career, have you
4 administered standardized testing?

5 **A** Yes. Hundreds of times.

6 **Q** Go ahead.

7 **A** Can I expand on that?

8 **Q** Yes.

9 **A** During my Master's work, I was a teaching
10 assistant for several courses, including intellectual
11 assessment, personality assessment, child development,
12 statistics. I worked as a psychologist in the public
13 schools for five years.

14 I've also worked as a psychologist in an approved
15 private school for brain-damaged, physically handicapped
16 and autistic children for four years, and also I've worked
17 in rehabilitation centers, in correctional settings. I've
18 done a lot of testing in my career.

19 **Q** Have you done testing in terms of making an effort
20 to determine mental retardation?

21 **A** Yes.

22 **Q** Would you state the basic description of mental
23 retardation?

24 **A** Yes. As defined by the DSM-IV, which is the
25 diagnostic manual used by the American Psychiatric

1 Association, one needs to have significantly subaverage
2 intelligence, concurrent deficit in adaptive functioning,
3 and to have those problems since childhood.

4 **Q** And when these types of problems are diagnosed
5 with -- you've done diagnosis with children; correct?
6 You've done testing with children?

7 **A** I have done testing with children and adults and
8 the elderly.

9 **Q** And you've done testing and can make a
10 determination for mental retardation?

11 **A** Oh, yes.

12 **Q** How many times?

13 **A** Over a hundred.

14 MR. PATARINI: I offer this witness as an
15 expert.

16 MS. NECESSARY: I have no objection.

17 THE COURT: Proceed.

18 MR. PATARINI: Thank you.

19 BY MR. PATARINI:

20 **Q** Now, you were contacted by me to do an evaluation
21 on Esad Lemo; is that correct?

22 **A** That's correct.

23 **Q** And when you were contacted by me to do an
24 evaluation of Esad Lemo, what were your concerns?

25 **A** I was told that there was a concern about his

1 intellectual ability due to a report that he may have been
2 in Special Education.

3 **Q** What about the language, the language, the fact
4 that speaking English was not his native language? Was
5 that a concern for you?

6 **A** Yes. That's the reason I turned you down the
7 first time you contacted me.

8 **Q** You turned me down repeatedly; is that correct?

9 **A** That's correct. That's correct.

10 **Q** And then you eventually agreed to do the
11 evaluation?

12 **A** Yes. I did. And my concerns were that most tests
13 available to psychologists in the U.S. are inappropriate
14 for someone from a different cultural background,
15 nonEnglish speaking.

16 So not only -- but not only is the test a factor,
17 also if you do have a test that you can administer that
18 possibly doesn't have a language component in it, then you
19 have to be able to have appropriate norms so that you can
20 interpret it. Interpreting a nonverbal test against U.S.
21 norms would be nonmeaningful.

22 **Q** Now, in an effort to try to do the evaluation,
23 were you provided with records?

24 **A** Yes, I was. Now, I will say that I did not have
25 those records prior to my evaluation of Mr. Lemo. The only

1 records that I did have were -- I believe that I had the
2 Mayview records and the police records of the
3 interrogation.

4 **Q** And you did your evaluation -- what type of
5 testing did you do? Explain what it is.

6 **A** I decided to administer the Raven's Progressive
7 Matrices test, the standard version. This is a test that
8 was developed in England in the 1930's, has been written
9 about, has been studied extensively. There's over 1700
10 articles studying this test in the literature. And norms
11 have been collected all over the world.

12 **Q** When you say norms, what specifically are you
13 talking about?

14 **A** The test is administered to people in different
15 countries, people of different ages in different countries
16 in order to determine what the normal distribution of
17 scores would be for that culture.

18 **Q** What is the tests that are used in this country
19 for IQ purposes?

20 **A** The most widely used is the Wechsler test, and
21 there are versions for adults, children and preschoolers.

22 **Q** And what -- why did you choose to us the Raven's
23 test?

24 **A** Well, the Wechsler test, as you were talking with
25 Dr. Wright, has a verbal and a nonverbal component to it.

1 The verbal I believe would not be appropriate because it is
2 language-based.

3 And the performance scale, the nonverbal scale,
4 the problem there is even if the tasks were appropriate --
5 culturally appropriate, and I don't know that they are, I
6 was not aware of any appropriate cultural norms, any
7 Bosnian norms.

8 **Q** Did you make a concerted effort to try to
9 determine if there were?

10 **A** I talked with the test company, and the only test
11 that I was able to determine was available in the United
12 States to American psychologists that had been translated
13 into Bosnian was the MMSE.

14 **Q** What was the problem with that?

15 **A** The problem was that the test company told me that
16 even though there's an official translation, the only norms
17 that are available are American norms. So they would be
18 inappropriate for interpretation.

19 **Q** So you chose to administer the Raven's test?

20 **A** Yes.

21 **Q** What other test did you administer?

22 **A** I also used the instruments for assessing
23 understanding and appreciation of Miranda rights in a
24 nonstandard way. This was a test that was developed by
25 Thomas Grisso to determine whether juveniles understood

1 their Miranda rights, and since then it has been studied
2 with mentally retarded individuals.

3 The reason that I said it was nonstandard is
4 because, first of all, the norms are American norms, and so
5 they're not appropriate, but also because there are
6 different versions of the Miranda rights, and the Grisso
7 test was normed on one version. That version was not the
8 same as the version that was given to Mr. Lemo by the
9 police here.

10 So when I asked him, I used the same words, the
11 same version as the police did here.

12 **Q** You were provided with the actual transcript of
13 the actual interrogation, and that was what you used to try
14 to formulate your opinion?

15 **A** I used the wordings of the warnings that were on
16 that transcript, yes.

17 **Q** All right. Now, briefly state -- excuse me -- I
18 didn't mean to say briefly. State the manner in which the
19 Raven's test was administered and what the results were.

20 **A** Okay. Let me first explain that the Raven's is a
21 test that does not require language. It is a test of fluid
22 intelligence, and it is reasoning individual spatial area.
23 What it involves is a pattern matching and analogy test so
24 that a patient is presented with a picture that has part of
25 it removed, and he is to choose between six -- one of

1 either six or eight alternatives in order to find the
2 correct piece to put in that missing space.

3 **Q** Okay. Go ahead.

4 **A** Okay. It is --

5 **Q** Let me -- to move things, is there different
6 levels when you take the test? Is it just one set of
7 questions and answers, or does it develop at a different
8 level?

9 **A** There is a children's version, and there is an
10 advanced version for above average adults. In addition,
11 the reason that norms are continued to be collected over
12 the years even on the same populations is that the scores
13 have tended to increase over the years. And so we want to
14 look at the most recent, most appropriate cultural norms.

15 **Q** And how -- what did you do in administering the
16 test? Where did you administer it?

17 **A** I saw Mr. Lemo in the Allegheny County Jail with
18 an interpreter. The test was explained using minimal
19 English as translated by the interpreter, but mostly
20 explained through gestures. And the test is divided into
21 five different sets of twelve problems each. There's a
22 different principle that applies to each set.

23 Initially it's basically pattern matching, and
24 then it gets into reasoning by analogy. The items get more
25 difficult across tests as well as within -- or across sets

1 as well as within each set.

2 Q You are aware of the term malingering?

3 A Yes.

4 Q And would you just state on the record what
5 malingering is?

6 A Malingering is faking bad.

7 Q And is there something in the test that helps you
8 to make that determination whether malingering is going on?

9 A Yes.

10 Q And would you explain what that is?

11 A You look at a couple of different things. One is
12 you compare the number of correct responses on each of the
13 sets based on the total number of correct responses. Since
14 there are five sets of twelve items each, there's 60
15 possible. Mr. Lemo obtained a total score of 21.

16 Most of his correct responses were on sets A and
17 B, the first two sets. He had a couple on C and D and none
18 on the last set. That is very consistent with what is seen
19 by mentally retarded individuals who take that test.

20 Then because he obtained a total score of 21, I
21 looked up the table for the expected score on each of those
22 sets for a total score of 21. He did not -- his score in
23 each of those sets did not differ significantly from the
24 expected.

25 Then I also looked at rate of decay, and he did

1 not have more than the expected rate of decay over the
2 test. And I also looked at -- there are several items on
3 which if you do not answer correctly on these items, that
4 is a flag for malingering, and he answered correctly on all
5 of these items. My conclusion was that he was not
6 attempting to malingering on the test.

7 **Q** What was his -- what were his test results? I
8 believe you already stated.

9 **A** He obtained a total score of 21, and then I had to
10 try to interpret that.

11 **Q** Now, when you get a -- when you get the results of
12 these test scores, is there any subjective analysis of the
13 answers? Is it right or wrong, or is there a subjective
14 analysis?

15 **A** It is right or wrong. On the initial items in a
16 set, one is able to demonstrate, and so there is a little
17 bit of learning the test that's involved just at the
18 beginning. And then it's -- part of the test is to see
19 whether or not the patient can learn from that and apply it
20 to subsequent items.

21 **Q** Now, after you got the test score, what was your
22 concerns? What were you going to do after you got the test
23 score?

24 **A** Well, I needed to be able to interpret it, to find
25 out what a 21 total score means.

1 **Q** Explain to the Court what you did.

2 **A** What I did was to look at all of the norms that
3 are available. According to American norms, the most
4 recent American norms in the manual, a cutoff of 35 falls
5 at the fifth percentile, and his score of 21 fell quite far
6 below there.

7 The British norms, the most recent, the cutoff is
8 30. Again, he falls considerably below there.

9 I looked at all of the different norms that are
10 available for different European countries as well as other
11 countries around the world, and he fell below the fifth
12 percentile cutoff for all of those countries except one for
13 adult norms of the same age.

14 **Q** Now, when you say below the fifth percentile, what
15 does that indicate?

16 **A** The Raven's manual said -- interprets that as
17 the -- as indicating intellectual impairment.

18 **Q** And on the basis that it was -- in light of the --
19 all the norms that you compared it to or that you used to
20 make the evaluation, below the fifth percentile or even in
21 the vicinity of the fifth percentile, how would that relate
22 to an IQ, or can you do that?

23 **A** Well, the Raven's has been used to estimate IQ for
24 years. However, it is not an IQ test. It is an estimate
25 of an IQ. An intelligence test would normally survey a

1 wider range of abilities than just one particular ability
2 as in the Raven's.

3 **Q** Are there any other conclusions that you made
4 after you did the comparisons?

5 **A** Well, one thing I didn't mention to you was that
6 because there are no Bosnian norms available, adult norms
7 available, I checked to see what I could find that was the
8 most appropriate cultural norm, and the test was
9 administered to children in Slovenia fairly recently.

10 And I looked at those norms and found that -- and
11 the reason Slovenia was considered most appropriate
12 culturally is that it is another country that was in
13 Yugoslavia. So it's a neighboring country to Bosnia and
14 Herzegovina.

15 **Q** And what was the outcome of that --

16 **A** According to the Slovenian norms, he scored at a
17 mean level for a seven and a half-year-old child. We
18 looked at norms from other countries as well, and similar
19 results were found. I think seven to eight and a half or
20 possibly nine-year-old.

21 **Q** Are there any -- before -- we're not going to go
22 to the test that makes the evaluation for making a knowing,
23 intelligent, voluntary waiver. We're not going to go to
24 that right now. But is there anything else you would like
25 to comment on the Raven's test as far as the test results

1 and what they indicated to you?

2 **A** Well, the test authors discourage turning the
3 Raven score into an IQ. And they instead recommend that
4 you look at the percentile, and the lowest percentile they
5 give is the fifth percentile, which is their intellectually
6 impaired range, as I said before.

7 However, given the total of 60, his score of 21
8 falling so far below the cutoffs for the others, I think
9 that you can interpolate that he was falling -- most likely
10 it would be an estimate that would be consistent with the
11 history of mild mental retardation.

12 **Q** Now, mental retardation, is it hopefully diagnosed
13 at an early age?

14 **A** It is -- whether it is diagnosed or not, the signs
15 need to be there. The onset is in childhood.

16 **Q** And in this particular case, you're evaluating a
17 man that is charged with a crime, charged with criminal
18 homicide.

19 **A** Yes.

20 **Q** You're aware of that?

21 **A** Yes.

22 **Q** Now, you stated that you did not have all -- you
23 did not have records as to his background prior to doing
24 your testing; is that correct?

25 **A** That's correct.

1 Q It was after your testing was complete that you
2 were provided with the records of his background?

3 | **A** That's right.

4 Q Were the records helpful in helping you make an
5 evaluation as to his ability to make a knowing,
6 intelligent, voluntary waiver of his right to remain
7 silent?

8 **A** Yes. They were in that they provided a background
9 to base that on.

10 Q All right. Do you want to state what, if any,
11 records you referred to?

12 **A** Okay. I have records -- school records, and the
13 first one is the personal certificate.

14 MR. PATARINI: Your Honor, all the records
15 that she's going to comment to, I have the original in
16 Serbo-Croatian, and I have the English underneath, and I
17 have them all marked as exhibits.

18 So at this time I can introduce them into evidence
19 or introduce them all at once, but I do have them all
20 marked and prepared, and the Commonwealth was provided with
21 each one of these records.

22 | THE COURT: Okay.

23 BY MR. PATARINI:

24 Q So when you state the personal certificate, you're
25 going to address the personal certificate, the personal

1 history --

2 **A** That's part of that personal certificate.

3 **Q** When you get to the personal history, say personal
4 history. All right? And you're also going to address the
5 living atmosphere?

6 **A** Right.

7 MR. PATARINI: All those particular documents
8 are in Defense Exhibit B.

9 MS. NECESSARY: Which I don't have a copy.

10 MR. PATARINI: I have a copy. These were
11 previously provided to the Commonwealth, and I'm providing
12 them an exact copy as I'm providing to the Court.

13 BY MR. PATARINI:

14 **Q** All right. Now, you want to comment on this
15 record at the time?

16 **A** Sure.

17 **Q** Go ahead. State the title of the top page, the
18 title at the top of the page.

19 **A** Well, I'm going to start with living atmosphere,
20 and I'm going to go to personal history and end up with
21 personal certificate.

22 **Q** All right.

23 **A** So I'll go through it backwards.

24 MS. NECESSARY: It is backwards.

25 **Q** All right.

1 **A** All right. What it says is that from the
2 beginning Mr. Lemo was demonstrating delays in development.
3 He was a twin, and compared with his twin, he attained
4 motor milestones at a later age. He also showed
5 differences from birth.

6 He's described as being small for age. I think
7 it's very possible that he suffered from intrauterine
8 growth retardation; and once out of the womb, he did not
9 appear to thrive vigorously.

10 He is described as being quiet, peaceful and
11 uninterested in feeding. That kind of lethargic
12 development when compared with his twin brother is
13 indicative of difficulties from the start.

14 So we have the developmental delays. He went to
15 school starting at age seven. He attended regular school,
16 regular education school in his village for seven years and
17 failed miserably. He was in first grade for three years.
18 He was in second grade for two years and in third grade for
19 two years.

20 At the age of 12 -- and now I'm on the first
21 page -- he apparently was classified by his -- I'm sorry.
22 I'm on the second page, personal history. He was
23 classified as mildly retarded based on an IQ of 65. And a
24 65 would fall in that mildly retarded range between 50 and
25 70.

1 It is stated that he is not qualified for
2 education in a normal school and should continue his
3 education in a special school. However, it took two more
4 years to get him there.

5 So he was accepted at the Special School for the
6 Education of Children in Sarajevo on October 29 of '73. He
7 was 14 at the time, and he was accepted into the fourth
8 grade. The basis for that was that IQ of 65, and his
9 diagnosis was moron mentality.

10 Now, I need to stop here and explain that moron is
11 an outmoded term for the mild range of mental retardation
12 and is used a lot in the records from Bosnia.

13 **Q** Is that -- is there any other comments that you
14 would like to make on the records that you've reviewed so
15 far?

16 **A** I think that's fine. I'd like to go to the
17 certificate now from the Institute for Special Children
18 dated August 24, 2006, signed by the principal, professor
19 of science, Dr. Zecic --

20 MR. PATARINI: Your Honor, I have all these
21 in one exhibit. These are all in here, if I could have one
22 moment. I believe this would be Defense Exhibit E. And I
23 believe she's going to comment on more than --

24 MS. NECESSARY: Do you have a copy for me?

25 MR. PATARINI: Yes. I do.

1 MS. NECESSARY: This is E?

2 MR. PATARINI: Yes.

3 Q Now, you were going to comment on the
4 certificates. These certificates are in the back of your
5 exhibit. When you comment on your exhibit, there is a
6 small number on the top of your page. If you would just
7 state what the small number is at the top of the page, that
8 way the prosecution and the Court can find that easily.

9 A Okay. I have a 16 on the left corner. Is that
10 the number that you're talking about?

11 Q No. It's a small print --

12 A Number 3 in the upper right-hand corner?

13 Q Yes.

14 A Okay. I'm sorry.

15 Q Before the Court, the heading -- it's small number
16 3 on the back of the page, and it starts with Institution
17 for Special Children. Okay. Go ahead.

18 A Okay. I just wanted to refer to this certificate
19 at the last sentence on it -- or second to last. The last
20 paragraph says that the certificate is proof that Esad Lemo
21 attended a special school for persons with mental
22 retardation.

23 The paragraph above that shows that he enrolled
24 there in 1973. He completed sixth grade in 1976, and in
25 1978 he completed eighth grade at the age of 19.

1 During his last year in the school, he was
2 assigned to the machine shop, and he received vocational
3 training.

4 **Q** Is there any other --

5 **A** Which it doesn't say that, but it says elsewhere
6 in the records.

7 **Q** Is there any other certificates that you would
8 like to comment on?

9 **A** Well, if we could, I'd like to jump to the
10 psychological evaluation.

11 **Q** All right.

12 **A** We know that he entered the special school with an
13 IQ of 65, but then after he was there, he was seen for a
14 psychological evaluation. We do have the report on that.

15 MR. PATARINI: At this time we have marked --
16 we have previously had witnesses comment on this. This is
17 Defense Exhibit C.

18 **Q** You're talking about the English -- it states
19 psychological certificate?

20 **A** It's psychology certificate, yes.

21 **Q** I'm sorry. Psychology certificate. Okay. Go
22 ahead.

23 **A** He was examined in May of 1974. He was 15 years
24 old at the time. He was given a WISC as well as a
25 Benet-Simon.

1 **Q** Would you state what those are?

2 **A** Sure. The WISC refers to the Wechsler
3 Intelligence Scale for Children. I mentioned before that
4 the Wechsler is the most widely used IQ test here in the
5 United States, and apparently there is a Bosnian
6 translation and norms that were available to psychologists
7 in Yugoslavia at the time.

8 **Q** And what is significant about this particular
9 report?

10 **A** He obtained a verbal IQ of 74. That score falls
11 within the borderline range.

12 **Q** When you say borderline, borderline what?

13 **A** Borderline -- it falls -- there are different
14 ranges for IQ's. There is an average range, a low average
15 range, a borderline range that keeps getting lower, and
16 then the mentally retarded range. So the borderline range
17 is between mentally retarded and low average.

18 So his verbal IQ falls in the borderline range.
19 He had a nonverbal IQ of 44, which falls in the mentally
20 retarded range and actually would be classified as
21 moderately mentally retarded range.

22 His complete scale or full scale IQ is a 56, and
23 that falls within the mild range of mental retardation.

24 He also was given the Benet-Simon. This was an IQ
25 test that was developed in France. There is an American

1 version, the Stanford-Benet. He obtained an IQ of 61 on
2 that test. That also falls within the mild range of mental
3 retardation.

4 And he was also given the Good Enough, which is
5 spelled just like it sounds, Good and Enough. And that's a
6 human figure drawing that is given oftentimes to children,
7 and there were norms developed, and on that he scored a 67
8 IQ, which again falls within that mildly retarded range.

9 **Q** Were there any conclusions stated in this
10 particular report?

11 **A** Well, the examiner said that the results show what
12 she called average or he called average moronity and stated
13 verbally he does not understand better than a moron.

14 It was noted that his speech was delayed.
15 His motor skills were retarded, and his reaction times were
16 slowed. His behavior during testing was notable for
17 wanting to succeed, but they also noted that most of the
18 time he was confused, particularly with comprehension.

19 His reading skills were said to be uncertain,
20 and he would make what they call less logical mistakes.

21 The conclusion is, as you noted before, was
22 that he is easily classified as retarded, that he tries to
23 show that he has the ability to understand, that he can
24 think as others, but it's very strained and difficult. The
25 recommendation was that he was qualified for the Special

1 Education school.

2 Q Anything else about the history?

3 **A** I have another certificate here. This one is from
4 the social work center in Libno (phonetic), and the number
5 in the upper right-hand corner is 6.

6 MR. PATARINI: Your Honor, it's in this
7 package here. The little 6 in the back.

8 | Q Go ahead.

9 **A** The certificate was obtained from the social work
10 center in Libno on August 24 of 2006, and it confirms that
11 Esad Lemo is and continues to be categorized as mental --
12 I'm sorry -- by the Commission for Categorization of
13 Mentally and Physically Disabled Children as a mentally
14 retarded person on a level of moronity.

15 Q Is there any other documents that you would like
16 to comment on?

17 **A** Yes. The next one is the military exemption. It
18 says page 1 of 1 on the upper right-hand corner. This one
19 (indicating). This one shows down on the lower right-hand
20 corner that in October of 1977, so when Mr. Lemo was 18
21 years old, his competence for Army service and training was
22 evaluated, and he was found to be not qualified -- I'm
23 sorry. Not qualified for military service.

24 Q Any other records that you would like to comment
25 on?

1 **A** Yes. No. 2 of the certificates (indicating) shows
2 that even though he was initially judged to be incompetent
3 for military service, he was later drafted during the
4 Balkan Wars as a military obliged person and did serve in
5 the Croate defense council between July '92 and May of '93.

6 **Q** Is that it as far as the records that you would
7 like to comment on?

8 **A** One last one.

9 **Q** I'm sorry. Go ahead.

10 **A** And this is No. 1 of the certificates. This is
11 from the police department in Libno dated September 1,
12 2006.

13 **Q** We're not going to -- no comment on this one.

14 **A** No comment, okay.

15 **Q** Is there any other documents that were helpful in
16 aiding you to do an evaluation of Mr. Lemo to determine if
17 he was capable of making a knowing, intelligent, voluntary
18 waiver at the time his statement was taken, any history?

19 **A** Well, I believe that I did mention in my report
20 that he did come from very modest means. He grew up in a
21 small village in Bosnia.

22 His father was a tanner, worked in a tannery
23 warehouse. He lived in a four-room flat above a stable.
24 The kind of chores he had when he was a child was that he
25 watched the cow and chopped wood. He was able to make it

1 to market, but, again, a very modest background in a Muslim
2 family.

3 MR. PATARINI: Your Honor, I believe the last
4 one I gave you was -- I can't remember. Do you have the
5 last number? Was it F?

6 THE COURT: The last one I have is E.

7 MR. PATARINI: Then I'll mark this one F.

8 BY MR. PATARINI:

9 Q Now, you haven't commented on the school records.
10 But you did have an opportunity to review this; correct?

11 A I did review the school records. He completed
12 those years in that special school, was promoted each year.
13 He was noted to do well. The first year he got there, he
14 seemed to do very well. They said that he was apparently
15 elected to -- president of the class.

16 The second two years are a little more difficult.
17 And his last year then in eighth grade, he was very serious
18 and diligent, apparently enjoyed his vocational training.

19 Q And that was in the School for Special Education;
20 is that correct?

21 A That's right. That's with a Special Education
22 curriculum. And the Special Education curriculum was for
23 mentally retarded children.

24 Q Anything else as to his background?

25 A Nothing I can think of.

1 **Q** All right. Now, you also stated that you
2 administered another test; correct?

3 **A** Yes.

4 **Q** And in administering the other test, is the other
5 test more subjective?

6 **A** Well, no --

7 **Q** Let me restate the question --

8 **A** No. It's not if you administer it in a
9 standardized way and use the norms. But I did not
10 administer it that way. So my administration would have
11 been more subjective.

12 **Q** All right. The history that you were able to
13 obtain as well as the Raven's test that you did, did it aid
14 you in any way in evaluating the -- let's call it the
15 waiver of rights test?

16 **A** It is part of my opinion. It did not determine my
17 opinion.

18 **Q** I understand that. Now, how is it part of your
19 opinion?

20 **A** It showed that from a young age he had
21 intellectual limitations.

22 **Q** What about his sophistication, his overall
23 sophistication in a society, period?

24 **A** I felt that he had adaptive deficits based on
25 his -- based on his inability to handle the home situation

1 as I understood it. My -- and we haven't gone over this
2 yet. So I don't know if you want to get into that at this
3 point.

4 **Q** Was there anything else about his background that
5 you learned that would aid you in making an evaluation of
6 his cognitive function to do an effective waiver? Did you
7 learn about his history in this country?

8 **A** Yes. That's what I meant, right. I wasn't sure
9 if you wanted me to get into that.

10 **Q** That's all right.

11 **A** My understanding was that he arrived here and was
12 sponsored by Catholic Charities. He was -- they found a
13 place for them to live and found him a job. He was --

14 **Q** What kind of job was he doing?

15 **A** He was employed as an unskilled worker in a
16 nursery. He reported that what he did was he shovelled
17 mushroom manure. He cleaned out the bathroom. He carried
18 purchases to customers' cars.

19 I asked him if he operated any machinery. He said
20 no. So it was a very low-level job, but he was employed
21 there for eight years and apparently up until about a week
22 before his arrest.

23 **Q** Is there any -- when you do your evaluation for --
24 to determine whether the person at the time he was
25 interrogated was capable of making a knowing, intelligent

1 and voluntary waiver of his rights, what is your primary --
2 what is your primary objective? What are you doing when
3 you're making that evaluation?

4 **A** I am using a variety of different sources of
5 information to come to -- to evaluate each of those three
6 components.

7 **Q** Explain to the Court -- I'm sorry. Explain to the
8 Court what the test --

9 **A** So part of that is background. Part of that is
10 what he was able to achieve, his functioning, which we were
11 just talking about, the fact that he was employed.

12 He appears to have married at a fairly late age.
13 He lived at home before that time with his parents. After
14 his marriage broke up, he apparently was granted custody of
15 the children, but his wife would come back to the house and
16 do the cooking and cleaning for him. Now, this is again
17 information that was provided to me.

18 So he showed deficits in being able to care for
19 himself and his children at home without additional
20 support. He also seemed to have deteriorated in
21 functioning following each of his losses, and I think it
22 was most likely a cumulative effect.

23 So his loss first of his brother, then of his
24 marriage, then of his children, then of his job, and the
25 thing with mild mental retardation is that even though

1 individuals with that level of intellectual functioning are
2 often able to obtain jobs and live independently at a
3 minimal level, they need guidance and assistance and
4 support, especially during times when there is increased
5 levels of stress. And it did not appear that Mr. Lemo had
6 any source of support after these losses.

7 **Q** Would you explain for the Court what the tests
8 for -- to make a knowing, intelligent, voluntary waiver of
9 your rights to remain silent consists of?

10 **A** The Grisso test?

11 **Q** Yes.

12 **A** Okay.

13 **Q** Do you want to spell it?

14 **A** G-r-i-s-s-o. Thomas Grisso is the developer of
15 the test. First of all, the warnings are presented, again,
16 in the same wording as was used by the police. And the
17 patient is asked to explain what the warnings mean.

18 Then vocabulary words are taken from the warnings,
19 and he's asked to explain the meanings of those vocabulary
20 words.

21 There is a section that is a multiple choice
22 section where he's asked if -- he's presented with a
23 warning, and then he's presented with a sentence and asked
24 if that sentence is the same or different than that
25 warning, means the same or different.

1 And finally, there are a series of vignettes, each
2 of which are accompanied by an illustration, and they
3 concern the interrogation situations at the police station
4 and in the courtroom.

5 **Q** Would you state details of the tests and the
6 answers which would be the most significant details of the
7 test which help you to formulate an opinion?

8 **A** Okay. In the first part of the test where he was
9 asked to paraphrase and explain what the warnings meant, he
10 tried on the first warning, but he very quickly became
11 confused, and thereafter he said that he did not know the
12 meaning.

13 I asked part of the warning then at times, and he
14 at times was able to partially explain what that part
15 meant, and then I asked him to put it together and say what
16 does this mean? He was not able to do that.

17 The vocabulary words he had little success with.
18 He scored at a chance level on the multiple choice section,
19 and so the first part of the test indicated to me that he
20 had little understanding of the warnings themselves.

21 Then when I asked him to kind of put them into
22 effect during these vignettes so that he could apply the
23 warnings in these situations, what I noted was that he did
24 seem to have an appreciation of the adversarial nature of
25 the interrogation.

1 He, however, did not appear to appreciate or
2 understand his right to counsel or right to silence.

3 **Q** What was your basis for that?

4 **A** I asked him questions, and they were the standard
5 questions in the test about a person in the situation in
6 this vignette and what he was thinking and feeling, what
7 the police were thinking and feeling, what the job was of
8 the lawyer, what he was to do in the courtroom, those kind
9 of things.

10 **Q** What about -- is that it for the second part of
11 the test?

12 **A** Well, you know, when I talked about the
13 adversarial nature, he did seem to understand that there
14 was an adversarial nature, and in response though he just
15 seemed to convey a sense of helplessness.

16 He did not seem to understand that he had a choice
17 of whether or not to speak to the police or actually any
18 authority figure. He seemed to believe that he had to
19 comply with whatever an authority figure told him to do.
20 And if he did not, he seemed to believe that he would risk
21 dire circumstances. For instance, being imprisoned or
22 fined.

23 Even so, he indicated that they would think that
24 he was lying anyway, which just reinforced that feeling of
25 helplessness.

1 **Q** Anything else about that portion of the test?

2 **A** He similarly didn't have any comprehension of his
3 right to avoid self-incrimination. He -- when I asked
4 him -- when I pressed him on the warning, anything you say
5 can and will be held against you in a court of law, his
6 response was somebody is suing you. They're against me,
7 which doesn't have anything to do with the warning, but
8 that was his understanding of it.

9 I did try to administer another test, the McArthur
10 Competence Assessment Tool for Criminal Adjudication, and I
11 only got -- I had to terminate the test fairly quickly. He
12 seemed to demonstrate a very black and white view of the
13 world, one in which people were either for or against him.
14 He believed that most of the people in a courtroom were
15 against him and had little idea of the function of the
16 jury, although he believed that some of the members would
17 be for him. Some would be against.

18 He thought the defense attorney was -- the role of
19 the defense attorney was to protect and free him.

20 As I was questioning him about his knowledge of
21 courtroom roles, he was becoming increasingly upset, and
22 after stating his belief that the Judge would be against
23 him, he became very distraught, despaired of his chances of
24 ever getting out of jail so that he could take care of his
25 children, and it was decided to terminate the session at

1 that point.

2 **Q** Was there anything else about the actual test?

3 **A** One thing that I didn't mention before is that
4 when I first met Mr. Lemo, I asked him to sign a release so
5 that I could send the results of the evaluation to the
6 Public Defender's office, a very short one-sentence consent
7 form.

8 It was translated to him. He readily signed it.

9 And then I asked him to check to see if he understood what
10 he was signing, and he said his understanding was that it
11 was fine with him if I gave that paper to -- the paper that
12 he just signed to the Public Defender's Office.

13 So on the basis of that, what I did was after each
14 of the tests, I asked him each time is it all right if I
15 let Mr. Patarini know how you did on this test? And he
16 said it was each time. But it illustrates how concrete his
17 thinking is.

18 **Q** Would you be able as a psychologist to make an
19 evaluation of a person's understanding of a principle such
20 as we're talking about here, a waiver of a right to remain
21 silent or a waiver to have counsel present, be able to
22 evaluate it based on the fact that he admits that it was
23 said to him, just that it was said to him? If --

24 **A** If he admits that he heard these warnings?

25 **Q** Right.

1 **A** And if you asked him did you hear, the thing is
2 that mentally retarded individuals in these situations tend
3 to want to please. And so the response bias is to say yes.
4 So that most often that's the response you're going to get.
5 And he may or may not have remembered that he was read
6 these warnings.

7 **Q** The mere -- I'm sorry --

8 **A** But he will have a tendency to say yes.

9 **Q** The mere fact -- well, can you make an evaluation
10 as to his understanding merely by the fact that he says it
11 was said to him?

12 **A** Whether or not he remembers hearing the
13 translation really has nothing to do with whether or not he
14 understood the warnings themselves or which I take is
15 the -- my understanding is the knowing part of it. The
16 intelligent part of it is understanding the implications of
17 those warnings.

18 **Q** Anything else about the actual tests?

19 **A** No, not about the actual test.

20 **Q** Were you able to make a conclusion after the test?

21 **A** Yes. I concluded that he continues to meet
22 criteria for a diagnosis of mild mental retardation and
23 that I thought that he had little to no understanding of
24 the concept of a right in itself, that he demonstrated
25 little comprehension of the warnings themselves except for

1 the adversarial nature of the interrogation.

2 But the other two components, the right to counsel
3 and right to silence, he had very little -- he demonstrated
4 very little understanding in applied situation of the
5 vignette. And I did not believe that he appreciated the
6 consequences of those warnings, for instance, his right to
7 avoid self-incrimination.

8 **Q** Have you formulated an opinion to a degree of
9 psychological certainty whether at the time of this
10 interrogation he was capable of making a knowing,
11 intelligent and voluntary waiver of his right to remain
12 silent and to have counsel present, all the Miranda
13 warnings? Was he -- was he capable of doing that?

14 **A** I believe that to a reasonable degree of
15 psychological certainty, he was not capable of providing a
16 knowing, intelligent and voluntary waiver of his rights at
17 the time of his interrogation.

18 MR. PATARINI: No further questions.

19 THE COURT: Miss Necessary?

20 - - -

21 CROSS-EXAMINATION

22 BY MS. NECESSARY:

23 **Q** Thank you, Your Honor. Dr. Johnston, how many
24 times have you given someone the Grisso Miranda rights
25 test?

1 **A** Probably I'd say about fifteen to twenty.

2 **Q** And you say in this particular situation though,
3 however, you were not able to correlate it to any norms
4 because you didn't give the test as it was designed to be
5 given?

6 **A** Right.

7 **Q** All right. How many times have you given the
8 Raven test?

9 **A** I have administered that one rarely. So probably
10 about --

11 **Q** Was this the first time?

12 **A** No. I have used it before, probably about five
13 times.

14 **Q** And my understanding was that the Raven creators
15 do not want you to correlate that to an IQ? Is that
16 correct?

17 **A** They discourage that.

18 **Q** So --

19 **A** However --

20 **Q** That is not to be done?

21 **A** Well, they discourage it. But then also in their
22 manual they also use the term so that when he scored within
23 the expected range on each of the sets for his total score,
24 it was said to indicate a consistent -- an estimate of his
25 capacity for intellectual ability. So they are still using

1 those terms.

2 **Q** But this is a purely nonverbal test?

3 **A** It is purely nonverbal, although factor analysis
4 has shown there is a verbal component to it, which most
5 likely comes up in the more higher level, more difficult
6 items of numerical reasoning.

7 **Q** But it is totally nonverbal? You didn't say a
8 word to him during this test?

9 **A** I did not say anything to him during the test. I
10 gave him very brief instructions that were translated and
11 used gestures.

12 **Q** Now, you as part of your duties as a psychologist
13 are required to, as you said, get him to sign a consent for
14 the release of this information to Mr. Patarini or whoever
15 you're doing it for?

16 **A** Uh-huh.

17 **Q** All right. And you did have the Defendant sign a
18 release of information?

19 **A** Uh-huh.

20 **Q** And you felt confident that he was capable of
21 waiving his right to confidentiality in that case, capable
22 of agreeing and understanding that he was giving up his
23 right to have this remain totally secret?

24 **A** I believe that he understood that. When he told
25 me at the end of each of the tests that I administered that

1 it was all right for me to tell Mr. Patarini how he did, I
2 thought he understood that, yes. He did not understand the
3 initial sentence that was a bit more abstract than that,
4 that I would release the results of the evaluation to the
5 Public Defender's Office.

6 **Q** But you believe he was capable of making that
7 decision, of making that waiver of what could be a very
8 important right?

9 **A** You know, I'm not sure about that because it's a
10 different setting than I think we're talking about.

11 **Q** Well, would that not be --

12 **A** This is a forensic setting. It was a court
13 ordered evaluation. So I'm not sure how much that applies.

14 **Q** Well, isn't it -- I mean aren't you ethically
15 bound to have him sign off and to consent to the release of
16 the information?

17 **A** I do it. I'm not sure how necessary that is in
18 this situation.

19 **Q** But you did do it?

20 **A** Yes. I always do that.

21 **Q** And had he said no, you would not have released
22 the information?

23 **A** I would not have proceeded with the evaluation.

24 **Q** The evaluation, right. So you determined ahead of
25 time that he was capable of making that decision?

1 **A** No. If he had told me no, I would not have
2 proceeded. I would have called Mr. Patarini and told him
3 that he was not willing, that I didn't see any point of
4 continuing.

5 **Q** All right. But when you did release the results
6 to Mr. Patarini, you were confident that he had agreed to
7 have those -- that information released?

8 **A** I felt that he understood at the time what I was
9 asking him. Yes.

10 **Q** All right. Now, you had -- you said you had some
11 of these records, Bosnian records, before the evaluation
12 and some of them afterwards, or did you get all of them
13 afterwards?

14 **A** No. All the Bosnian records were after the
15 evaluation, some months after.

16 **Q** All right. And did you have access and did you
17 review the records from Mayview?

18 **A** Yes. I had those before the evaluation.

19 **Q** And did you have Dr. Friend's notes about her
20 testing?

21 **A** Yes, I did.

22 **Q** And did you have Dr. Martone's notes or report
23 from the Behavior Clinic?

24 **A** I'm not sure that I had her notes, but I had
25 knowledge of what in essence was said, the basis for the

1 commitment.

2 **Q** All right. So you're saying you don't think you
3 actually saw those records?

4 **A** I don't recall seeing the commitment application.

5 **Q** Now, when you're referring to the Raven's test
6 that you gave, you have told us that there are no Bosnian
7 norms for this particular test for adults?

8 **A** Not that I'm aware of.

9 **Q** All right. And the only norms were for Slovenian
10 children?

11 **A** The culturally -- the most appropriate cultural
12 norms were children of --

13 **Q** Eastern European --

14 **A** Slovenian.

15 **Q** Did you also tell us that that is a different
16 test?

17 **A** No. Actually -- no. It was the Standard
18 Progressive Matrices that was administered to these
19 children. There is a children's version. There is a
20 children's version, but the Standard Progressive Matrices
21 was used.

22 **Q** So there is no correlation between that test and
23 adults? It's not being compared against adults at all? No
24 Slovenian adults were tested?

25 **A** No Slovenian adults were tested. I believe it

1 only went up to about 15 1/2.

2 **Q** You did, however, check that there were some norms
3 for the -- for another eastern European nation, which would
4 be Poland?

5 **A** Yes.

6 **Q** And his score in that case fell between the 10th
7 and the 25th percentile?

8 **A** That's correct. That is the only -- the only
9 norms that I could find that -- where he would not fall
10 below the fifth percentile.

11 **Q** So that's a significant difference, is it not,
12 between the Wechsler -- the western -- the American,
13 Canadian or British norms and the Polish norms?

14 **A** Well, yes, except that he also fell below the
15 fifth percentile for adults in Belgium, Ireland, China. So
16 the other European nations -- the same thing happened with
17 kids.

18 **Q** Within European nations; is that right?

19 **A** And China.

20 **Q** And China. You place some reliance upon these
21 records from Bosnia as to -- for estimating his
22 intelligence; is that right?

23 **A** Yes, quite a bit of reliance on them.

24 **Q** And you have no independent information as to the
25 reliability of these records; do you?

1 **A** I take them at face value. They look like a
2 psychological report that would be obtained in a school
3 setting. I have no reason to doubt that they were not.

4 **Q** You don't know the quality of the psychological
5 evaluation that was done?

6 **A** It looks like a pretty comprehensive evaluation to
7 me. They gave a Wechsler test. They gave a Benet test.
8 They gave a figure drawings. That's more than a typical
9 school psych evaluation would do in this country.

10 **Q** You didn't see the raw test scores or --

11 **A** Yes, I did. They provided the raw test scores on
12 that form.

13 **Q** They provided the results that he had written down
14 or that were written down on the test --

15 **A** No. They provided the raw scores and the scale
16 scores for the WISC.

17 **Q** I'm talking about the actual forms that he would
18 have filled out when he was being tested or that someone
19 would have filled out.

20 **A** I do not have access to those, but that is not
21 typically available.

22 **Q** You do not know who provided the information about
23 his home life? I guess that would be in -- where he was
24 taking care of the cow?

25 **A** Right. That was in that -- that personal

1 certificate, that first one.

2 Q You don't know as to whether that is typical of
3 Bosnian society, of the area in which he came from?

4 A I think that kind of chore would most likely be
5 typical of some of the things that would have to be done
6 in --

7 Q And as far as you know, his IQ was not tested
8 from I guess from -- since the year 1974?

9 A That was the --

10 Q Thirty-four or some years ago?

11 A As far as I know, that is the last one. So he was
12 tested before the age of 14 and at age 15, and I don't have
13 any other records on that.

14 Q And actually his IQ went up a little bit as far as
15 I'm talking about the verbal score from a 61 to a 74 during
16 that period of time?

17 A I don't know. Because his -- I don't believe
18 that's true because the initial IQ was a 65 that was
19 provided. That was an IQ that was obtained before the age
20 of 14, and I don't know if that was a verbal or nonverbal
21 or a full scale. I'm assuming that's a full scale IQ.

22 Q So you don't know --

23 A The WISC is the test that would separate the
24 verbal and nonverbal IQ out.

25 Q Isn't there a pretty big discrepancy between his

1 verbal IQ and his nonverbal in the records that you saw?

2 **A** Yes.

3 **Q** And does that not make it --

4 **A** I don't know if that's a significant discrepancy.
5 I would think that it probably is.

6 **Q** And does that not make it difficult to average the
7 two and come up with a full scale IQ?

8 **A** No. I don't believe so. That is -- that is how
9 the norms are developed. So one would note that there is a
10 discrepancy between those two. But the full scale IQ is
11 not an average of the verbal and performance IQ.

12 **Q** All right. His verbal --

13 **A** It's from a different norms table.

14 **Q** His verbal IQ is actually in the -- you said it
15 was borderline. That's actually in the average range, but
16 in the lower borderline --

17 **A** Absolutely not.

18 **Q** It is not?

19 **A** Absolutely not. There is nothing average about a
20 74 IQ.

21 **Q** What is the cutoff?

22 **A** The cutoff for average is 90. 90 to 109 on a
23 Wechsler is average range.

24 **Q** And this is -- you're saying this is borderline?
25 It's not average? It's not mentally retarded?

1 **A** It's not average. It's not low average. It's not
2 mentally retarded. It's borderline, the verbal IQ. The
3 other IQ's all fall within the mentally retarded range.

4 Q And, Doctor, you don't know whether this is a --
5 this is the way that they evaluate people and refer to
6 moron mentality. That's not done nowadays in the United
7 States?

8 **A** It is not, but it used to be.

9 (Brief pause.)

10 Q Doctor, did you review Dr. Wright's report?

11 **A** Very briefly.

12 Q So you're aware and I suppose also from hearing
13 the testimony today that there were some discrepancies,
14 some inconsistencies in the way that he answered the
15 various questions between what he told you and between what
16 he told Dr. Wright even with the same types of questions?

17 **A** Discrepancies in the way that Mr. Lemo -- yes.

18 Q In how he answered the questions. For example,
19 once he said that the police told him he could have an
20 attorney, and he wanted one, but the attorney didn't come?
21 Now, he didn't tell you that; right?

22 **A** No. I can look up to see exactly what he said if
23 you want me to.

24 Q Well, I think it's in your report.

25 A Okay.

1 **Q** And also in your test data. But you -- he told
2 you he didn't know what the right to remain silent meant?

3 **A** He attempted to answer that question, but the way
4 that he answered it was to repeat the warning. And so when
5 I asked him to explain it, he became confused, and he could
6 not explain it using different words than the words in the
7 warning.

8 **Q** He said that I don't say anything? Isn't that
9 what he said?

10 **A** I have to check.

11 **Q** That's on your notes that you --

12 **A** Yeah. That's what I was trying to find.

13 **Q** This one (indicating).

14 **A** That's what I was trying to find.

15 **Q** But I'll need that back.

16 **A** All right --

17 **Q** I just wanted to ask about that one question. He
18 said --

19 **A** Right. I asked him the first warning as the
20 police said was you had the right to remain silent. He
21 said you have the right -- you have rights. I really don't
22 know.

23 And so I asked him, well, what does it mean to
24 remain silent? And he says that I don't say anything.

25 So I said okay. So what does it mean you have the

1 right to remain silent? And he said I don't know.

2 Q And he said I don't know a lot?

3 A He did say it, yes.

4 Q Can that not be an indication of malingering?

5 A It could be.

6 Q All right. And you did not administer any tests
7 to detect malingering on this particular test, the Grisso
8 test; did you?

9 A There is no malingering component in the Grisso
10 test.

11 Q Making contradictory statements, answering one way
12 one time and another way another time, that could also be
13 an indication of malingering; is that right?

14 A It could be an indication of several things.

15 Q Also, and I take it you did hear the -- you did
16 hear -- or you read the transcript of the interrogation,
17 the questioning?

18 A Yes.

19 Q All right. And you know that there is nothing in
20 there indicating the Defendant said I want an attorney? He
21 did not say that during the interrogation?

22 A I did not hear anything --

23 MR. PATARINI: If I may object at this
24 particular point in time, the interpreters, when she
25 testified, she testified she did not say verbatim

1 everything that was said, and there was some things that
2 she summed up, and for her to be able to say whether it was
3 said or not, she could only say what was said by the
4 interpreter. He could have said other things in a foreign
5 language that the interpreter didn't say.

6 MS. NECESSARY: Well, I'm sure if he had said
7 that, Mr. Patarini would have had someone to say that.

8 THE COURT: You can ask your question.

9 Q You didn't hear anything in the -- or didn't see
10 anything in the transcript of the questioning that he asked
11 for an attorney?

12 A No. I did not see that statement.

13 Q All right. And you recall him telling Dr. Wright,
14 oh, I asked for an attorney, but the attorney didn't come?

15 A You know, he saw Dr. Wright two years after his
16 arrest and the original warnings. He saw me a year and a
17 half after that. I really don't know with a person of his
18 cognitive ability if he remembered. I don't know. I don't
19 know that he understood what was being said to him at the
20 time.

21 Q Or he was malingering?

22 A That's always a possibility and one that's
23 important to rule out.

24 Q Now, Doctor, I don't have all of your tests. We
25 had requested some of the testing, and one of the tests

1 that you gave him, do you have your notes there? It's
2 called Joe's interrogation.

3 **A** You have that. It's this one.

4 **Q** Okay. And I don't have -- I don't know what Joe's
5 interrogation was, but I do know on this one you said that
6 he got seven out of ten correct. Is that right?

7 **A** That's for the nature of the interrogation, which
8 indicates that he understood the adversarial nature of the
9 interrogation.

10 **Q** Can I see your notes to see what that vignette
11 was --

12 THE COURT: Hold up.

13 (Brief pause.)

14 BY MS. NECESSARY:

15 **Q** Dr. Johnson, you just showed me the original sheet
16 that you have the function of the rights and interrogation.
17 And you have something called Joe's interrogation. But it
18 doesn't have a scenario describing Joe's interrogation; is
19 that right?

20 **A** Joe's interrogation is one of the vignettes that I
21 mentioned.

22 **Q** Right. And do you know what the vignette was?

23 **A** I don't have that with me. You mentioned
24 professional ethics a while ago, and it's part of our
25 ethics to try to protect the integrity of our tests. And

1 so test data is distinguished from test materials.

2 Test materials would involve giving out the actual
3 questions, and we are advised to try to protect those as
4 much as possible because if they were to become available
5 to everyone, then the norms would lose their meaning.

6 **Q** So you're giving us the answers but no -- we don't
7 know what the questions were?

8 **A** You do not know what the questions are because I
9 do not have them with me.

10 **Q** But anyway, on this vignette, whatever it was, he
11 got seven out of ten right?

12 **A** Uh-huh.

13 **Q** That's pretty good; right?

14 **A** Again, you had -- I can't evaluate if it's pretty
15 good. I only evaluated it subjectively based on what he
16 was able to tell me, and what he was able to tell me
17 indicated that he understood the adversarial nature of the
18 interrogation fairly well.

19 **Q** So what you're telling us is that you made a
20 subjective determination which you're telling -- a
21 conclusion which you're telling us here today, but you
22 can't tell us what the story was that he was supposed to be
23 giving answers about?

24 **A** Again, if I released that to you and release the
25 questions, that would jeopardize the integrity of the test,

1 and ethically I am reluctant to do that.

2 **Q** All right. Doctor, part of mental retardation is
3 not only just a test score, a number, but also some problem
4 in adaptive functioning? I think you mentioned that?

5 **A** Uh-huh.

6 **Q** And you knew that the Defendant once he was in
7 this special school in Bosnia apparently did good to
8 excellent in his school work? That's on one of those
9 pages --

10 **A** As you will find in Special Education programs,
11 children usually do.

12 **Q** So he did?

13 **A** In a Special Education curriculum, that was
14 appropriate for his level of functioning.

15 **Q** And he worked on cars in Bosnia in some sort of a
16 job in a garage? Are you aware of that?

17 **A** He was trained in auto body spraying, paint
18 spraying.

19 **Q** Okay.

20 **A** Or auto paint spraying, not body, in the machine
21 shop during eighth grade.

22 **Q** He was married and had children?

23 **A** He did.

24 **Q** He had custody of the children at times?

25 **A** He -- that's my knowledge. That's true.

1 **Q** But he had -- that's what the records say. He
2 worked at a nursery, had fulltime employment for some
3 period of time while -- when he was in this country?

4 **A** My understanding was that that lasted for eight
5 years with one time off when he was injured.

6 **Q** He served in the military in Bosnia?

7 **A** He served in a -- in some kind of a military,
8 yeah.

9 **Q** He was oriented --

10 **A** During the time of war.

11 **Q** During the time of war. He was oriented times
12 three, person, place and time when you spoke with him?

13 **A** Oriented with the exception of the date.

14 **Q** And you found his thoughts were logical?

15 **A** His thoughts were logical that he was relating,
16 yes.

17 **Q** And did you know that he did have a driver's
18 license?

19 **A** I did not know if he had a driver's license.

20 **Q** All right. And so he did have a number of things
21 about his life that were typical of what a normal person
22 would have in their life?

23 MR. PATARINI: I'm going to object to the
24 term normal. I mean that's such a broad term --

25 THE COURT: There's been nothing normal about

1 this whole day.

2 MR. PATARINI: What does the word normal
3 mean? I mean --

4 THE COURT: Sustained.

5 MS. NECESSARY: An average functioning
6 person.

7 Q And you said that one of your -- your feeling
8 about his adaptive deficit was his ability to handle his
9 home situation. I take it you're referring to the
10 difficulties that he had with his wife?

11 A I think that's possible, but I think more I was
12 talking about his ability to take care of his children, to
13 do the chores, responsibilities having to do with their
14 care as well as his own, given that I was told that his
15 wife had to come back and cook and clean for him.

16 Q Couldn't that also be a cultural norm? There may
17 be -- men in Bosnia may not cook and clean? You don't know
18 that; do you?

19 A I do not know that. No.

20 MS. NECESSARY: Thank you. That's all.

21 - - -

22 REDIRECT EXAMINATION

23 BY MR. PATARINI:

24 Q You were asked about Dr. Friend's report; correct?
25 You were asked about Dr. Friend's report?

1 **A** I don't recall.

2 **Q** You were asked by Miss Necessary about --

3 **A** I may have been.

4 **Q** She gave one standardized test; correct?

5 **A** Yes. She did. She gave a screening test, an
6 MMSE.

7 **Q** Is that like an overall evaluation? Is that an
8 overall evaluation?

9 **A** It is not a comprehensive evaluation. Typically
10 that test would be used to determine if there is an
11 indication of cognitive impairment; and if so, that would
12 be followed by a more comprehensive evaluation.

13 **Q** You were shown -- or you were questioned
14 concerning some of the statements that were made to
15 Dr. Wright; correct?

16 **A** I believe so. Yes.

17 **Q** And in some of these were -- in some of these
18 statements he stated that, you know, he answered the
19 questions correctly; correct? In terms of whether or not
20 you have a right to remain silent. Some of them he had --
21 he was said the phrase, and he was told to repeat the
22 phrase, and that's in fact what he did?

23 **A** That's possible. That's possible. If it was
24 explained to him, he may have used the same words as the
25 explanation. He may have used his response by us. It's

1 possible that he didn't remember what he said the first
2 time. A lot of things are possible.

3 Q And you are aware of the fact that he was
4 represented by an attorney since the time of his arrest in
5 2006? Correct?

6 A I believe that the Public Defender's Office has
7 been involved since that time, yes.

8 Q And there was a comment about his serving in the
9 military. At one time he was rejected from serving in the
10 military; correct?

11 A That's correct.

12 Q And at time of war he was drafted to serve in the
13 military?

14 A That's what the records suggest to me.

15 MR. PATARINI: I have further question.

16 MS. NECESSARY: Nothing further. Thank you.

17 THE COURT: Thank you. You may step down.

18 We'll see you at 9:30 tomorrow.

19 MR. PATARINI: May this witness be excused,
20 Your Honor?

21 THE COURT: Yes.

22 MR. PATARINI: Thank you.

23 (Whereupon, these proceedings were adjourned
24 at 5:10 p.m.)

25 - - -

1 Thursday, January 22, 2009

2 9:45 a.m.

3 (In open court, Defendant present with
4 counsel:)

5 THE COURT: Mr. Patarini?

6 MR. PATARINI: Good morning. At this time we
7 enter the final two exhibits. Exhibit A, we had a hearing
8 previous to trial in which the Court instructed or
9 suggested that I make an effort to obtain all the records.
10 This was the letter that was sent to them, the
11 Serbo-Croatian version as well as the English version, and
12 this was their letter back in response with the records.

13 THE COURT: All right.

14 MR. PATARINI: This is Defense Exhibit A,
15 Defense Exhibit B. With that, we have no further evidence
16 to offer on this issue.

17 THE COURT: All right. Miss Necessary?

18 Anything on behalf of the Commonwealth?

19 MS. NECESSARY: Yes, Your Honor. Your Honor,
20 the subject of this hearing is, of course, whether or not
21 the Defendant made a knowing, intelligent and voluntary
22 waiver of his Miranda rights and a voluntary statement.

23 As the Court knows, the purpose of Miranda is to
24 deter illegal police conduct. And the Commonwealth's
25 burden is by a preponderance to show that there was no

1 such, and it was a voluntary waiver.

2 As one of the cases in Pennsylvania says, it must
3 be an intentional choice made without undue governmental
4 pressure, and the Court must consider the totality of the
5 circumstances.

6 In this case there is absolutely no evidence that
7 the Defendant was in any way threatened, coerced, tricked,
8 or that his will was overborne in any way, or that -- or
9 that he was in any way taken advantage of by the police in
10 an effort to persuade him to talk.

11 All the evidence that has been presented shows
12 that the Defendant was rather eager to speak. The tape
13 which the Court heard, although you can't understand his
14 words, shows that the Defendant's words were flowing. He
15 was speaking very eagerly. It sounded like he was very
16 eager to tell his side of the story. As he said at the
17 end, he wanted to tell the truth.

18 And in this case, the Defendant's rights were
19 scrupulously protected. He was not in any way coerced, and
20 the Commonwealth submits that his waiver was voluntary.

21 The fact that he claims mental impairment does not
22 render a statement involuntary. There are many, many cases
23 of mentally retarded, mentally challenged, even people who
24 suffer from hallucinations and delusions, and the courts
25 have held that these people have executed a valid waiver

1 and have given voluntary statements.

2 Here Detective Palmer met the Defendant at the
3 hospital, had a little conversation with him, enough to ask
4 him to consent to a blood sample, which he freely and
5 voluntarily did. He cooperated with the hospital personnel
6 in the taking of the blood sample.

7 He even engaged in conversation with Detective
8 Palmer and the other people there in English complaining
9 about the fact that his pants had been torn or cut by the
10 medics in trying to treat him and complaining about other
11 things.

12 He accompanied the detectives to the police
13 station where a translator was provided. His rights were
14 read to him two separate times. And each time he agreed
15 and waived those rights.

16 And I submit that the translation that was done by
17 Miss Pejic conveyed the essential meaning of Miranda and
18 provided the Defendant with an opportunity to either
19 exercise his rights or waive them, and he chose to waive
20 them. And in fact, he was eager to waive them. There's no
21 indication anywhere in the tape that he at any time said I
22 don't want to speak or I'm not sure.

23 The Defendant is not completely without some
24 knowledge of the English language, as shown by his
25 interaction with the people at the hospital. He functions

1 in society, had a job, drove a car, engaged in the normal
2 activities of daily life, and he knew that this was
3 questioning about a serious matter, which was also one of
4 the things raised in many of the cases. Never requested an
5 attorney or expressed any interest in remaining silent.

6 The examination of the Defendant by both the
7 Commonwealth and the defense experts shows the Defendant
8 gave some rather inconsistent statements about what he had
9 said at the time, which is not all that unusual for someone
10 who's trying to have their statement suppressed. At times
11 he said, oh, I asked for a lawyer, but they didn't give me
12 one. Well, that's clearly not true, because we have the
13 tape, and there's no indication on there that he ever asked
14 for a lawyer.

15 He said to Dr. Wright that the police were
16 arrogant to him, and you can hear on the tape Detective
17 Palmer was nothing other than low key and matter of fact
18 and very professional.

19 So Your Honor, in the totality of the
20 circumstances, it's clear that the Defendant's rights were
21 freely and voluntarily waived, and he gave a voluntary
22 and -- free and voluntary statement free of any pressure by
23 the police.

24 THE COURT: Mr. Patarini?

25 MR. PATARINI: Thank you, Your Honor.

1 This -- as the Commonwealth has stated and has argued
2 previously, the Court is asked to evaluate the totality of
3 the circumstances.

4 In an effort to present the totality of the
5 circumstances to the Court, we obtained his history,
6 evaluations that were done for purposes of education in his
7 native country.

8 These -- the reports indicate that he was
9 evaluated as having an IQ of 65, that he was -- he had --
10 before he was in a special school he had repeatedly failed
11 first grade, second grade, third grade, and that
12 Dr. Johnston testified that the amount of testing that was
13 done was a whole battery of tests. They said that he was
14 easily classified as retarded, and he tries to show that he
15 has the ability to understand and that he can think as
16 others, but it is very strained and difficult.

17 We would argue that this is the type of evaluation
18 that has been accepted in our society, especially in light
19 of the fact that it was done at a time when he was not
20 facing any criminal charges. This was presented for the
21 Court's evaluation.

22 Also, there was details included in these reports
23 as to his background, the fact that it was not meant to
24 show anything that he grew up in -- that he lived in a barn
25 with animals. That was only offered to show his level of

1 sophistication when he was growing up.

2 Later when he did finish Special Education school,
3 he was given a labor job, which was basically spray
4 painting cars. He did -- he was married, and he came to
5 this country, and then when he came to this country, he had
6 not assimilated into the culture in that he did not develop
7 ability to speak the native language of this country.

8 He did have a job, but it was labor, as described
9 as -- what did he do? He shovelled mushroom manure,
10 carried cans and worked with the same company for
11 approximately nine years, in which he was discharged within
12 two weeks of this incident.

13 That when he came to this country, he had problems
14 with his family. He had a very -- just a common laborer
15 job. He was able to obtain a driver's license.

16 There was other things he was able to do, but at
17 the same time there was no indication that he was anything
18 other than borderline intelligence.

19 He was -- the first time that he was assessed in
20 Mayview when they gave him the only standardized testing
21 that they gave him was the MMSE, the psychologist that did
22 the testing stated that he had impaired judgment, impaired
23 insight and also classified him as borderline intellectual
24 functioning.

25 So we have all the standardized testing that was

1 done in Bosnia. He finally comes to this country, and the
2 only standardized testing that was given to him within a
3 month of this actual incident corroborates what was done in
4 Bosnia.

5 Now, as far as the totality of the circumstances,
6 I would argue that the facts leading up to this particular
7 incident are -- should be given greater consideration than
8 evaluations done by experts at a later time.

9 We know that certain things were said to him at
10 the time of the interrogation. We know that he was under
11 stress, as described by Ms. Pejic. He said he was
12 stressed. She said he said he was stressed out. The
13 translation stated that he had a headache and that he was
14 very upset.

15 Dr. Johnston testified --

16 THE COURT: It said that she said he was
17 stressed out because he said he was stressed out.

18 MR. PATARINI: She said what she translated
19 what he said was stressed out. The literal translation is
20 that he had -- his head hurt. I'm just saying there was
21 like physical discomfort, emotional discomfort. Anyone
22 facing a situation like this, common knowledge would say it
23 is a stressful situation.

24 Dr. Johnston stated that an individual with
25 borderline intelligence or mildly retarded, when they're in

1 this kind of situation, this is when they need the greatest
2 amount of support.

3 When the police questioned my client, they
4 admitted that there was no explanation of the rights. They
5 did not attempt to explain anything. What they did was
6 read the rights to him verbatim.

7 The questioning in and of itself on at least three
8 occasions asked for yes or no answers. When I asked
9 Detective Palmer and I asked Ms. Pejic if the tape
10 encapsulated all the things that were said prior to, they
11 both said yes. So we would argue that the tape is the best
12 evaluation as to what actual rights were communicated to
13 him in his native language.

14 When Ms. Pejic was asked whether he -- when she
15 translated do you know you have a right to have a lawyer to
16 represent you before and during the interrogation, she
17 admitted she never said during. She said before and after.

18 She admitted that when the police officer said if
19 you cannot afford an attorney to represent you, one could
20 be here before and after. Once again, she said she never
21 used the word during. There was no indication of any
22 record that he was told that he was entitled to have a
23 lawyer during the investigation.

24 The Commonwealth argues that this statement was
25 done voluntarily in light of the fact that he is speaking,

1 and it appears that he is being candid and giving the
2 information.

3 However, the Miranda warnings are more than that.
4 They have to be knowing and intelligent and voluntarily
5 waived. You have to give up your right to remain silent,
6 but you have to give up your right to remain silent and
7 give up your right to have a lawyer present with you during
8 the interrogation knowingly and intelligently.

9 There is no indication at the time that this
10 interrogation took place that he was informed that he was
11 entitled to have a lawyer present.

12 Contrary to that, there was no indication -- in
13 fact, the person speaking his native language said I did
14 not say during the interrogation. There was no indication
15 that he was ever informed of that. And we would argue that
16 that defect cannot be cured by the totality of the
17 circumstances.

18 You have Dr. Wright testifying about his rights,
19 and he admits he's explaining the rights to my client, and
20 then he's asking my client to rephrase what he said to my
21 client, and that's how he's basing his evaluation.

22 We would argue that that is asking someone to
23 parrot something, you know, saying you have a right to
24 remain silent. Now say that in your open words, and he
25 admits he used the word explain. But the police officers

1 when they conducted the interrogation, they didn't explain
2 anything. They read it verbatim.

3 I asked both Detective Palmer and Ms. Pejic was
4 anything said other than what was on the tape when the tape
5 was not being played? And they both said the tape is an
6 encapsulization as to what was said.

7 We would argue that if the Court would consider
8 the fact that my client has been diagnosed as retarded,
9 borderline intellectual functioning, the fact that he was
10 under stress, the fact that there was no explanation of his
11 rights given to him at the time that the interrogation took
12 place, the fact that the explanation of the rights in and
13 of itself was defective, and then he was never informed
14 that he had the right to have an attorney present during
15 the interrogation, that that has not been cured by the
16 totality of the circumstances, that defect still remains,
17 we would ask the Court to suppress the statement. Thank
18 you.

19 THE COURT: I've reviewed all of the exhibits
20 that have been offered and the testimony that we've had
21 throughout the course of this particular trial, and I think
22 it is unquestionable that Mr. Lemo does fall within the
23 purview of mental retardation.

24 That, however, does not mean that he cannot
25 understand what his rights are, nor does it mean that he is

1 prohibited from waiving those particular rights. Based
2 upon the totality of the testimony that's been presented
3 and the expert opinions that have been offered, it's clear
4 that Mr. Lemo understood what his rights were and that he
5 freely and voluntarily waived those particular rights. The
6 motion to suppress would be denied.

7 Are we ready to proceed?

8 MR. PATARINI: Your Honor, we have another
9 motion, and we have another matter that we would like -- I
10 would like to discuss with the Court.

11 THE COURT: All right.

12 MR. PATARINI: We have a motion in limine.
13 Your Honor, we were presented a number of records by the
14 Commonwealth involving telephone calls to the police by
15 Jazminka, the wife of my client.

16 There was records of a PFA. There were a number
17 of records that indicate that there was marital discourse
18 during the marital relationship of my client with his wife.

19 We would argue that, you know, right now I don't
20 know specifically what they intend to present, and we would
21 ask that they be specific and present an offer of proof --

22 THE COURT: Miss Necessary?

23 MS. NECESSARY: Your Honor, two basic areas.
24 I know Mr. Patarini has received a number of records
25 concerning the litigation between the victim and the

1 Defendant. And to that end, we would be presenting
2 evidence concerning this litigation which began, I believe,
3 with a protection from abuse petition which was filed -- I
4 believe there was some further litigation involving an ICC,
5 indirect criminal contempt complaint based on that
6 petition, and then there were several -- there was
7 litigation involving divorce proceedings, custody, support
8 and various other matters which required them to go to
9 court.

10 THE COURT: All this litigation taking place
11 in the real Criminal Division?

12 MS. NECESSARY: In Family Division, Your
13 Honor.

14 THE COURT: The real Criminal Division.

15 MS. NECESSARY: In a sense that's true. And
16 basically we would show that to show, as is admissible, the
17 prior bad relationship between the parties, which would go
18 to show intent and malice.

19 In addition, I also provided Mr. Patarini with a
20 report from Treda Anderson, a neighbor of the Lemos, who
21 overheard a threat made by the Defendant to the victim
22 approximately a year prior to the incident where he
23 threatened to kill her.

24 MR. PATARINI: Once again, these are
25 incidents that involve hearsay of the victim. They are --

1 the reports are completely one-sided. My client was never
2 represented by counsel. The circumstances under which --

3 THE COURT: Oh, not the PFA. The PFA has to
4 be under oath. She has to sign the petition, and she's
5 sworn under oath.

6 MS. NECESSARY: And to my understanding he
7 was represented by counsel because I have some letters from
8 his counsel -- actually -- I think that was for the
9 divorce. I don't know exactly what it was -- how often he
10 was represented, but he was certainly represented at least
11 part of the time.

12 MR. PATARINI: He was represented during some
13 of the family proceedings, but he never had counsel during
14 the PFA proceedings. There was a consent petition entered
15 into. His version was never presented.

16 What we would argue is he's in a situation where
17 he's going to have to try to defend against charges that he
18 has never been convicted of. It was a consent petition
19 that was entered into without --

20 THE COURT: You don't have to be convicted of
21 charges on a PFA. The PFA establishes the basis upon which
22 somebody's entitled to relief in the form of injunctive
23 relief to have somebody removed from the residence and can
24 stay away from the residence or family or separate criminal
25 sanctions by virtue of the violation of that particular

1 order, and he has the decision to make as to whether or not
2 he's going to defend that particular petition or he's going
3 to consent to the order. If he consents to the order, it's
4 an admission that those allegations are correct.

5 MR. PATARINI: I don't particularly agree
6 with whether that -- that the allegations are correct.
7 It's just that he consented to the order. I don't think
8 there is any --

9 THE COURT: Well, for the purpose of the
10 record, it's an admission that the allegations are correct.

11 MR. PATARINI: We would argue that it is
12 hearsay. It is highly prejudicial, that it's not -- it
13 does not -- it's not close in time to the actual incident.
14 There was not a factual basis to support the fact that
15 this -- that these incidents were in any way related to the
16 actual incident in which the victim was killed in this
17 particular case.

18 MS. NECESSARY: Your Honor, actually we would
19 be able to show that the relations between the parties were
20 ongoing from the time I suppose of the first PFA up until
21 shortly before this incident. There were ongoing --

22 THE COURT: How long before the incident was
23 the PFA filed?

24 MS. NECESSARY: I think the PFA was back in
25 2002 or 2003.

1 THE COURT: And it was continuing?

2 MS. NECESSARY: It was continuing. Yes. And
3 then there was a divorce. There was custody. There was,
4 in fact -- I believe the divorce papers were filed -- or
5 intention to finalize the divorce was filed approximately a
6 month prior to this incident.

7 THE COURT: That's relevant.

8 MR. PATARINI: We have another incident to
9 discuss.

10 THE COURT: Actually I can refer to my
11 expert, Mr. Goodyear. He knows all about PFA's.

12 MR. PATARINI: I believe my client wants to
13 proceed in a nonjury trial.

14 THE COURT: Okay.

15 MR. PATARINI: However, I discussed with
16 Ms. Necessary the fact that my expert would not be
17 available to testify tomorrow. He's available to testify
18 all day today, but he's not going to be --

19 THE COURT: Well, we'll take him out of
20 order.

21 MR. PATARINI: To have him testify today?

22 THE COURT: Sure.

23 MS. NECESSARY: Your Honor, could we -- I
24 really would prefer to have a little bit more time --

25 THE COURT: I understand that you would

1 prefer that way. The problem is I don't have that luxury.
2 I've got another homicide that's picking that because of
3 some problems they're not going to be able to pick today.
4 They're going to pick tomorrow and hope to get it started
5 Monday. And I've got a time problem on that one.

6 THE CLERK: We also have another jury picking
7 right now.

8 THE COURT: I've also got another jury that's
9 going to be starting supposedly at 1:30 this afternoon.

10 MS. NECESSARY: Your Honor, my suggestion was
11 I'm going to be away next week anyway. I was going to
12 suggest that if we do all the factual things and go as far
13 as we can this week, the Commonwealth should be able to get
14 their case in today and probably part of tomorrow, and then
15 recess until the week after and present our doctors,
16 because I believe that would be Dr. Bernstein that
17 Mr. Patarini is going to present, and then I have
18 Dr. Wright in rebuttal. And so that would --

19 THE COURT: Mr. Patarini?

20 MS. NECESSARY: Since it's a nonjury trial --

21 MR. PATARINI: We can't do it -- it's my
22 understanding we can't do it next week and would have to do
23 it the week after? I don't see why that would be a problem
24 if I can just make a phone call.

25 THE COURT: Sure.

1 MR. PATARINI: My expert is always very
2 cooperative, always very flexible. This is the first time
3 in all the times I've used him that he said I just can't do
4 it at a certain time.

5 THE COURT: Go ahead and make the call.

6 THE CLERK: Are either one of you attending
7 the CLE's on the 4th or 5th?

8 MS. NECESSARY: I was signed up for it, but
9 I'm not --

10 THE CLERK: Okay. How is your Thursday,
11 February 12, looking, Jan?

12 MS. NECESSARY: I could probably do it that
13 way if that's okay with Mr. Patarini.

14 (A discussion was held off the record.)

15 THE CLERK: Chris is available Monday, the
16 morning of the 2nd, the p.m. of the 4th and p.m. on Friday,
17 the 6th.

18 THE COURT: Put it in March.

19 MR. PATARINI: Thank you.

20 THE COURT: I just don't want to do it
21 piecemeal.

22 THE CLERK: Friday, March 6; and if we have
23 to continue, through Monday, March 9 and 10.

24 MR. PATARINI: That's fine with me, but could
25 we check with our experts?

1 THE CLERK: Sure. 6th, 9th and 10th. How
2 about checking with the 11th through the 13th?

3 (Proceedings were adjourned at 10:18 a.m.)

4 - - -

5 10:35 a.m.

6 MR. PATARINI: Your Honor, we're proceeding
7 with the trial today; correct?

8 THE COURT: Yes.

9 MR. PATARINI: Your Honor, I had gone through
10 the entire waiver with my client over in the jail in which
11 I explained everything in great detail with my translator.
12 We spent like at least an hour just on the waiver for the
13 nonjury trial. And I'm prepared to do the waiver again,
14 which I'm just going to go through the actual terms --

15 THE COURT: I would rather do it at the time
16 we do the trial. That way I don't get someone changing
17 their mind.

18 MR. PATARINI: That's what I mean. Are we
19 doing the trial today?

20 THE COURT: I thought we were doing it --

21 THE CLERK: That was the expert witness.

22 THE COURT: Oh, I thought -- okay. That's
23 why I told --

24 THE CLERK: That's okay. I can stop them.

25 THE COURT: We're going to do everything in

1 March.

2 MR. PATARINI: All right.

3 THE COURT: There's just too many things
4 going on.

5 THE CLERK: So those days that we had spoken
6 about, March 11, 12 and 13?

7 MR. PATARINI: I'm free. That's fine with
8 me. Like I said, he's free on the 12th. They'll
9 definitely be here.

10 THE CLERK: How long is his testimony?

11 MR. PATARINI: His testimony is not long.
12 His testimony should be less than an hour, more likely a
13 half hour.

14 MS. NECESSARY: But the thing is when do we
15 start the trial, because that's at the end? That makes a
16 difference in my schedule.

17 THE CLERK: He can always be taken out of
18 order, can he not, and at least preserve his testimony?

19 MR. PATARINI: So are we going to get the
20 trial date now?

21 THE CLERK: Let's plan on a date certain of
22 Wednesday, March 11.

23 MS. NECESSARY: That's the only trouble. I
24 have a trial starting on the 9th, a homicide.

25 THE CLERK: With the exception of the

1 expert --

2 MR. PATARINI: I have nothing other than the
3 expert.

4 THE CLERK: How much do you have to put on?

5 MS. NECESSARY: I would say a day, a full day
6 anyway.

7 THE CLERK: Would Thursday, the 12th, give
8 you a better window of opportunity as opposed to Wednesday,
9 the 11th?

10 MS. NECESSARY: Well, his doctor is coming in
11 the morning.

12 MR. PATARINI: No. He can also be available
13 on the 13th in the afternoon. The 13th? The 12th for the
14 trial?

15 MS. NECESSARY: If that's okay with the
16 people here.

17 THE CLERK: Do you want to check with them
18 too?

19 MR. PATARINI: The 12th is fine with me, and
20 my expert will be available on the 13th. I will call him
21 right now.

22 THE CLERK: Your Honor, Thursday, March 12.

23 THE COURT: Okay.

24 (Proceedings were adjourned at 10:45 a.m.)

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3 COMMONWEALTH OF PENNSYLVANIA)

4 COUNTY OF ALLEGHENY)

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7 CERTIFICATE OF REPORTER

8

9 I, Deborah L. Rowe, do hereby certify that the
10 evidence and proceedings are contained accurately in the
11 machine shorthand notes taken by me at the trial of the
12 within cause, and that the same were transcribed under my
13 supervision and direction, and that this is a correct
14 transcript of the same.

15

16

Deborah L. Rowe
16 Deborah L. Rowe, RMR, CRR
17 Registered Merit Reporter
18 Certified Realtime Reporter

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