

1 VAN NUYS, CALIFORNIA; FRIDAY, APRIL 5, 1996

2 11:10 A.M.

3 DEPARTMENT NW "N" HON. STANLEY M. WEISBERG, JUDGE

4 (APPEARANCES AS HERETOFORE NOTED.)

5 (MARILYN A. FADALE, OFFICIAL REPORTER.)

6 (MARY LU MURPHY, OFFICIAL REPORTER.)

7

8 THE COURT: IN THE TRIAL, DEFENDANTS ARE IN  
9 COURT WITH THEIR LAWYERS, THE PEOPLE ARE HERE.

10 WE HAVE SOME MATTERS TO DISCUSS. IT  
11 WOULD SEEM THAT AT THIS STAGE WE WON'T BE ABLE TO  
12 DEAL WITH THE JURY, SINCE THEY ARE ONLY HERE UNTIL  
13 NOON. THERE'S SOME ISSUES THAT THE LAWYERS WANT TO  
14 BRING TO THE COURT'S ATTENTION.

15 IS IT AGREEABLE THAT THE JURY BE EXCUSED  
16 WITHOUT HAVING THEM COME TO THE COURTROOM, WITH THE  
17 STIPULATION THAT THEY BE DEEMED PROPERLY TO HAVE  
18 BEEN ADMONISHED DURING THEIR ABSENCE?

19 MR. GESSLER: YES, YOUR HONOR.

20 MR. CONN: YES, YOUR HONOR.

21 MR. LEVIN: YES, YOUR HONOR.

22 THE COURT: WE'LL ASK THAT THE BAILIFF  
23 INDICATE TO THE JURY, OR APOLOGIZE, THAT WE WON'T BE  
24 ABLE TO USE THEM THIS MORNING, BUT THEY ARE TO  
25 RETURN MONDAY AT 8:30.

26 THE COURT ALSO RECEIVED A REQUEST ON  
27 BEHALF OF THE COUNSEL FOR THE LOS ANGELES TIMES FOR  
28 ACCESS TO TRANSCRIPTS OF PROCEEDINGS THAT OCCURRED

1 YESTERDAY AFTERNOON IN COURT WITHOUT THE PUBLIC  
2 PRESENT, AND TO SOME EXTENT, WITHOUT THE DISTRICT  
3 ATTORNEY PRESENT.

4 I MET AND CONFERRED WITH THE LAWYERS  
5 THIS MORNING, INDICATING THAT MY VIEW WAS THAT, TO  
6 AT LEAST A GREAT EXTENT, THE TOTALITY OF THINGS  
7 DISCUSSED WERE NOT PRIVILEGED OR SUBJECT TO BEING  
8 SEALED, AND MY INCLINATION WAS TO HAVE THEM  
9 RELEASED, THE TRANSCRIPTS RELEASED. BUT I WOULD  
10 PROVIDE COUNSEL FOR EACH DEFENDANT AN OPPORTUNITY TO  
11 REVIEW THE TRANSCRIPTS AND ASSERT ANY PARTICULAR  
12 CLAIMS OF PRIVILEGE THAT THEY FEEL IS APPROPRIATE.

13 WE'LL GET TO THAT; NOT AT THIS STAGE,  
14 BUT --

15 MR. GESSLER: OKAY.

16 THE COURT: ONE OF THE THINGS THAT OCCURRED  
17 THIS MORNING WAS THE COURT INDICATED THAT TO  
18 COUNSEL, SO AMONG OTHERS, MR. GESSLER COULD REVIEW  
19 THE TRANSCRIPTS WITH THOSE REMARKS IN MIND, AND  
20 WE'LL RESOLVE THAT TODAY AS WELL.

21 ALL RIGHT. THEN LET'S PROCEED WITH  
22 ISSUES THAT WERE BROUGHT UP YESTERDAY DEALING WITH  
23 VARIOUS MOTIONS THAT THE DEFENDANTS INDICATED THEY

24 INTENDED TO PURSUE.

25 WHO IS IT THAT WISHES TO DEAL WITH THAT  
26 FIRST?

27 MR. GESSLER: WELL, I THINK WE DO AT THIS  
28 POINT.

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1 ON BEHALF OF LYLE MENENDEZ, YOUR HONOR,  
2 WE, AT THIS POINT, ARE MOVING FOR A MISTRIAL ON HIS  
3 BEHALF ON THE GROUND THAT I BELIEVE INEFFECTIVE  
4 ASSISTANCE OF COUNSEL, BY CO-COUNSEL, MS. ABRAMSON,  
5 FOR ERIK MENENDEZ, HAS IRREVOCABLY DAMAGED LYLE  
6 MENENDEZ' CHANCES FOR A FAIR AND INDIVIDUALIZED  
7 DETERMINATION OF LIFE AND DEATH FROM THIS JURY  
8 PANEL. AND THAT'S BASED ON TWO GROUNDS:  
9 ONE, THAT IT WAS INEFFECTIVE ASSISTANCE  
10 OF COUNSEL, FOR MRS. ABRAMSON TO CALL DR. VICARY,  
11 KNOWING THE INCONSISTENT STATEMENTS THAT WERE THERE  
12 IN CERTAIN NOTES THAT HAD BEEN TURNED OVER TO THE  
13 DISTRICT ATTORNEYS, SO THAT HE WAS VULNERABLE TO  
14 CROSS-EXAMINATION ON THAT FROM HER CLIENT, ERIK  
15 MENENDEZ, WHO, OF COURSE, WAS ALSO A WITNESS FOR US  
16 AT THE GUILT TRIAL.  
17 THIS NEVER WOULD HAVE COME IN AT AN  
18 INDIVIDUALIZED PENALTY TRIAL FOR LYLE MENENDEZ, HAD

19 WE HAD A SEVERANCE, BECAUSE WE IN NO WAY WOULD HAVE  
20 CALLED DR. VICARY.

21 AND THE SECOND GROUNDS FOR MISTRIAL IS,  
22 AGAIN, ON INEFFECTIVE ASSISTANCE OF COUNSEL FOR ERIK  
23 MENENDEZ, BECAUSE AT THIS POINT, IT APPEARS TO THE  
24 JURY, RIGHTLY OR WRONGLY, THAT THERE HAS BEEN  
25 MISCONDUCT ENGAGED IN, IN EFFECT, TRYING TO DELETE  
26 NOTES; AND BY DR. VICARY'S SWORN TESTIMONY IN FRONT  
27 OF THE JURY THAT THERE WAS TESTIMONY LEFT OUT, OR  
28 NOT -- BUT INFORMATION LEFT OUT OF HIS NOTES ON THE

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1 LAST HALF PAGE AT THE REQUEST OF LESLIE ABRAMSON,  
2 BECAUSE IT WAS PREJUDICIAL AND OUT OF BOUNDS, AND  
3 THAT THIS OCCURRED, THIS CONVERSATION, AND  
4 APPARENTLY ACT, OCCURRED BEFORE THE FIRST TRIAL.

5 SURPRISINGLY, THE DISTRICT ATTORNEY HAS  
6 ALL THE INFORMATION, WHICH IS USUALLY I THINK THE  
7 REVERSE; THAT IF NOTES ARE REDACTED, IT'S THAT THE  
8 DISTRICT ATTORNEY GETS LESS THAN THE FULL, NOT MORE  
9 THAN THE FULL. BUT IN THIS CASE THEY HAVE IT ALL.

10 AND YET THE WITNESS ON THE STAND IS  
11 TESTIFYING THAT HE WAS TOLD, IN CONSULTATION WITH  
12 MS. ABRAMSON, TO REMOVE CERTAIN THINGS.

13

14 AND SPECIFICALLY, ONE OF THOSE THINGS WAS A PRIOR  
15 STATEMENT ABOUT A MAN, A HOMOSEXUAL LOVER OF JOSE  
16 MENENDEZ, TELLING THE YOUNG MEN THEY WERE GOING TO  
17 BE KILLED BY THEIR PARENTS, WHICH WAS REDACTED.

18 AND THEN IT GOT INTO THE REASONS WERE  
19 THAT ERIK LATER SAID IT WAS A LIE.

20 NOW, THE PROBLEM IS, WITHOUT BEING GONE  
21 INTO ANY FURTHER, IT LOOKS TO THE JURY AS THOUGH  
22 THIS WAS MISCONDUCT ON BEHALF OF CO-COUNSEL. IT  
23 LOOKS AS THOUGH IT WAS PERHAPS TAMPERING WITH OR  
24 MANUFACTURING A DEFENSE, OR KEEPING OUT INFORMATION  
25 THAT THE JURY MAY HAVE WANTED TO KNOW ABOUT THE  
26 DEFENSE; AND IT CERTAINLY SEEMS TO SPILL OVER BADLY  
27 ONTO LYLE MENENDEZ, WHO HAS NOTHING TO DO WITH  
28 THIS. HE DIDN'T CALL THE WITNESS. HE HASN'T

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1 TESTIFIED IN THE CASE. AND TO MAKE IT LOOK LIKE  
2 HE'S A PART OF THIS PROCESS, OF A MANUFACTURED  
3 DEFENSE.

4 TO CORRECT THAT -- IF COUNSEL ON  
5 REDIRECT ATTEMPTS TO CORRECT THAT PARTICULAR  
6 PASSAGE, THAT GETS INTO PRIVILEGED INFORMATION THAT  
7 I MENTIONED TO THE COURT YESTERDAY WHEN WE WERE IN  
8 CAMERA, THREE PAGES OF THAT PARTICULAR MATTER, WHICH

9 WOULD VIOLATE LYLE MENENDEZ' 6TH AMENDMENT, 8TH, AND  
10 14TH-AMENDMENT RIGHTS; AND PARTICULARLY, THE PEOPLE  
11 VERSUS ANDERSON CASE.

12 TO STRAIGHTEN THAT OUT ON BEHALF OF ERIK  
13 MENENDEZ, WOULD UNFORTUNATELY, CALL FOR INADMISSIBLE  
14 EVIDENCE TO BE BROUGHT IN IN VIOLATION OF PRIVILEGE,  
15 THAT WOULD AGAIN IMPACT LYLE MENENDEZ UNDER BOTH  
16 STATE AND FEDERAL LAW.

17 SO I SEE NO SOLUTION TO THIS. WE CAN'T,  
18 FROM LYLE MENENDEZ' SITUATION, LET IT GO ON  
19 UNANSWERED BEFORE THE JURY, THAT IT LOOKS LIKE THERE  
20 HAS BEEN A MANUFACTURED DEFENSE, OR AN ATTEMPT TO  
21 MANUFACTURE A DEFENSE PUT BEFORE THEM.

22 ON THE OTHER HAND, WE CAN'T CORRECT IT  
23 EITHER, BECAUSE THAT WOULD IMPACT LYLE MENENDEZ'  
24 RIGHTS. I'M PUT IN A QUANDARY. THERE'S NO WAY I  
25 CAN PROCEED FAIRLY AND PROTECT LYLE MENENDEZ' RIGHTS  
26 BEFORE THIS JURY.

27 THE COURT: OKAY.

28 BEFORE I HEAR THE PEOPLE'S RESPONSE, I

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1 INDICATED TO COUNSEL THIS MORNING AND YESTERDAY THAT  
2 THE COURT NEEDED FURTHER INFORMATION REGARDING THESE  
3 REDACTIONS, AND REGARDING THE NOTES THEMSELVES, SO

4 THAT I HAVE SOME BACKGROUND AS TO HOW THESE EVENTS  
5 OCCURRED, AND HOW FURTHER INFORMATION MIGHT BE  
6 BROUGHT TO THE JURY'S ATTENTION DURING EXAMINATION  
7 BY EITHER COUNSEL FOR ERIK MENENDEZ, LYLE MENENDEZ,  
8 OR THE PROSECUTION.

9 SO LET ME START WITH THE PROSECUTION TO  
10 INQUIRE OF YOU WHEN IT WAS THAT THE PROSECUTION  
11 FIRST OBTAINED THE NOTES FROM WHICH YOU WERE  
12 EXAMINING DR. VICARY YESTERDAY, MR. CONN OR  
13 MS. NAJERA?

14 MS. NAJERA: I CAN RESPOND ON BEHALF --

15 MR. LEVIN: I'M SORRY. BEFORE THE -- BEFORE  
16 THE PROSECUTION RESPONDS, I THINK THERE SHOULD BE  
17 SOME PROTECTION AFFORDED TO THE DEFENSE AT THIS TIME  
18 WITH RESPECT TO ANY REVELATION THAT THE PROSECUTION  
19 MIGHT MAKE IN OPEN COURT ABOUT INFORMATION THAT WE  
20 DEEM IS PRIVILEGED AND PROPERLY REDACTED; AND  
21 THEREFORE --

22 THE COURT: I'M NOT ASKING FOR THE CONTENTS  
23 AT THIS POINT. I'M ASKING FOR WHAT MATERIAL WAS  
24 OBTAINED.

25 MR. LEVIN: THAT'S FINE.

26 THE COURT: WE'LL GET INTO SPECIFICS LATER ON  
27 AS FAR AS THE CONTENT.

28 MY QUESTION WAS: AS TO THE NOTES THAT

1 MR. CONN WAS USING IN HIS EXAMINATION, THOSE PIECES  
2 OF PAPER, WHEN WAS IT THAT THE PROSECUTION FIRST WAS  
3 IN POSSESSION OF THEM?

4 MS. NAJERA: YOUR HONOR, WE OBTAINED THEM  
5 APPROXIMATELY A MONTH AND A HALF TO TWO MONTHS AGO.

6 BUT I THINK I'M THE PERSON IN THE  
7 POSITION TO GIVE THE HISTORY OF HOW WE GOT THEM AND  
8 WHAT HAPPENED WITH THE WHOLE SITUATION THERE.

9 THE COURT: OKAY.

10 MS. NAJERA: IF I MAY, YOUR HONOR.

11 THE COURT: YES.

12 MS. NAJERA: OKAY. WELL, APPARENTLY, WHEN I  
13 HEARD THAT DR. VICARY HAD -- ON THE STAND HE STATED  
14 THAT HE HAD THE UNTAMPERED WITH NOTES -- BEFORE THE  
15 LAST TRIAL HE GOT TOGETHER WITH MS. ABRAMSON, AND AT  
16 HER REQUEST HE CHANGED THEM.

17 NOW, AT SOME POINT AFTER THAT -- AND I  
18 LOOKED AT THE TRANSCRIPT. IT WAS RIGHT AFTER  
19 DR. VICARY TESTIFIED. THERE IS IN THE TRANSCRIPT A  
20 COMMENT THAT MS. ABRAMSON GAVE MS. BOZANICH 101  
21 PAGES, AND MS. BOZANICH ACKNOWLEDGED THAT SHE GOT  
22 101 PAGES OF A DOCUMENT.

23 I SEARCHED FOR THAT DOCUMENT, AND  
24 COULDN'T IMMEDIATELY FIND THEM. SO --

25 THE COURT: AGAIN, I WANT TO KNOW WHEN IT WAS  
26 THAT YOU HAD THE MATERIAL THAT MR. CONN WAS USING  
27 YESTERDAY. WHERE DID YOU FIRST GET THAT? AND THEN



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1 YESTERDAY.

2 WHEN DID YOU GET THE MATERIAL AND HOW

3 DID YOU OBTAIN IT?

4 MS. NAJERA: THE DOCUMENT THAT WE RECEIVED --

5 I JUST WANT TO MAKE SURE THIS IS CLEAR. THE

6 DOCUMENT WE'RE USING WE RECEIVED A MONTH AND A HALF

7 TO TWO MONTHS AGO. THE COURT HAD SOME CONCERN THAT

8 THIS WAS A DOCUMENT THAT HE BELIEVED WAS THE SAME

9 DOCUMENT GIVEN TO MRS. BOZANICH --

10 THE COURT: ONE THING AT A TIME. THE

11 DOCUMENT YOU GOT THAT YOU'RE USING, MR. CONN WAS

12 USING YESTERDAY, YOU GOT ONE AND A HALF TO TWO

13 MONTHS AGO?

14 MS. NAJERA: CORRECT.

15 THE COURT: WHERE DID YOU GET IT?

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1 MS. NAJERA: WE GOT THAT FROM REQUESTING IT FROM  
2 DR. DIETZ.

3 THE COURT: AND WHEN YOU GOT IT FROM DR. DIETZ,  
4 WAS THIS BEFORE OR AFTER DR. DIETZ HAD TESTIFIED, IF YOU  
5 REMEMBER?

6 MS. NAJERA: THIS WOULD BE ABOUT THE SAME TIME  
7 THAT DR. DIETZ WAS TESTIFYING.

8 THE COURT: DID YOU HAVE -- MR. CONN, DID YOU  
9 HAVE THESE NOTES AT THE TIME DR. DIETZ TESTIFIED?

10 MR. CONN: I DON'T KNOW IF WE ACTUALLY HAD THE  
11 NOTES ON THE VERY DAYS THAT HE WAS TESTIFYING.

12 WHAT HAPPENED WAS THAT JUST BEFORE  
13 DR. DIETZ TESTIFIED, HE WAS PROVIDED BY DEFENSE COUNSEL,  
14 MS. ABRAMSON, WITH A BOX OF MATERIAL FOR HIM TO REVIEW.  
15 AND AT THE TIME, IN PREPARATION OF THE -- IN  
16 ANTICIPATION OF THE REBUTTAL TESTIMONY FROM DR. VICARY,  
17 WE WANTED TO REVIEW DR. VICARY'S NOTES.

18 SINCE OUR OFFICES ARE DOWNTOWN, WE LOOKED  
19 FOR OUR COPY OF DR. VICARY'S NOTES HERE IN VAN NUYS, AND  
20 WE WERE UNABLE TO FIND OUR COPY OF DR. VICARY'S NOTES.

21           SO, RATHER THAN GO BACK DOWNTOWN AND  
22 CONDUCT A FULL SEARCH FOR DR. VICARY'S NOTES, WE JUST  
23 PUT IN A PHONE CALL TO DR. DIETZ, AND WE ASKED DR. DIETZ  
24 IF HE COULD PROVIDE US WITH A COPY OF DR. DIETZ'S -- OF  
25 DR. VICARY'S NOTES THAT WERE PROVIDED TO HIM BY LESLIE  
26 ABRAMSON.

27           SO HE PROVIDED US WITH A COPY THAT I WAS  
28 USING YESTERDAY, WHICH IS DR. VICARY'S ORIGINAL NOTES.

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1           SINCE THIS ALL CAME TO LIGHT, WE DID GO  
2 BACK DOWNTOWN TO SEE IF WE COULD FIND THE COPY THAT WAS  
3 PROVIDED TO DEPUTY DISTRICT ATTORNEY PAMELA BOZANICH IN  
4 THE FIRST TRIAL, AND WE DID, IN FACT, FIND THAT COPY,  
5 AND THAT COPY IS A REVISED COPY OF NOTES.

6           SO THE PROSECUTION WAS NEVER PROVIDED WITH  
7 THE ORIGINAL NOTES OF DR. VICARY. INSTEAD, WE OBTAINED  
8 THE ORIGINAL NOTES ONLY BECAUSE LESLIE ABRAMSON  
9 ACCIDENTALLY TURNED THEM OVER TO DR. DIETZ.

10       THE COURT: DO YOU HAVE THEN THE COPY OF THE  
11 NOTES THAT WERE -- OR THE COPY THAT WAS GIVEN TO  
12 MRS. BOZANICH IN 1993?

13       MS. NAJERA: YES.

14       MR. CONN: YES.

15       THE COURT: ALL RIGHT. AND THAT WAS IN YOUR  
16 MATERIALS IN YOUR OFFICE DOWNTOWN?

17 MS. NAJERA: YES.

18 MR. CONN: YES. CORRECT, YOUR HONOR.

19 AND WE ALSO CALLED DEPUTY DISTRICT ATTORNEY  
20 BOZANICH, AND SHE INDICATED TO US THAT THIS IS THE ONE  
21 AND ONLY COPY THAT SHE EVER RECEIVED FROM THE DEFENSE,  
22 AND SHE MADE NO COPIES OF IT.

23 THE COURT: AND THEN WHEN YOU WERE EXAMINING  
24 DR. DIETZ, HAD YOU SEEN OR READ THESE NOTES OF DR.  
25 VICARY AS OF THAT TIME WHEN YOU WERE EXAMINING DR.  
26 DIETZ?

27 MR. CONN: WHICH NOTES IS THE COURT REFERRING TO?

28 THE COURT: DR. VICARY'S NOTES, EITHER VERSION.

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1 MR. CONN: SOMETIME AGO, WHEN I FIRST CAME ON THE  
2 CASE, I BELIEVE THAT I DID READ DR. VICARY'S REVISED  
3 NOTES; THAT IS, THE COPY THAT WAS GIVEN TO DEPUTY  
4 DISTRICT ATTORNEY BOZANICH.

5 AND THEN ONCE I OBTAINED THE ORIGINAL NOTES  
6 FROM DR. DIETZ, THAT WAS THE COPY THAT I WAS WORKING  
7 WITH. AND AS I WAS CROSS-EXAMINING DR. VICARY, I JUST  
8 ASSUMED THAT EVERYONE IN THE COURTROOM WAS WORKING FROM  
9 THE SAME SET OF NOTES.

10 THE COURT: OKAY. AND THEN THESE COPIES OF THE  
11 NOTES YOU GOT ONE AND-A-HALF, TWO MONTHS AGO FROM  
12 DR. DIETZ?

13 MR. CONN: THAT'S CORRECT.

14 THE COURT: OKAY.

15 AND THEN THE -- AT THE TIME DR. WILSON WAS  
16 TESTIFYING IN THIS MATTER, AND HAD TESTIFIED TO THE  
17 NOTES OF WITNESSES, AND SPECIFICALLY NOTES OF  
18 DR. VICARY, AT THAT TIME YOU WERE STILL ONLY IN THE  
19 POSSESSION OF NOTES THAT MS. BOZANICH HAD OBTAINED FROM  
20 MS. ABRAMSON?

21 MR. CONN: RIGHT. WE WERE IN POSSESSION, BUT  
22 THEY ACTUALLY WEREN'T HERE IN THE BUILDING. THEY WERE  
23 DOWNTOWN IN THE CRIMINAL COURTS BUILDING, AND I DIDN'T  
24 EVEN REVIEW THEM AT THAT POINT IN TIME.

25 THE COURT: OKAY. AND AS I LOOK AT THE  
26 TRANSCRIPT OF DECEMBER THE 1ST, 1993, THAT APPEARS TO BE  
27 THE TIME IN WHICH -- OR THE DATE ON WHICH THOSE NOTES  
28 WERE PROVIDED TO MRS. BOZANICH. THIS IS REFLECTED IN

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1 THE TRANSCRIPT. OKAY.

2 NOW, DO YOU KNOW IF DR. DIETZ KEPT A COPY  
3 OF THOSE NOTES, OR HE SENT YOU ALL THE MATERIALS THAT HE  
4 HAD?

5 MR. CONN: NO. HE STILL HAS A CLEAN COPY OF  
6 THOSE NOTES.

7 THE COURT: ALL RIGHT.

8 NOW, THAT GIVES ME SOME INFORMATION AS TO

9 HOW THE PROSECUTION OBTAINED THIS MATERIAL.

10 DID COUNSEL FOR ERIK MENENDEZ WISH TO  
11 AMPLIFY THE RECORD AS TO HOW THESE EVENTS OCCURRED?

12 MR. LEVIN: YES, YOUR HONOR.

13 I MUST STATE THAT I AM IN SOMEWHAT OF AN  
14 UNUSUAL AND DELICATE SITUATION.

15 AS I UNDERSTAND IT, AT THIS POINT IN TIME  
16 THE COURT IS ATTEMPTING TO CONDUCT AN INQUIRY ON ITS OWN  
17 TO DETERMINE HOW THESE NOTES GOT IN THE POSSESSION OF  
18 THE PROSECUTION, HOW IT WAS THAT DR. VICARY CHANGED HIS  
19 NOTES, THE CIRCUMSTANCES SURROUNDING THE CHANGING OF THE  
20 NOTES, WHO WAS RESPONSIBLE FOR THOSE CHANGES, AND WHY  
21 THEY WERE MADE.

22 AND AS I INDICATED TO THE COURT YESTERDAY,  
23 I NEEDED SOME TIME TO DETERMINE, AS BEST I COULD, NOT  
24 ONLY MY POSITION IN THIS CASE WITH RESPECT TO ERIK  
25 MENENDEZ AS HIS ATTORNEY, MY POSITION WITH MS. ABRAMSON  
26 AS HER BEING MY CO-COUNSEL, AND WHAT MY DUTIES AND  
27 RESPONSIBILITIES WOULD BE FROM THIS POINT FORWARD; AND  
28 ALSO, TO TRY TO DETERMINE WHAT, IF ANY, LEGAL ISSUES

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1 SHOULD BE RAISED TO THIS COURT AT THIS TIME.

2 AND I THINK THAT BEFORE I ADDRESS TO THE  
3 COURT ANY ISSUE WITH RESPECT TO ITS INQUIRY, I ASK THIS  
4 COURT TO CONSIDER THE FACT THAT THIS ISSUE, WITH RESPECT

5 TO THE QUESTIONING OF DR. VICARY, WAS OPENED UP BY THE  
6 PROSECUTION, AND TO NOTE THAT ALL DR. VICARY WAS CALLED  
7 TO TESTIFY FOR WAS ON THE ISSUE OF HIS UNDERSTANDING OF  
8 ERIK MENENDEZ'S POST-CRIME STATE OF MIND, AND ANY CHANGE  
9 IN HIS BEHAVIOR, HIS PERSONALITY, HIS DEMEANOR FROM THE  
10 TIME HE WAS TAKEN INTO CUSTODY TO THE PRESENT TIME, AND  
11 ALSO TO STATE AN OPINION TO THE JURY IN PROPER PENALTY  
12 PHASE DETERMINATION, WHAT VALUE ERIK MENENDEZ WOULD  
13 HAVE, IF INDEED HE WERE SENTENCED TO LIFE IN PRISON  
14 WITHOUT THE POSSIBILITY OF PAROLE.

15 AND THAT'S ALL THAT DR. VICARY WAS CALLED  
16 TO TESTIFY FOR.

17 THE PROSECUTION, ONCE IT REALIZED THAT IT  
18 HAD HAD A CHANGE IN -- OR A DIFFERENCE WITH RESPECT TO  
19 THE NOTES THAT IT HAD IN ITS POSSESSION, IT CHANGED ITS  
20 FOCUS AND ATTACKED DR. VICARY, ATTACKED LESLIE ABRAMSON,  
21 ATTACKED ERIK MENENDEZ; GOING AFTER ERIK MENENDEZ'S  
22 STATE OF MIND AND CREDIBILITY ON ISSUES THAT WERE NOT  
23 RAISED BY THE DEFENSE IN THE CALLING OF  
24 DR. VICARY, TO ATTEMPT TO IMPEACH ERIK MENENDEZ'S  
25 CREDIBILITY WITH RESPECT TO HIS TESTIMONY IN THE GUILT  
26 PHASE.

27 NOT ONLY WAS THIS IRRELEVANT, IT WOULD BE  
28 AN IMPROPER, NON-STATUTORY FACTOR IN AGGRAVATION FOR

1 THIS JURY TO CONCLUDE THAT WHETHER OR NOT THE INFERENCE  
2 THAT MS. ABRAMSON DID ANYTHING WRONG, OR THE INFERENCE  
3 THAT DR. VICARY DID ANYTHING WRONG, IT'S THE ISSUE WITH  
4 RESPECT TO HOW IT SPILLS OVER TO ERIK MENENDEZ IN THE  
5 PENALTY PHASE OF A CAPITAL CASE, AND CAN THAT BE  
6 DETERMINED BY A JURY TO BE AN AGGRAVATING FACTOR TO  
7 JUSTIFY A DEATH SENTENCE? AND I SUBMIT TO THIS COURT  
8 THAT IT CANNOT.

9       AND SO WHERE WE ARE IN THE STATE OF THIS  
10 PROCEEDINGS NOW IS WITH THIS INFERENCE LOOMING OUT  
11 THERE, WITH AN INABILITY FOR ANY APPELLATE COURT DOWN  
12 THE ROAD TO EVER DETERMINE, IF THERE IS A DEATH SENTENCE  
13 IN THIS CASE, AS TO WHETHER THEY DECIDED THAT THE DEATH  
14 SENTENCE WAS APPROPRIATE FOR ERIK MENENDEZ BECAUSE OF  
15 WHAT HE TRULY DID IN CONNECTION WITH THIS CASE, OR WHAT  
16 HAS BEEN ALLUDED TO BY THE PROSECUTION IN THEIR  
17 PREPARATION, IN THEIR PRESENTATION OF THE  
18 CROSS-EXAMINATION OF DR. VICARY, TO IMPUGN THE  
19 CREDIBILITY OF ERIK MENENDEZ FOR A REASON WHICH THE  
20 WITNESS WAS NEVER CALLED.

21       AND THAT'S OUR PROBLEM AT THE PRESENT TIME,  
22 IS THAT THE PROSECUTION IS PROCEEDING WITH A WITCH-HUNT  
23 AGAINST MS. ABRAMSON. RIGHTLY OR WRONGLY, IT'S  
24 IRRELEVANT.

25       WHAT WE ARE HERE TO DO IS TO ENSURE THAT  
26 JUSTICE IS DONE WITH RESPECT TO THE PENALTY PHASE OF  
27 ERIK MENENDEZ.

28       THE COURT: OKAY. LET ME GIVE YOU MY RESPONSE TO



1 THAT, WITHOUT HEARING FROM THE PROSECUTION AT THIS  
2 POINT.

3 THE ISSUES THAT THE JURY IS CALLED UPON TO  
4 DECIDE IN THE PENALTY PHASE ARE VERY SIMPLE AND CLEAR  
5 CUT: WHAT THE PUNISHMENT SHOULD BE.

6 AND THE EVIDENCE THAT THEY ARE ENTITLED TO  
7 CONSIDER IS ALL THE EVIDENCE PRESENTED IN THE GUILT  
8 PHASE, AS WELL AS THE EVIDENCE PRESENTED IN THE PENALTY  
9 PHASE.

10 AND MUCH OF THE EVIDENCE IN THE GUILT  
11 PHASE -- AT LEAST ON BEHALF OF THE DEFENSE -- WAS THE  
12 TESTIMONY OF ERIK MENENDEZ. HIS CREDIBILITY WAS  
13 SUBSTANTIALLY AT ISSUE DURING THE GUILT PHASE. IT  
14 REMAINS SUBSTANTIALLY AT ISSUE IN THE PENALTY PHASE.

15 WITNESSES CALLED BY THE DEFENSE VOUCHERED FOR  
16 THE CREDIBILITY OF ERIK MENENDEZ; THE MOST RECENT BEING  
17 THE WITNESS WHO TESTIFIED JUST BEFORE DR. VICARY, WAS  
18 ASKED SPECIFICALLY: "DO YOU BELIEVE ERIK MENENDEZ?"

19 CREDIBILITY WAS BROUGHT OUT IN THE PENALTY  
20 PHASE BY THE DEFENSE.

21 SO AS CREDIBILITY REMAINS AN ISSUE RELATING  
22 TO THE FACTS AND CIRCUMSTANCES OF THE CRIME, HIS  
23 CREDIBILITY IS AN ISSUE BECAUSE OF THAT, WHICH IS A FACT  
24 THAT THE JURY IS ENTITLED TO CONSIDER. THE FACTS AND  
25 CIRCUMSTANCES OF THE CRIME AND HIS TESTIMONY ABOUT THE

26 CRIME AND WHAT OCCURRED IS CERTAINLY A FACT THAT THE  
27 JURY IS ENTITLED TO CONSIDER.  
28 THE TESTIMONY OF DR. VICARY, THE

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1 EXAMINATION OF DR. VICARY, WAS CERTAINLY APPROPRIATE.  
2 FURTHERMORE, JUST THE NATURE OF THE DIRECT  
3 EXAMINATION OF DR. VICARY -- ALTHOUGH YOU SAY THAT THERE  
4 WERE CERTAIN REASONS WHY HE WAS CALLED, THE NATURE OF  
5 HIS EXAMINATION OPENED UP THE AREA OF INQUIRY ON  
6 CROSS-EXAMINATION THAT WAS ACCOMPLISHED BY THE QUESTION  
7 ASKED OF DR. VICARY BY MR. CONN.  
8 SO I FIND THAT THAT EXAMINATION WAS  
9 PROPERLY WITHIN THE SCOPE OF THE DIRECT EXAMINATION AND  
10 PROPERLY WITHIN THE SCOPE OF A PENALTY PHASE  
11 DETERMINATION BY THE JURY.  
12 MR. LEVIN: ASSUMING, ARGUENDO, THAT THE COURT IS  
13 CORRECT; THAT WHAT I HEAR THE COURT SAYING IS THAT  
14 MR. CONN SHOULD BE ENTITLED TO TAKE DR. VICARY'S  
15 UNREDACTED NOTES AND COMPARE THEM WITH THE REDACTED  
16 NOTES FOR THE PURPOSE OF ELICITING FROM DR. VICARY WHAT  
17 ERIK MENENDEZ TOLD HIM THAT WAS INCONSISTENT WITH HIS  
18 TRIAL TESTIMONY TO IMPEACH THE TESTIMONY THAT ERIK  
19 MENENDEZ GAVE DURING THE GUILT PHASE -- ASSUMING  
20 ARGUENDO THAT THE COURT IS CORRECT IN THAT, THAT SHOULD  
21 BE THE LIMIT OF THE INQUIRY WITH RESPECT TO DR. VICARY.

22 BUT THAT IS NOT WHERE WE ARE AT, YOUR  
23 HONOR. WHERE WE ARE AT NOW IS ISSUES REGARDING  
24 SUBORNATION OF PERJURY.  
25 THE COURT: NO, NO. WE ARE AT A PLACE WHERE THE  
26 JURY IS NOT IN THE JURY BOX. AS I SAID YESTERDAY,  
27 BEFORE I CAN ANALYZE THE MOTION THAT MR. GESSLER  
28 PROPOSED TO MAKE -- AS HE PROPOSED YESTERDAY, AND AS

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1 HE'S MADE TODAY -- AND HE HAS ANOTHER MOTION RELATED TO  
2 IT IN SOME REGARDS -- I HAVE TO HAVE MORE INFORMATION AS  
3 TO WHAT OCCURRED, AND WHAT MIGHT COME BEFORE THE TRIER  
4 OF FACT IN FURTHER TESTIMONY AND FURTHER EVIDENCE  
5 PRESENTED DURING THIS PENALTY PHASE.

6 I CAN'T EVALUATE THE MOTION MADE BY  
7 MR. GESSLER IN THE ABSTRACT, AND SAY WELL, ALL THAT IS  
8 GOING TO BE PRESENTED TO THE JURY IS WHAT HAS ALREADY  
9 OCCURRED, AND NOTHING ELSE, AND I SHOULD JUST BE BOUND  
10 BY WHAT HAS OCCURRED AND NOT KNOW WHAT ELSE OCCURRED,  
11 AND WHAT ELSE MIGHT BE PRESENTED TO THE JURY, IN MAKING  
12 A DETERMINATION AS TO THE VALIDITY OF HIS MOTION.

13 THAT WOULD BE A FOOLISH THING TO DO. I  
14 NEED MORE INFORMATION.

15 MR. LEVIN: THAT IS NOT THE NATURE OF MY ARGUMENT  
16 BEFORE THE COURT.

17 AND I ASSUME THAT SOME APPELLATE COURT DOWN

18 THE ROAD IS GOING TO BE REVIEWING MY COMMENTS, AS I  
19 STAND UP HERE NOW, AND I MIGHT PREFACE TO THEM MY  
20 IGNORANCE IN NOT KNOWING THE PRECISE ORDER IN HOW TO  
21 PROCEED.

22 IN OTHER WORDS, WHATEVER IT IS I AM SAYING  
23 NOW, AT THIS MOMENT, I HOPE THAT SOME APPELLATE COURT  
24 UNDERSTANDS THAT I AM NOT WAIVING SOMETHING THAT I MIGHT  
25 OR SHOULD HAVE SAID BEFORE I SAY WHAT I'M SAYING NOW.

26 BECAUSE WHAT I AM ASKING THE COURT TO  
27 CONSIDER AT THIS POINT IS ADOPT THE NOTION THAT WHETHER  
28 OR NOT

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1 MS. ABRAMSON OR DR. VICARY, AND/OR MS. ABRAMSON AND  
2 DR. VICARY DID SOMETHING IMPROPER, IS TO ADOPT THE  
3 POSITION THAT THAT WOULD BE AN IMPROPER CONSIDERATION IN  
4 AGGRAVATION TO DETERMINE WHETHER OR NOT THE DEATH  
5 PENALTY IS APPROPRIATE FOR ERIK MENENDEZ.

6 THE COURT: I DON'T THINK THE PEOPLE WOULD BE  
7 ARGUING CONTRARY TO THAT.

8 MR. LEVIN: DOESN'T MATTER WHETHER THE PEOPLE  
9 ARGUE IT OR NOT, YOUR HONOR.

10 THE COURT: AGAIN, WE'RE STILL TALKING ABOUT A  
11 HEARING OUTSIDE THE PRESENCE OF THE JURY, TO MAKE  
12 FURTHER INQUIRY AND TO SEE WHAT ELSE CAN BE DONE OR  
13 SHOULD BE DONE.

14 MR. LEVIN: WELL, IF I MAY. IF THE COURT ADOPTS  
15 THE POSITION THAT I JUST STATED, THAT IT WOULD BE AN  
16 IMPERMISSIBLE, IMPROPER, NON-STATUTORY FACTOR IN  
17 AGGRAVATION, AS TO THOSE MATTERS THAT ARE INFERENTIALLY  
18 NOW LAID BEFORE THE JURY; THAT MS. ABRAMSON COMMITTED  
19 SOME SORT OF MISCONDUCT, DR. VICARY COMMITTED SOME SORT  
20 OF MISCONDUCT, OR BOTH OF THEM DID, THAT THEY CANNOT  
21 HOLD THAT AGAINST ERIK MENENDEZ.

22 THEY SHOULD BE TOLD THAT IN A CURATIVE JURY  
23 INSTRUCTION NOW. THE JURY SHOULD BE GIVEN AN  
24 INSTRUCTION THAT NOTHING MS. ABRAMSON DID WAS IMPROPER;  
25 THAT PROFESSIONALS, EXPERTS ARE OFTENTIMES CALLED TO  
26 TESTIFY AND ARE EXAMINED --

27 THE COURT: WHY WOULD I SAY THAT IF I DIDN'T FIND  
28 THAT TO BE A FACT?

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1 MR. LEVIN: THEN I BELIEVE THAT WHAT THE COURT  
2 WOULD BE SAYING IS THAT IT WOULD BE A PERMISSIBLE FACTOR  
3 IN AGGRAVATION FOR THE JURY TO RENDER A DEATH SENTENCE  
4 AGAINST ERIK MENENDEZ BASED ON MISCONDUCT OR  
5 INCOMPETENCY OF MS. ABRAMSON; OR OTHERWISE, DR. VICARY  
6 COULD BE A LIAR.

7 THE COURT: OKAY. WE'RE TALKING ABOUT A REQUEST  
8 NOW OF DEFENSE FOR ERIK MENENDEZ TO ADMONISH THE JURY IN  
9 SOME FASHION.

10 WE'LL GET TO THAT REQUEST. BUT AT THIS  
11 POINT THE FOCUS IS ON MY INQUIRY AS TO WHAT HAS OCCURRED  
12 HERE.

13 MR. LEVIN: AND TO ADDRESS THAT, HAVING MADE  
14 THOSE PREFATORY REMARKS, I AM UNCERTAIN WHETHER THIS  
15 COURT HAS JURISDICTION TO CONDUCT AN INQUIRY AS IT HAS  
16 SET FORTH AT THIS TIME.

17 I DON'T KNOW WHETHER THIS COURT HAS A DUTY  
18 TO CONDUCT AN INQUIRY OR A HEARING, NOR DO I HAVE AN  
19 UNDERSTANDING AS TO WHAT PURPOSE IT IS THAT THE COURT IS  
20 CONDUCTING SUCH AN INQUIRY.

21 BUT I DO KNOW THIS: THAT IN MY  
22 DISCUSSIONS, AND MY BRIEF AND INEFFECTIVE INVESTIGATION  
23 THAT TRANSPIRED BETWEEN YESTERDAY'S EVENTS AND TODAY'S  
24 PROCEEDINGS, I WOULD STATE THAT IT'S MY PERSONAL OPINION  
25 THAT THERE IS A SUBSTANTIAL -- OR THE POTENTIAL OF A  
26 SUBSTANTIAL CONFLICT OF INTEREST BETWEEN MS. ABRAMSON  
27 AND DR. VICARY. AND IF I WERE MS. ABRAMSON'S COUNSEL, I  
28 WOULD ADVISE HER TO TAKE THE 5TH AMENDMENT. AND IF I

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1 WERE DR. VICARY'S COUNSEL, I WOULD ADVISE HIM TO TAKE  
2 THE 5TH AMENDMENT.

3 AND SO BY THE VERY NATURE OF THIS COURT'S  
4 INQUIRY, IT MAY BE IN A POSITION -- OR IT IS IN A  
5 POSITION OF REQUIRING PARTIES, WHO HAVE PERHAPS VERY

6 DRAMATIC CONSEQUENCES THAT COULD BEFALL THEM, FROM THE  
7 DISCLOSURE OF THEIR PARTICULAR VIEWS, TO BE  
8 INCRIMINATING THEMSELVES TO POTENTIAL CRIMINAL  
9 LIABILITY.

10 AND WHAT I AM STATING TO THIS COURT IS THAT  
11 IF IT WISHES TO PROCEED IN THE FASHION THAT IT IS, TO  
12 APPOINT COUNSEL FOR DR. VICARY, FOR LESLIE ABRAMSON, AND  
13 INDEPENDENT COUNSEL FOR ERIK MENENDEZ. BECAUSE I, TOO,  
14 DON'T KNOW WHETHER I AM IN A POSITION TO EFFECTIVELY  
15 ADVISE MY CLIENT HOW HE SHOULD PROCEED AT THIS MOMENT.

16 IF I WERE ERIK MENENDEZ, I PERHAPS WOULD  
17 RAISE A MARSDEN MOTION. PERHAPS ERIK MENENDEZ COULD  
18 RAISE ISSUES THAT COULD SWAY THIS COURT, OR COULD  
19 PERSUADE THIS COURT, THAT WOULD RESULT IN A REVERSAL OF  
20 THE GUILT PHASE.

21 SO I DON'T THINK THAT THIS COURT SHOULD  
22 PROCEED WITH THIS INQUIRY WITHOUT SERIOUSLY CONSIDERING  
23 THE APPOINTMENT OF COUNSEL, AS I HAVE SUGGESTED.

24 THE COURT: WELL, I WOULDN'T SERIOUSLY OR  
25 UNSERIOUSLY CONSIDER IT, BECAUSE I WOULDN'T APPOINT  
26 COUNSEL FOR ANYBODY WHO WAS NOT INDIGENT.

27 SO THAT'S A VERY SIMPLE ISSUE.

28 MR. LEVIN: OKAY. I UNDERSTAND.

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1 THAT MATTER ASIDE, THEN I BELIEVE THAT WHAT

2 I AM REQUESTING IS MY CLIENT IS INDIGENT, AND I AM

3 REQUESTING --

4 THE COURT: AND YOU ARE HIS LAWYER.

5 MR. LEVIN: AND I AM HIS LAWYER. BUT I AM ALSO

6 CO-COUNSEL WITH MS. ABRAMSON, AND I AM UNCERTAIN AND DO

7 NOT BELIEVE THAT OUR POSITIONS ARE IN CONFLICT. I

8 CANNOT SAY THAT I COULD STAND BEFORE THIS COURT AND

9 ASSERT THAT MY CO-COUNSEL COMMITTED PREJUDICIAL

10 MISCONDUCT.

11 I CAN'T -- I CAN'T SAY THAT. AND I CAN'T

12 SAY THAT SHE DIDN'T. BECAUSE QUITE FRANKLY, YOUR HONOR,

13 I DON'T THINK THIS SITUATION HAS EVER ARISEN TO GIVE ME

14 GUIDANCE TO KNOW HOW TO PROCEED.

15 THE COURT: WELL, FIRST OF ALL -- FIRST OF ALL,

16 YOU HAVE TO FIND OUT WHAT OCCURRED; AND IF YOU HAVEN'T,

17 THEN YOU SHOULD, AND PROVIDE THE COURT WITH MORE

18 INFORMED OPINIONS ABOUT THE MATTER THAN YOU APPEAR TO BE

19 PREPARED TO DO AT THIS POINT.

20 MR. LEVIN: WELL, I AM NOT AN INVESTIGATOR FOR

21 THIS COURT, NOR AM I GOING TO DO ANYTHING THAT'S GOING

22 TO JEOPARDIZE THE RIGHTS OF MY CLIENT, NOR WILL I EVER

23 DO ANYTHING THAT I FEEL WOULD JEOPARDIZE OR INCREASE THE

24 LIKELIHOOD THAT MY CLIENT WOULD RECEIVE A DEATH VERDICT.

25 WHAT I HAVE PROPOSED TO DO, WHICH I THINK

26 IS REASONABLE, IS FOR THE COURT TO CONSIDER THE

27 IRRELEVANCY OF PROCEEDING ALONG THE COURSE OF EVEN

28 CONDUCTING AN INQUIRY, AND TAKE NOTE OF THE FACT THAT



1 FROM WHAT I HAVE STATED -- AT LEAST WHAT I UNDERSTAND TO  
2 BE THE STATE OF THE LAW AT THE PRESENT TIME -- THAT WHAT  
3 IS BEFORE THE JURY AT THIS TIME, BASED ON WHAT THE  
4 PROSECUTION HAS DONE -- IT WAS NOTHING THAT MS. ABRAMSON  
5 DID ON DIRECT.

6 MAYBE SHE OPENED UP THE ISSUE WITH RESPECT  
7 TO ERIK MENENDEZ' CREDIBILITY. BUT IT WAS CERTAINLY  
8 MR. CONN WHO SEIZED UPON THE MOMENT, AND WITH GREAT  
9 GLEE, I MIGHT ADD, LAID BEFORE THE JURY THE OBVIOUS,  
10 DIRECT INFERENCE THAT MS. ABRAMSON HAD DONE SOMETHING  
11 VERY WRONG. AND NOT ONLY DID SHE DO SOMETHING WRONG,  
12 BUT SO DID THE CHIEF PSYCHIATRIC WITNESS ON  
13 MR. MENENDEZ'S MENTAL STATE DO SOMETHING WRONG.

14 HIS CREDIBILITY, IN MY VIEW, HAS BEEN SO  
15 SEVERELY DAMAGED THAT I DON'T THINK A CURATIVE  
16 INSTRUCTION WOULD WORK.

17 THE COURT: WELL, ISN'T THAT PART OF THE ROLE OF  
18 EXAMINATION OF WITNESSES, TO TEST CREDIBILITY; AND IF  
19 CREDIBILITY IS RIGHTFULLY DAMAGED, THAT THAT DAMAGE  
20 OCCURS, AND THE TRIER OF FACT EVALUATES THAT IN  
21 DETERMINING WHETHER TO BELIEVE OR DISBELIEVE THE  
22 WITNESS? WHAT'S WRONG WITH THAT?

23 MR. LEVIN: I THINK IN THE GENERAL SENSE THAT'S  
24 CORRECT, YOUR HONOR. BUT WHEN WE'RE DEALING WITH  
25 SOMEONE THAT -- OR AN ISSUE THAT MAY HAVE BEEN -- FIRST  
26 OF ALL, THAT I BELIEVE WOULD GO TO AN IMPERMISSIBLE

27 INFERENCE THAT COULD BE USED AGAINST AN INDIVIDUAL WHO  
28 IS FACING THE CONSEQUENCES OF DEATH, I THINK THAT HIS

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1 DUE PROCESS RIGHTS UNDER BOTH STATE AND THE FEDERAL  
2 CONSTITUTION SHOULD ALLOW THE COURT TO PROHIBIT THAT  
3 TYPE OF QUESTIONING, ESPECIALLY WHEN ANY OFFER OF PROOF  
4 MADE BY THE PROSECUTION ON CONTINUING THE INQUIRY WOULD  
5 BE TO DISPARAGE BOTH DEFENSE COUNSEL AND THE WITNESS,  
6 AND THE SPILL-OVER EFFECT OF THAT.

7 IT'S ERIK MENENDEZ THAT WE'RE CONCERNED  
8 ABOUT HERE. IT'S NOT LESLIE ABRAMSON, AND IT'S NOT  
9 DR. VICARY.

10 AND THE POINT THAT I'M TRYING TO MAKE IS  
11 THAT THE STATE OF THE RECORD RIGHT NOW IS SUCH THAT IT  
12 WOULD BE IMPOSSIBLE FOR SOME REVIEWING COURT TO  
13 DETERMINE, IF A DEATH SENTENCE WERE HANDED DOWN, ON WHAT  
14 BASIS THEY DID SO.

15 AND THAT'S WHY I MADE THE PREFATORY  
16 REMARKS. IF THE COURT DETERMINES THAT THIS LINE OF  
17 QUESTIONING IS IMPERMISSIBLE WITH RESPECT TO  
18 MS. ABRAMSON, AND WE SEEK TO CURE OR LIMIT THE  
19 IMPERMISSIBLE INFERENCE, AND THEN ALLOW THE PROSECUTION  
20 TO CONTINUE ITS CROSS-EXAMINATION, AND LET THEM SHRED  
21 DR. VICARY TO THE EXTENT THAT IMPEACHES ERIK MENENDEZ IN  
22 A WAY THAT IS INCONSISTENT FROM HIS TESTIMONY IN THE

23 GUILT PHASE, THE PEOPLE HAVE HAD THEIR DAY IN COURT.  
24 THE JURY HAS HAD SUFFICIENT, PERMISSIBLE EVIDENCE TO  
25 ALLOW THEM TO MAKE A PENALTY-PHASE DETERMINATION, AND WE  
26 CAN GO ON WITH THIS TRIAL.

27 BUT IF IT'S GOING TO BE A -- IF THE FOCUS  
28 IS ON MS. ABRAMSON, WHERE SHE NOW IS GOING TO BE

-11541

1 REQUIRED TO, IN SOME FASHION, TAKE A COURSE AS TO "DO I  
2 INFORM THE COURT AS TO THESE MATTERS THAT I REFERRED TO  
3 BEFORE DR. VICARY?" THE FOCUS IS OFF ERIK MENENDEZ, AND  
4 THE FOCUS IS NOW ON POTENTIAL MISCONDUCT OF  
5 MS. ABRAMSON.

53996

1 THE COURT: OKAY. YOU'VE TALKED AT GREAT  
2 LENGTH, BUT YOU REALLY HAVEN'T GIVEN ME MUCH  
3 INFORMATION, MR. LEVIN, QUITE FRANKLY.

4 MR. LEVIN: I HAVE ATTEMPTED TO DO THAT.

5 THE COURT: THERE WAS A LOT OF VOLUME, BUT NO  
6 SUBSTANCE.

7 MR. LEVIN: I THINK INDEPENDENT COUNSEL  
8 SHOULD BE APPOINTED FOR ERIK MENENDEZ.

9 THE COURT: BEFORE WE GET INTO ANY OF THAT,  
10 WE'RE STILL FOCUSED ON THIS PARTICULAR INQUIRY. AND

11 SINCE MR. LEVIN HAS NO INFORMATION ON THE SUBJECT,

12 MS. ABRAMSON, WHAT IS YOUR INFORMATION?

13 MR. LEVIN: I'M ADVISING MS. ABRAMSON --

14 THE COURT: YOU'RE NOT HER LAWYER, SO SHE CAN

15 SPEAK FOR HERSELF.

16 MR. LEVIN: I'M TAKING THE POSITION. I DON'T

17 THINK THIS COURT HAS JURISDICTION AT THIS POINT IN

18 TIME TO FORCE MS. ABRAMSON TO MAKE ANY KIND OF

19 COMMENT TO THIS COURT WITHOUT GIVING HER THE

20 OPPORTUNITY OF CONSULTING WITH COUNSEL.

21 THE COURT: SHE'S HAD THAT OPPORTUNITY.

22 MR. LEVIN: WHETHER THAT'S ME OR ANYONE ELSE.

23 THE COURT: SHE'S HAD ALL YESTERDAY AFTERNOON

24 AND ALL NIGHT TO DO THAT, AND SHE CAN SPEAK FOR

25 HERSELF IF SHE WANTS TO ASSERT ANY PRIVILEGE, OR

26 WANTS TO CONFER WITH COUNSEL. SHE CAN ALWAYS TELL

27 ME THAT.

28 MR. LEVIN: WELL, I'M ADVISING --

53997

1 THE COURT: SHE'S COUNSEL OF RECORD IN THIS

2 MATTER, AND CERTAINLY ISSUES AROSE DURING THE COURSE

3 OF PRESENTATION OF EVIDENCE, AND I THINK IT'S FAIR

4 INQUIRY TO FIND OUT WHAT HER KNOWLEDGE OF THESE

5 EVENTS ARE.

6 MR. LEVIN: WELL, I THINK THERE MAY BE A  
7 CONFLICT OF INTEREST BETWEEN MS. ABRAMSON AND  
8 MYSELF, IN THAT MS. ABRAMSON MAY PERHAPS SAY  
9 SOMETHING -- AND I DON'T KNOW WHAT SHE'S GOING TO  
10 SAY -- THAT COULD-- THAT COULD INFLUENCE OR AFFECT  
11 OR SOMEHOW HARM THE PRESENT POSITION OF ERIK  
12 MENENDEZ. AND TO, IN SOME WAY, IN SOME FASHION,  
13 IMPACT UPON MY CLIENT GETTING A DEATH SENTENCE.  
14 AND SO AT THIS MOMENT I'M ADVERSE TO  
15 MS. ABRAMSON, AND I NEED TO CONSULT AN ATTORNEY,  
16 BEFORE THIS COURT PROCEEDS, TO INQUIRE OF CO-COUNSEL  
17 OF MATTERS TO WHICH I DON'T KNOW WHAT SHE'S GOING TO  
18 SAY, OR WHAT IMPACT IT MIGHT HAVE IN A HARMFUL WAY  
19 TO MY CLIENT.  
20 THE COURT: I DON'T SEE ANY NEED.  
21 MS. ABRAMSON: I WOULD LIKE TO ADDRESS THE  
22 COURT VERY BRIEFLY, THOUGH.  
23 MR. LEVIN: YOUR HONOR, I WOULD ASK FOR A  
24 RECESS.  
25 MS. ABRAMSON: BARRY.  
26 THE COURT: I DON'T SEE ANY NEED FOR IT. I  
27 THINK WE'RE --  
28 MS. ABRAMSON: BARRY, WHAT DO YOU THINK I'M

1 GOING TO SAY? JUST RELAX.

2 MR. LEVIN: I DON'T THINK IT'S APPROPRIATE  
3 FOR THE COURT TO ORDER MS. ABRAMSON TO MAKE ANY  
4 COMMENT IF IT -- I FEEL VERY UNCOMFORTABLE WITH -- I  
5 DIDN'T KNOW THAT WHEN WE CAME IN THIS MORNING THAT  
6 THE COURT WAS GOING TO CONDUCT AN INQUIRY THAT WOULD  
7 REQUIRE MS. ABRAMSON TO MAKE ANY COMMENTS AT ALL.

8 AND I WOULD AT LEAST LIKE TO HAVE A  
9 BRIEF OPPORTUNITY -- IT'S 10 TO 12:00 -- UNTIL OVER  
10 THE NOON HOUR --

11 MS. ABRAMSON: BARRY, CAN I --

12 MR. LEVIN: -- TO INQUIRE WITH APPELLATE  
13 COUNSEL.

14 THE COURT: I DON'T SEE ANY NEED FOR THAT.

15 MS. ABRAMSON: BARRY, COME HERE.

16 (ATTORNEYS ABRAMSON AND LEVIN  
17 CONFER SOTTO VOCE.)

18

19 THE COURT: ALL RIGHT. MS. ABRAMSON.

20 MS. ABRAMSON: YES. WHAT I CAN SAY AT THIS  
21 POINT, YOUR HONOR, IS THE FOLLOWING:

22 THAT I HAVE CONSULTED WITH COUNSEL, AND  
23 WITH A VIEW OF MY CLIENT'S RIGHTS, AND I THINK  
24 RIGHTLY SO, I SHOULD INFORM THE COURT THAT I BELIEVE  
25 THERE ARE TWO CONFLICT OF INTERESTS AT WORK HERE.

26 ONE IS A CONFLICT OF INTEREST -- TWO  
27 CONFLICTS OF INTEREST WHICH INURE TO THE DETRIMENT  
28 OF MY CLIENT.

1 THE FIRST IS A POTENTIAL CONFLICT OF  
2 INTEREST BETWEEN MYSELF AND THE WITNESS, DR. VICARY.

3 THE WAY THAT WOULD COME ABOUT IS IF THIS  
4 INQUIRY IS PURSUED WITH AN EFFORT TO FIND LIABILITY  
5 OR BLAME, IF YOU WILL, FOR CHANGES IN THE NOTES, IT  
6 WOULD NECESSITATE MY BECOMING A WITNESS IN THE  
7 CASE. POTENTIALLY, I COULD BE A WITNESS WHO'S IN A  
8 POSITION OF IMPEACHING THE VERACITY OF A MATERIAL  
9 WITNESS FOR MY CLIENT, WHICH CERTAINLY CREATES A  
10 CONFLICT OF INTEREST BETWEEN MYSELF AND MY CLIENT.

11 OR, AND THIS IS A HYPOTHETICAL, YOUR  
12 HONOR, I COULD BE IN A POSITION OF IMPEACHING MY OWN  
13 VERACITY, THEORETICALLY; THUS CAUSING HARM TO MY  
14 CLIENT, BECAUSE I HAVE BEEN THE CHIEF SPOKESMAN,  
15 SPOKESPERSON, FOR HIM BEFORE THE JURY IN THIS CASE.  
16 AND WE ARE WELL FAMILIAR, I BELIEVE, YOUR HONOR,  
17 HISTORICALLY IN THIS CASE, WITH THE PROBLEM OF AN  
18 ATTORNEY BECOMING A WITNESS.

19 NOW, THAT'S ONE PROBLEM. IT'S NOT JUST  
20 MY BECOMING A WITNESS FOR MY CLIENT'S BENEFIT; IT  
21 WOULD BE BECOMING A WITNESS TO MY CLIENT'S DETRIMENT  
22 BY QUESTIONING THE VERACITY OF A MATERIAL WITNESS.

23 THE SECOND PROBLEM THAT I HAVE BEEN  
24 ADVISED BY COUNSEL TO LAY OUT FOR THE COURT ARE THE

25 ALLEGATIONS AND IMPLICATIONS OF SO-CALLED  
26 MISCONDUCT. I HAVE BEEN ADVISED THAT WITHOUT ANY  
27 FACTUAL EXAMINATION AT THIS POINT, THAT MIGHT  
28 REQUIRE ME TO ASSERT MY 5TH-AMENDMENT RIGHTS.

54000

1           AND WERE I TO DO THAT THERE TOO, MY  
2 CLIENT IS HARMED BECAUSE OF THIS COURT'S INTEREST IN  
3 DETERMINING BASICALLY WHAT HAPPENED. AND IT WOULD  
4 PUT THE POSTURE OF THE CASE IN A POSITION WHERE THE  
5 COURT CANNOT FIND THAT OUT IF I ASSERT MY  
6 5TH-AMENDMENT RIGHTS.

7           AND I'M NOT SURE WHAT GOES ON AFTER  
8 THAT. IT'S SUFFICIENTLY COMPLICATED THAT I HAVEN'T  
9 THOUGHT IT THROUGH ALL THE WAY TO THE END. SO  
10 THAT'S -- THE REAL PROBLEM AT THIS POINT IS THE  
11 POTENTIAL FOR CONFLICT.

12          NOW, WITHOUT GETTING INTO ANY GREAT  
13 DETAIL, AND AMPLIFYING ONE THING THAT MR. LEVIN WAS  
14 SAYING, I DON'T SEE THE PURPOSE AT THIS POINT --  
15 WHATEVER THE COURT MAY WANT TO INQUIRE INTO FOR  
16 WHATEVER THE COURT'S LEGITIMATE PURPOSE IS IN  
17 GENERAL CONCERNING WHETHER OR NOT THERE HAS BEEN  
18 ATTORNEY MISCONDUCT IN A CASE, WHICH IS WITHIN THE  
19 COURT'S PURVIEW -- I WOULD SUBMIT THAT WHETHER OR



20 NOT THERE HAS BEEN IS AN ISSUE SEPARATE AND APART  
21 FROM WHAT WE'RE TRYING TO DETERMINE IN THIS PENALTY  
22 TRIAL.

23 THE REAL ISSUE IN THIS PENALTY TRIAL HAS  
24 TO DO WITH CREDIBILITY ISSUES. I MEAN, THE ISSUES  
25 WE'RE DEALING WITH HAVE TO DO WITH THE CREDIBILITY  
26 OF THIS WITNESS, THE CREDIBILITY OF THE CLIENT. AND  
27 WHETHER I HAVE COMMITTED MISCONDUCT OR NOT, SHOULD  
28 NOT BE RELEVANT TO THESE ISSUES. THAT'S SOMETHING

54001

1 WE CAN DEAL WITH SOME OTHER TIME SOON, AND I'M HAPPY  
2 TO DEAL WITH THAT IN THIS FORUM, OR ANY OTHER  
3 APPROPRIATE FORUM.

4 BUT THE REAL PROBLEM IS THAT THE JURY  
5 HAS HEARD, NOT ONLY THAT A WITNESS CHANGED HIS  
6 NOTES, BUT A CLAIM THAT HE DID SO ON MY REQUEST; AND  
7 THAT WHAT HE WAS CHANGING WAS, QUOTE, PREJUDICIAL  
8 AND OUT OF BOUNDS.

9 NOW, THE PROBLEM WITH THAT IS, TO  
10 LITIGATE WHETHER WHAT THE JURY HEARD ON THAT SCORE  
11 IS TRUE OR NOT, THIS WHOLE ISSUE OF ATTORNEY  
12 MISCONDUCT GETS PLAYED OUT BEFORE THE TRIER OF FACT  
13 AND CAN DO MY CLIENT NO GOOD, BECAUSE IT DOESN'T  
14 MATTER IF THE WITNESS IS NOT TELLING THE TRUTH ABOUT

15 THAT; HIS CREDIBILITY IS BLOWN. IF HE IS TELLING  
16 THE TRUTH ABOUT IT, MY CREDIBILITY IS BLOWN. EITHER  
17 WAY, THE ONLY PERSON WHO PAYS IMMEDIATELY --  
18 WHATEVER MAY HAPPEN TO ME AND THE WITNESS LATER --  
19 IS THE CLIENT.  
20         AND THAT'S THE PROBLEM WITH -- I  
21 UNDERSTAND THE COURT IS INTERESTED IN KNOWING, BUT I  
22 THINK THE REAL ISSUE IS: WHAT DO WE DO ABOUT THE  
23 INFERENCES THAT HAVE BEEN RAISED IN FRONT OF THIS  
24 JURY TO FINISH THIS PENALTY TRIAL? AND ANY NUMBER  
25 OF HEARINGS THE COURT MAY WANT TO HOLD, I WILL BE  
26 HAPPY TO PARTICIPATE IN.  
27         BUT AT THIS POINT I REALLY THINK THIS IS  
28 THE FOCUS AND THIS IS THE PROBLEM. ANYTHING ELSE

54002

1 HAVING TO DO WITH LAWYER DISCIPLINES OR LAWYER  
2 MISCONDUCT, I HAVE NO PROBLEM DEALING WITH THAT.  
3         THE COURT: I HAVEN'T SAID THAT'S THE PURPOSE  
4 OF MY INQUIRY.  
5         AS I SAID, THE PURPOSE OF MY INQUIRY AT  
6 THIS POINT IS TO DEAL WITH THE OBJECTION AND MOTION  
7 MADE BY MR. GESSLER, AND THE REQUEST BY MR. LEVIN  
8 FOR SOME SORT OF LIMITING INSTRUCTION OR ADMONITION  
9 TO THE JURY. AND BEFORE I CAN RULE ON EITHER OF

10 THESE MATTERS, I NEED MORE INFORMATION.

11 MR. LEVIN: WHAT INFORMATION DOES THE COURT  
12 NEED?

13 THE COURT: YOU'RE ASKING ME, MR. LEVIN, TO  
14 TELL THE JURY SOMETHING I'M NOT PREPARED TO SAY,  
15 THAT THERE WAS NO MISCONDUCT BY COUNSEL. THAT'S  
16 NUMBER ONE.

17 MR. LEVIN: WHAT IF THERE WAS?

18 THE COURT: WELL, THEN I WOULD BE IN A  
19 POSITION -- I WOULDN'T BE IN A POSITION TO MISINFORM  
20 THE JURY ABOUT A MATTER THAT PLAYS OUT THE WAY IT  
21 MIGHT.

22 MR. LEVIN: WELL, THEN SHOULDN'T ERIK  
23 MENENDEZ HAVE INDEPENDENT COUNSEL TO ASSESS --

24 THE COURT: WE'RE STILL GOING BEYOND ALL OF  
25 THIS. RIGHT NOW WE'RE TALKING JUST ABOUT THIS  
26 INQUIRY, AND GIVING THE COURT A BASIS FOR RULING  
27 UPON THE MOTION BY MR. GESSLER AND YOUR REQUEST.

28 MR. LEVIN: WELL, I STILL WOULD LIKE TO HAVE

54003

1 A BRIEF BREAK OVER THE NOON HOUR TO CONSULT WITH  
2 APPELLATE COUNSEL.

3 THE COURT: OKAY.

4 MS. ABRAMSON: WHAT I'M CONSIDERING IS, I'D

5 LIKE TO TALK TO -- NOT APPELLATE COUNSEL, BUT MY  
6 COUNSEL, AND SEE IF PERHAPS THERE IS A WAY TO  
7 SATISFY THE COURT'S NEED FOR CERTAIN INFORMATION IN  
8 CAMERA OR EX-PARTE -- I'M NOT SURE WHAT WOULD BE  
9 APPROPRIATE -- BUT IN A WAY THAT IT DOESN'T ENHANCE  
10 THE PROSECUTION'S ABILITY TO USE INFORMATION AGAINST  
11 MY CLIENT, WHETHER IT'S NEGATIVE INFORMATION ABOUT  
12 ME, OR NEGATIVE INFORMATION ABOUT THE WITNESS.

13       AND SO I WOULD ASK THE COURT TO CONSIDER  
14 WHETHER THAT WOULD SATISFY THE COURT'S NEED FOR  
15 INFORMATION, AND YET PROTECT THE CLIENT, AND THEN I  
16 CAN CONSULT WITH MY COUNSEL AS TO WHETHER THAT  
17 RESOLVES, NUMBER ONE, THE CONFLICT CONCERNING MY  
18 CLIENT; AND AS FAR AS MY OWN CONCERNS, WE CAN DEAL  
19 WITH THAT LATER.

20       THE COURT: I DON'T KNOW WHICH COUNSEL YOU'RE  
21 TALKING ABOUT, OR WHO YOU'RE CONFERRING WITH.

22       MS. ABRAMSON: I HAVE AN ATTORNEY.

23       THE COURT: HE OBVIOUSLY HAS A CONFLICT OF  
24 INTEREST IF HE'S GIVING YOU ADVICE AS TO WHAT'S IN  
25 YOUR BEST INTEREST, AS WELL AS YOUR CLIENT.

26       MS. ABRAMSON: NO. HE'S FRAMING THE ISSUES  
27 OF --

28       THE COURT: HE'S EITHER A LAWYER FOR YOU OR

1 THE DEFENDANT. I HAVEN'T APPOINTED HIM AS A LAWYER  
2 FOR YOU.

3 MS. ABRAMSON: HE'S A LAWYER FOR ME. BUT  
4 WITH RESPECT TO WHAT'S IN MY CLIENT'S BEST INTEREST,  
5 THAT'S MY ETHICAL OBLIGATION. IF I BREACH THAT  
6 OBLIGATION, MY ATTORNEY IS TELLING ME I'M IN  
7 TROUBLE, AND HE'S RIGHT.

8 HE'S NOT THE LAWYER FOR MY CLIENT, BUT  
9 FOR ME AS AN ATTORNEY WHO'S UNDER AN OBLIGATION TO  
10 ACT LEGALLY AND ETHICALLY. AND ONE OF THOSE ETHICAL  
11 OBLIGATIONS IS TO NOT JEOPARDIZE MY CLIENT.

12 THE COURT: WE'LL TAKE A BREAK IN A FEW  
13 MINUTES AND RESUME IN THE AFTERNOON.

14 BUT JUST TO RESPOND TO ONE OTHER ISSUE  
15 HERE THAT KEEPS BUBBLING TO THE SURFACE BY COMMENTS  
16 OF MS. ABRAMSON AND MR. LEVIN, AS THOUGH THIS WAS  
17 SOMETHING THAT WAS DONE BY THE PROSECUTION.

18 YOU KNOW WHERE BLAME LAYS, WHERE IT'S TO  
19 BE FOUND,  
20 MR. LEVIN, AND IT HAS NOTHING TO DO WITH WHAT THE  
21 PROSECUTION DID. AND IT'S CLEARLY SOMETHING THAT  
22 FROM, HOW I VIEWED IT YESTERDAY, WAS DISCOVERED BY  
23 THE PROSECUTION AS IT UNFOLDED IN COURT.

24 MR. LEVIN: I UNDERSTAND.

25 THE COURT: THERE'S NOTHING IMPROPER WITH  
26 WHAT THE PROSECUTION DID AT ALL. IF THERE'S BLAME,  
27 THE BLAME LIES SOMEWHERE ELSE.

54005

1 THE COURT: TO KEEP HARPING UPON THAT SUBJECT  
2 AS THOUGH YOU'RE CREATING SOME FALSE SHIELD HERE --  
3 I THINK YOU OUGHT TO GET OFF OF THAT AND FOCUS ON  
4 THE ISSUE BEFORE THE COURT.

5 MR. LEVIN: MY DESIRE IS TO SOMEHOW BE  
6 EFFECTIVE WITH THIS COURT, AND I DON'T WANT TO HARP  
7 ON ANY ISSUE THAT THE COURT DOES NOT DEEM TO BE  
8 IMPORTANT. I ONLY POINTED IT OUT TO INDICATE THAT  
9 AT THE TIME THAT MR. CONN WAS QUESTIONING DR. VICARY,  
10 THE FOCUS WAS ON IMPEACHING WHAT ERIK MENENDEZ TOLD  
11 HIM.

12 AND THEN, FOR WHATEVER REASON, MR. CONN  
13 SHIFTED THE QUESTIONING TO ENCOMPASS MISCONDUCT, OR  
14 THE APPEARANCE OF MISCONDUCT, BY DEFENSE COUNSEL,  
15 MS. ABRAMSON.

16 AND THAT WAS -- THAT WAS MY -- WHEN I  
17 HEARD THAT, MY MIND STARTED TO THINK IN THE AREA  
18 OF: HOW IS THE JURY GOING TO EVER SEPARATE OUT, AND  
19 TO WHAT AGREE DOES IT BLAME ERIK MENENDEZ FOR THE  
20 APPEARANCE OF IMPROPRIETY COMMITTED BY MS. ABRAMSON  
21 IN ARRIVING AT A DEATH JUDGMENT?

22 THE COURT: I SAID WHAT I THINK AS FAR AS MY

23 RESPONSE TO YOUR REMARKS, THE GENERAL NATURE OF  
24 THOSE REMARKS.

25 I THINK, AGAIN, WE KNOW WHO CALLED THE  
26 WITNESS TO THE WITNESS STAND, AND HOW THESE THINGS  
27 TRANSPIRED IN COURT YESTERDAY; AND IT CERTAINLY  
28 WASN'T THE PROSECUTION THAT PUT DR. VICARY ON THE

54006

1 WITNESS STAND.

2 MR. CONN, DO YOU HAVE ANY REMARKS AT  
3 THIS POINT TO RESPOND TO WHAT HAS BEEN SAID?

4 MR. CONN: I THINK THAT, FOLLOWING UP ON THE  
5 INQUIRY OF THE COURT, I AGREE WITH THE COURT THAT IT  
6 IS APPROPRIATE FOR THE COURT TO MAKE THE INQUIRY  
7 INTO THE CIRCUMSTANCES SURROUNDING THE NOTES, AND TO  
8 MAKE THAT INQUIRY OF MS. ABRAMSON.

9 MS. ABRAMSON HAS INDICATED THAT HER  
10 5TH-AMENDMENT RIGHTS MAY BE IMPLICATED IN THAT  
11 INQUIRY; AND IF THAT IS THE CASE, THEN I THINK THAT  
12 SHE CAN REFUSE TO RESPOND TO THE COURT'S INQUIRY.

13 HOWEVER, I DON'T THINK THAT THAT SHOULD  
14 BAR OR PREVENT THE COURT IN ANY WAY FROM MAKING THAT  
15 INQUIRY, BECAUSE SUCH INQUIRY IS NECESSARY TO  
16 RESOLVE THE ISSUES THAT ARE BEFORE THE COURT.

17 THE COURT: OKAY. WE'LL BE IN RECESS UNTIL

18 1:30.

19 (PROCEEDINGS WERE ADJOURNED AT  
20 12:00 NOON UNTIL 1:30 P.M.  
21 OF THE SAME DAY.)

22

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24

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54007

1 VAN NUYS, CALIFORNIA; FRIDAY, APRIL 6, 1996

2 1:50 P.M.

3 DEPARTMENT NW "N" HON. STANLEY M. WEISBERG, JUDGE

4 (APPEARANCES AS HERETOFORE NOTED.)

5 (MARILYN A. FADALE, OFFICIAL REPORTER.)

6 (MARY LU MURPHY, OFFICIAL REPORTER.)

7

8 (THE FOLLOWING PROCEEDINGS WERE  
9 HELD IN OPEN COURT, OUT OF THE  
10 PRESENCE OF THE JURY:)

11

12 THE COURT: IN THE TRIAL, THE DEFENDANTS ARE



13 IN COURT WITH THEIR LAWYERS, THE PEOPLE ARE HERE.

14 WE'LL RESUME NOW WITH THE HEARING THAT

15 RECESSED AT NOON.

16 THE LAST PORTION OF THE HEARING INVOLVED

17 INQUIRY OF COUNSEL FOR ERIK MENENDEZ. AT THAT POINT

18 WE HAD EXHAUSTED THE INFORMATION AND KNOWLEDGE

19 MR. LEVIN HAD ON THE SUBJECT, SO I ADDRESSED

20 MS. ABRAMSON, INQUIRING OF YOUR KNOWLEDGE OF THE

21 HISTORY OF THESE NOTES OF DR. VICARY.

22 MS. ABRAMSON: YES, YOUR HONOR.

23 THE COURT: WHAT IS YOUR RESPONSE?

24 MS. ABRAMSON: MY RESPONSE, YOUR HONOR, IS

25 THAT I HAVE MY ATTORNEY HERE NOW, DENNIS FISCHER,

26 AND HE WOULD ADDRESS THE COURT.

27 THE COURT: OKAY. MR. FISCHER.

28 MR. FISCHER: GOOD AFTERNOON, YOUR HONOR.

54008

1 THE COURT: GOOD AFTERNOON.

2 MR. FISCHER: I'M DENNIS, MIDDLE INITIAL A,

3 FISCHER, F-I-S-C-H-E-R.

4 I WAS CONTACTED EXTREMELY RECENTLY BY

5 MS. ABRAMSON AND INFORMED OF BRIEF BACKGROUND ON THE

6 ISSUE THAT'S BEFORE THE COURT.

7 AND TO CUT TO THE QUICK, BASED ON THE

8 INFORMATION I'VE HAD, AND PRELIMINARY RESEARCH, I  
9 HAVE INFORMED MS. ABRAMSON OF MY ADVICE AND  
10 INSTRUCTION THAT AT THIS POINT SHE DECLINE TO  
11 FURTHER RESPOND TO THE COURT'S QUESTIONS, AND ASSERT  
12 THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE  
13 CALIFORNIA AND FEDERAL CONSTITUTIONS.

14 THE COURT: OKAY. AND SPECIFICALLY, THE  
15 COURT WOULD ASK MS. ABRAMSON WHICH VERSION OF THE  
16 NOTES OF DR. VICARY WERE TURNED OVER TO THE DISTRICT  
17 ATTORNEY IN 1993?

18 MR. FISCHER: WITHOUT, IN EACH INSTANCE,  
19 PERHAPS KEEPING MY CLIENT FROM RESPONDING  
20 DIRECTLY. . .

21 THE COURT: I THINK SHE SHOULD.

22 MR. FISCHER: I WILL INSTRUCT HER, IF SHE  
23 WOULD, TO ASSERT THE PRIVILEGE AS INDICATED.

24 THE COURT: I THINK SHE SHOULD RESPOND.

25 MR. FISCHER: I AGREE.

26 THE COURT: YOUR RESPONSE, MS. ABRAMSON?

27 MS. ABRAMSON: I'M SORRY?

28 MR. FISCHER: I DIRECT YOU TO ASSERT YOUR

54009

1 PRIVILEGE AGAINST SELF-INCRIMINATION.

2 MS. ABRAMSON: I DO ASSERT MY PRIVILEGE

3 AGAINST SELF-INCRIMINATION, YOUR HONOR.

4 THE COURT: OKAY. AS TO WHY THERE WERE

5 REDACTIONS IN THE NOTES OF DR. VICARY, DO YOU HAVE

6 ANY INFORMATION ABOUT THOSE REDACTIONS, OR WHY THEY

7 OCCURRED?

8 MR. FISCHER: SAME INSTRUCTION, MS. ABRAMSON.

9 MS. ABRAMSON: I WOULD ASSERT MY PRIVILEGE

10 AGAINST SELF-INCRIMINATION AS TO THAT QUESTION, YOUR

11 HONOR.

12 THE COURT: OKAY. DO THE PEOPLE HAVE ANY

13 QUESTIONS ON THESE SUBJECTS AT THIS POINT?

14 MR. CONN: NO, YOUR HONOR, NOT AT THIS POINT.

15 THE COURT: ALL RIGHT. MR. LEVIN, DO YOU

16 HAVE ANY MORE INFORMATION ABOUT THE STATUS OF THESE

17 NOTES?

18 MR. LEVIN: IN DIRECT ANSWER TO THE COURT'S

19 INQUIRY, NO, I DO NOT. HOWEVER --

20 THE COURT: HOW ABOUT AN INDIRECT ANSWER?

21 MR. LEVIN: INDIRECTLY AND DIRECTLY, I DO

22 NOT.

23 BUT I WOULD AT THIS TIME MAKE A MOTION

24 ON BEHALF OF ERIK MENENDEZ FOR A MISTRIAL.

25 THE COURT: OKAY. WE'LL ENTERTAIN THAT

26 MOTION AS WELL, OR HEAR IT ARGUED.

27 FIRST OF ALL, WITH THE UNDERSTANDING

28 THAT THERE IS STILL DR. VICARY AS A POTENTIAL SOURCE

1 OF FURTHER INFORMATION ABOUT THESE MATTERS, AND  
2 WITHOUT EXPLORING THAT AT THIS POINT, WE'LL GO BACK  
3 TO THE MOTION OF MR. GESSLER, WHO WAS THE FIRST TO  
4 REQUEST TO BE HEARD ON ANY OF THESE SUBJECTS.

5 AND WE'LL HEAR YOUR ARGUMENT, MR. GESSLER.

6 MR. GESSLER: NOTHING HAS BEEN SOLVED SINCE I  
7 FIRST SPOKE TO THE COURT THIS MORNING. WE STILL  
8 HAVE THE ISSUE OF THE JURY BELIEVING MISCONDUCT HAS  
9 OCCURRED ON THE PART OF CO-COUNSEL, AND REDACTING  
10 AND KEEPING FROM THEM CERTAIN EVIDENCE.

11 WE HAVE THE I.A.C. I MENTIONED IN  
12 CALLING DR. VICARY AT ALL TO THE STAND, GIVEN THE  
13 INFORMATION THAT WAS OUT THERE TO IMPEACH HIM WITH.

14 WE HAVE THE ANDERSON PROBLEM, IF IT WERE  
15 TRIED TO BE SOLVED WITH PRIVILEGES. AND NOW WE HAVE  
16 THE ADDED PROBLEM OF CO-COUNSEL, MS. ABRAMSON, AND  
17 HER LAWYER PERHAPS DUKING IT OUT WITH DR. VICARY;  
18 AND IF HE HAS ONE, HIS LAWYER. AND AS THEY DUKE IT  
19 OUT, WHY LYLE MENENDEZ RECEIVES THE BLOWS, AND HE'S  
20 NOT A PART OF THIS. I CANNOT SEE HOW HE CAN NOW  
21 RECEIVE A FAIR INDIVIDUALIZED DETERMINATION OF LIFE  
22 WITHOUT PAROLE OR DEATH FROM THIS JURY.

23 THE COURT: OKAY. WELL, LET'S BREAK IT DOWN  
24 INTO ISSUES HERE SO THAT WE CAN DEAL WITH THIS AS  
25 BEST WE CAN.

26 BEARING IN MIND, AGAIN, TO REPEAT WHAT I

27 SAID THIS MORNING, THE MANNER IN WHICH THIS ALL  
28 AROSE, AND HOW IT AROSE, BY MS. ABRAMSON CALLING

54011

1 DR. VICARY AS A WITNESS, AND NOW MS. ABRAMSON  
2 ASSERTING A PRIVILEGE, AND CERTAIN MATTERS BEING  
3 REVEALED DURING DR. VICARY'S TESTIMONY, ALL OF WHICH  
4 SUDDENLY BECOMES THE BASIS FOR MOTIONS FOR MISTRIAL  
5 ON BEHALF OF BOTH DEFENDANTS.

6 SO LET'S FIRST HEAR THE FIRST BASIS OF  
7 YOUR MOTION FOR MISTRIAL, MR. GESSLER.

8 MR. GESSLER: FIRST BASIS IS, YOUR HONOR,  
9 THAT IT WAS I.A.C.

10 THE COURT: I.A.C. IS WHAT?

11 MR. GESSLER: INEFFECTIVE ASSISTANCE OF  
12 COUNSEL.

13 THE COURT: THAT'S LANGUAGE OR SHORTHAND THAT  
14 I'M NOT FAMILIAR WITH.

15 MR. GESSLER: OH, I THOUGHT THAT WAS KIND OF  
16 COMMON. BUT ANYWAY...

17 THE COURT: MAYBE IN THE DEFENSE BAR IT'S  
18 SOMETHING YOU'RE MORE FOCUSED ON. I DON'T USE IT.  
19 WE HAVE OTHER SHORTHAND LANGUAGE FOR REVERSIBLE  
20 ERROR, AND THINGS OF THAT NATURE, THAT THE TRIAL  
21 COURT IS CONCERNED WITH.

22 MR. GESSLER: AT ANY RATE, THE FIRST PART OF  
23 THE MOTION IS IT WAS INEFFECTIVE ASSISTANCE OF  
24 COUNSEL FOR MS. ABRAMSON TO CALL DR. VICARY TO THE  
25 STAND AT THE PENALTY PHASE, FOR THE EVIDENCE WHICH  
26 SHE HAD ELICITED, GIVEN THE INFORMATION THAT WAS OUT  
27 THERE IN THE DISTRICT ATTORNEY'S HANDS WITH WHICH TO  
28 IMPEACH THIS WITNESS AS TO THE TESTIMONY THAT HE

54012

1 GAVE, AND AS TO AN OPINION HE FORMED AND STATEMENTS  
2 HE HAD RECEIVED FROM ERIK MENENDEZ.

3 THE COURT: AS FAR AS THE ASSERTION OF  
4 INEFFECTIVE ASSISTANCE OF COUNSEL, SINCE SHE IS NOT  
5 COUNSEL FOR LYLE MENENDEZ, THAT PARTICULAR  
6 ARTICULATED REASON WOULD NOT BE THE BASIS OF A  
7 MOTION FOR MISTRIAL ON BEHALF OF LYLE MENENDEZ.

8 PERHAPS WE CAN HEAR ARGUMENT BY  
9 MR. LEVIN ON THAT POINT. BUT I THINK YOU HAVE SOME  
10 RELATED ARGUMENTS.

11 MR. GESSLER: I DO, BUT I CANNOT DEFER TO  
12 MR. LEVIN ON THAT ARGUMENT EITHER, BECAUSE NOT ONLY  
13 WAS ERIK MENENDEZ A DEFENDANT CALLED AT THE TRIAL,  
14 AT THAT TIME HE ALSO, OF COURSE, WAS A WITNESS FOR  
15 LYLE MENENDEZ. AND NOW, AT THE PENALTY TRIAL, TO  
16 OPEN HIM UP TO IMPEACHMENT BY OTHER STATEMENTS THAT

17 HE MADE CONTRARY OR INCONSISTENT WITH THE TESTIMONY  
18 THAT HE GAVE AT TRIAL, IMPACTS ON LYLE MENENDEZ'  
19 LIFE AND DEATH DECISION BY THIS JURY, NOT JUST ERIK  
20 MENENDEZ.

21 AND THAT'S ONE INDEPENDENT MOTION THAT I  
22 AM MAKING, YOUR HONOR, OVER AND APART FROM THE  
23 SECOND MOTION, WHICH IS THAT THERE WAS INEFFECTIVE  
24 ASSISTANCE OF COUNSEL AND CAUSE FOR A MISTRIAL BY  
25 EVIDENCE GIVEN BY DR. VICARY; THAT ON  
26 MRS. ABRAMSON'S DIRECTION, IN 1993, IN A TRIAL  
27 BEFORE WE EVER BECAME A PART OF THIS TRIAL, THAT HE  
28 ALTERED HIS NOTES BY OMITTING CERTAIN PORTIONS OF IT

54013

1 THAT THE COURT HAS FOUND RELEVANT, ON THE DIRECTION  
2 OF MS. ABRAMSON, ON THE GROUNDS THAT IT WAS OUT OF  
3 BOUNDS AND PREJUDICIAL.

4 THE COURT: NO. LET ME SAY THAT ON THE ISSUE  
5 OF WHAT I FOUND RELEVANT AND NOT RELEVANT AT THE  
6 TIME I MADE THOSE REMARKS. AND EVEN AS OF NOW, I  
7 HAVE NOT COMPARED THOSE MATTERS THAT WERE BROUGHT  
8 OUT DURING THE CROSS-EXAMINATION WITH NOTES TO  
9 DETERMINE WHICH OF THOSE MATTERS WERE AND WHICH OF  
10 THOSE MATTERS WERE NOT CONTAINED IN THE REDACTED  
11 VERSIONS OF THE NOTES. IT COULD VERY WELL BE THAT

12 SOME OF THOSE MATTERS WERE IN THE REDACTED VERSION,  
13 AS WELL AS THE UNREDACTED. I DON'T KNOW.

14 MR. GESSLER: THE ONE WE'RE MAINLY TALKING  
15 ABOUT WAS IN THE UNREDACTED, YOUR HONOR, THAT THE  
16 DISTRICT ATTORNEY SPENT A CONSIDERABLE AMOUNT OF  
17 TIME ON YESTERDAY.

18 THE COURT: OKAY. THAT ONE WAS -- JUST SO  
19 WE'RE CLEAR --

20 MR. GESSLER: THAT IS AN ISSUE AS TO WHETHER  
21 OR NOT ANOTHER MAN, BEING A HOMOSEXUAL LOVER OF JOSE  
22 MENENDEZ, HAD TOLD THE BOYS THEIR LIFE WAS IN DANGER  
23 AT THE HANDS OF THEIR PARENTS.

24 THE COURT: OKAY. AND THAT ONE IS NOT IN THE  
25 REDACTED VERSION?

26 MR. GESSLER: THAT IS IN ONLY THE UNREDACTED,  
27 AND NOT THE REDACTED VERSION, YOUR HONOR.

28 THE COURT: ALL RIGHT.

54014

1 MR. GESSLER: THERE ARE MANY OTHER THINGS IN  
2 THE REDACTED VERSION WHICH WE HAVE NOT YET GONE  
3 INTO, AND PROBABLY WILL IN A 402, AS FOR AN OFFER OF  
4 PROOF FROM THE DISTRICT ATTORNEY, AS TO WHERE  
5 THEY'RE GOING, BUT I BELIEVE ALSO LEADING TO I.A.C.,  
6 IF THEY ARE ADMITTED AS PRIOR INCONSISTENT



7 STATEMENTS BY THE COURT AND WITHIN THE SCOPE OF THE  
8 DIRECT EXAMINATION THAT HAS BEEN GIVEN.  
9       THAT'S OVER AND BEYOND THE PLACE WE  
10 STAND NOW WITH THE JURY, WHICH IS THE PRIMARY  
11 CONCERN, THAT THIS JURY IS LEFT WITH THE IMPRESSION  
12 OF WITNESS-TAMPERING, OF HIDING EVIDENCE, OF TRYING  
13 TO GUIDE THE STATEMENTS AND KEEP OUT CERTAIN THINGS  
14 THAT THE JURY PROBABLY WANTED TO KNOW AND THOUGHT  
15 WAS IMPORTANT; AND THE WITNESS SAYING THAT THIS WAS  
16 AT THE DIRECTION OF CO-COUNSEL.

17       NOW, IT'S HARD ENOUGH FOR ANY TWO  
18 DEFENDANTS TO GET A FAIR TRIAL WITH INDIVIDUALIZED  
19 DETERMINATIONS FOR EACH, BEFORE THE SAME JURY, AND I  
20 KNOW WE WENT INTO THIS OVER A YEAR AGO AS TO KIND OF  
21 SPECULATING THAT'S WHAT MIGHT HAPPEN. NOW IT'S A  
22 REALITY.

23       IT'S HARD ENOUGH FOR ANY TWO PEOPLE, BUT  
24 FOR TWO BROTHERS, THE SPILL-OVER EFFECT TO THE JURY --  
25 IT'S ALMOST IMPOSSIBLE TO DISREGARD; THAT THEY ARE  
26 SEEN IN THIS INSTANCE AS A UNIT, AND THAT ANYTHING  
27 THE JURY FEELS MS. ABRAMSON DID, AND WHATEVER ONUS  
28 IT PUTS ON THAT, IS ALSO NOW GOING OVER ON LYLE

2 HAPPENED IF LYLE MENENDEZ HAD THE SINGLE TRIAL THAT  
3 WE SOUGHT FOR HIM, PARTICULARLY FOR PENALTY, BECAUSE  
4 WE NEVER WOULD HAVE CALLED DR. VICARY, AND NONE OF  
5 THESE OTHER STATEMENTS WOULD HAVE COME TO LIGHT THAT  
6 ARE GOING TO BE USED, HAVE BEEN USED TO IMPEACH ERIK  
7 MENENDEZ.

8       AND CERTAINLY, WE WOULD NOT BE IN THIS  
9 POSITION OF A REDACTED STATEMENT, AND WITH THAT  
10 CLOUD HANGING OVER IT IN THE JURY, THAT SOMETHING  
11 WAS DONE WRONG BY COUNSEL.

12       IT'S ONE THING TO SAY A DEFENDANT DID  
13 SOMETHING AND BROUGHT IT ON HIMSELF AND LOSES  
14 CREDIBILITY; THAT'S ONE.

15       IT'S SOMETHING ENTIRELY DIFFERENT, AND  
16 PARTICULARLY IN A DEATH-PENALTY CASE, WHERE  
17 CREDIBILITY IS EVERYTHING, TO SAY THAT COUNSEL DID  
18 SOMETHING WRONG, OR TO INDICATE, OR EVEN INFER THAT  
19 COUNSEL DID SOMETHING WRONG TO THE JURY THAT IS  
20 GOING TO HAVE TO DETERMINE LIFE AND DEATH.

21       AND IT'S FAR WORSE FOR SOMEBODY WHO SITS  
22 HERE WHO HAS NOT TAKEN THE STAND IN THE GUILT PHASE,  
23 DID NOT TAKE THE STAND IN THE PENALTY PHASE. THERE  
24 HAS BEEN NO TAINT GIVEN TO ANY WITNESSES CALLED BY  
25 MRS. TOWERY, NOR ME; AND YET, EVEN SO, THERE HAS  
26 BEEN INSINUATIONS BY THE DISTRICT ATTORNEY.

27       FOR INSTANCE, WITNESSES SUCH AS FAITH  
28 GOLDSMITH, AS TO WHETHER OR NOT, AS TO SOMETHING

1 PERTAINING TO ERIK, THAT FIRST CAME TO LIGHT AFTER  
2 SHE TALKED TO LESLIE ABRAMSON.

3 I THINK THERE WAS ANOTHER SIMILAR  
4 INSINUATION MADE ON THE TESTIMONY OF SANDY SHARP,  
5 WHO TESTIFIED INDIVIDUALLY TO CERTAIN THINGS  
6 CONCERNING LYLE MENENDEZ AND CERTAIN THINGS  
7 CONCERNING ERIK MENENDEZ; AND AS TO ERIK MENENDEZ,  
8 THE DISTRICT ATTORNEY INFERRING THAT CERTAIN THINGS  
9 GOT EXAGGERATED OR CHANGED AFTER TALKING TO LESLIE  
10 ABRAMSON.

11 NOW, I DON'T SEE HOW ANY JURY IS GOING  
12 TO BE ABLE TO SEPARATE THE MANNER IN WHICH WE HAVE  
13 CONDUCTED THE TRIAL FOR LYLE MENENDEZ, THE WITNESSES  
14 THAT WE HAVE PUT ON, THE WAY THAT WE HAVE ASKED THEM  
15 QUESTIONS, AND THE COMPARTMENTALIZATION OF LYLE  
16 MENENDEZ' LIFE, FROM WHAT IS NOW BEING INFERRED  
17 AGAINST MS. ABRAMSON THROUGH DR. VICARY THROUGH THIS  
18 HEARING THAT WE'RE HAVING. I JUST DON'T SEE HOW IT  
19 CAN HAPPEN.

20 THE COURT: OKAY. AGAIN, I DON'T CONSTRUE  
21 THIS AS A MOTION RELATING TO INEFFECTIVE ASSISTANCE  
22 OF COUNSEL, FOR THE REASON I STATED; THAT  
23 MS. ABRAMSON IS NOT COUNSEL FOR LYLE MENENDEZ.

24 WHAT YOU'VE ARGUED HERE IS BASICALLY

25 THAT YOUR CLIENT IS BEING DENIED HIS DUE PROCESS  
26 RIGHTS IN A PENALTY PHASE BY CONTAMINATION OF  
27 CONDUCT, OR BY CONDUCT OF COUNSEL FOR CODEFENDANT.  
28 MR. GESSLER: THAT'S MOST CERTAINLY TRUE.

54017

1 I'M NOT ABANDONING THE INEFFECTIVE ASSISTANCE OF  
2 COUNSEL ARGUMENT, EVEN THOUGH THE COURT THINKS I  
3 DON'T HAVE STANDING TO STATE IT. I DON'T KNOW WHAT  
4 A FEDERAL OR LATER COURT MIGHT DO. CERTAINLY THE  
5 ESSENCE OF THE ARGUMENT I'M MAKING FOR LYLE MENENDEZ  
6 IS UNDER THE 6TH, 8TH AND 14TH AMENDMENTS; THAT HE  
7 IS BEING DENIED DUE PROCESS OF AN INDIVIDUALIZED AND  
8 FAIR DETERMINATION BY AN UNTAINTED JURY AS TO  
9 WHETHER OR NOT HE SHOULD LIVE OR DIE.

10 THE COURT: OKAY. LET ME HEAR THE PEOPLE'S  
11 RESPONSE TO THAT ONE.

12 MR. CONN: I THINK THAT COUNSEL IS WRONG IN  
13 CONCLUDING THAT ANY BEHAVIOR OF MS. ABRAMSON, IF  
14 INDEED THE JURY FEELS THAT THERE WAS SOME  
15 MISBEHAVIOR BY MS. ABRAMSON, WILL IN ANY WAY BE  
16 ATTRIBUTED TO LYLE MENENDEZ. I THINK THE JURY  
17 CORRECTLY REALIZED THAT ANY BEHAVIOR ON THE PART OF  
18 LESLIE ABRAMSON HAS NOTHING WHATSOEVER TO DO WITH  
19 LYLE MENENDEZ. IT WOULD BE AS IF A WITNESS CALLED

20 BY ONE SIDE SOMEHOW IN THE END WAS OBSERVED TO HAVE  
21 COMMITTED SOME IMPROPER ACT, SUCH AS LYING OR SOME  
22 OTHER MISBEHAVIOR.

23       THERE'S NO WAY THAT THAT MISBEHAVIOR CAN  
24 BE ATTRIBUTED TO THE CODEFENDANT. IT'S A LEAP THAT  
25 COUNSEL MAKES. HE SIMPLY SAYS THAT THERE IS  
26 CONTAMINATION, OR THAT THERE IS SPILL-OVER, BUT HIS  
27 REASONS FOR REACHING THAT CONCLUSION ARE SIMPLY NOT  
28 BORNE OUT BY THE EVIDENCE.

54018

1       THIS JURY HAS BEEN INSTRUCTED THAT  
2 CERTAIN EVIDENCE CAN BE CONSIDERED ONLY AGAINST ONE  
3 DEFENDANT, AND NOT THE OTHER; AND IN MUCH THE SAME  
4 FASHION AS THEY HAVE FOLLOWED THOSE INSTRUCTIONS, I  
5 THINK THE JURY WILL BE ABLE TO RECOGNIZE THAT ANY  
6 ACTIONS ON THE PART OF MS. ABRAMSON HAVE ABSOLUTELY  
7 NOTHING TO DO WITH LYLE MENENDEZ.

8       THE COURT: DID YOU WANT TO RESPOND TO THAT,  
9 MR. GESSLER, OR DID YOU WANT TO SUBMIT IT?

10      MR. GESSLER: NO, YOUR HONOR. I THINK -- I  
11 WAS JUST LOOKING FOR A QUOTE THAT WAS GIVEN IN A  
12 PRETRIAL MOTION HERE BEFORE WE KNEW WHAT WOULD  
13 HAPPEN, ONLY WITH THE IDEA THAT SOMETHING WOULD  
14 HAPPEN WHEN WE TRIED TO HAVE A PSYCHIATRIST COME IN

15 FOR ONE BROTHER AND NOT FOR THE OTHER, AND TRY TWO  
16 BROTHERS BEFORE THE SAME JURY.

17 AND WE FILED A MOTION FOR A SEPARATE  
18 TRIAL, AND IN IT WE INCORPORATED A MOTION THAT HAD  
19 BEEN FILED TO THE COURT BEFORE THE FIRST TRIAL, IN  
20 WHICH I GAVE A DECLARATION. SO I'M QUOTED IN MY OWN  
21 MOTION.

22 "WHEN TWO BROTHERS ARE TRIED  
23 TOGETHER, THAN SEPARATELY...THE JURY  
24 STOPS VIEWING THE CONDUCT AND  
25 BACKGROUND OF EACH BROTHER AS AN  
26 INDIVIDUAL AND INSTEAD VIEWS THEIR  
27 CRIMINAL CONDUCT AS COLLECTIVELY  
28 ATTRIBUTED TO BOTH."

54019

1

2 THAT'S BASED ON EXPERIENCE I HAVE HAD  
3 THROUGH TRIALS IN THE PAST, AND THE EXPERIENCE OF  
4 OTHER COUNSEL WHO FILED SIMILAR AFFIDAVITS BEFORE  
5 THE COURT IN THE ORIGINAL MOTION FOR SEVERANCE IN  
6 THE 1993 TRIAL, EVEN THOUGH WE WERE NOT COUNSEL  
7 INVOLVED IN CASE AT THE TIME.

8 AND I THINK MR. CONN IS NOT TAKING INTO  
9 ACCOUNT HUMAN NATURE WHEN HE SAYS: "WELL, GEE, NO

10 JURORS THERE ARE GOING TO IMPUTE ANYTHING OVER TO  
11 LYLE MENENDEZ BECAUSE OF SOMETHING THAT ERIK  
12 MENENDEZ' OR ERIK MENENDEZ' COUNSEL DID."

13 I JUST THINK THAT'S AN UNREALISTIC HOPE  
14 AS TO THE FAIRNESS OF JURORS AND THEIR ABILITIES TO  
15 ASSESS THE SITUATION THAT IS BEFORE US.

16 I REAFFIRM MY MOTION THAT I'M ASKING FOR  
17 A MISTRIAL BASED ON THE DUE PROCESS RIGHTS OF LYLE  
18 MENENDEZ BEING UNALTERABLY AFFECTED BY THIS  
19 SITUATION OF MS. ABRAMSON'S CONDUCT, AND THE  
20 TESTIMONY CONCERNING IT AS GIVEN BY DR. VICARY.

21 THE COURT: ALL RIGHT. AS TO THIS MOTION,  
22 THE COURT RULES -- FIRST, THE OBSERVATION AGAIN THAT  
23 MS. ABRAMSON IS NOT COUNSEL FOR LYLE MENENDEZ, AND  
24 ANY ACTIVITY ON HER PART, WHATEVER IT MIGHT BE, AND  
25 HOWEVER IT MIGHT BE CHARACTERIZED, WOULD NOT BE  
26 VIEWED BY THE JURY AND USED IN ANY WAY TO MAKE A  
27 DECISION AS TO PENALTY. IT JUST DOESN'T WORK THAT  
28 WAY.

54020

1 THE ISSUES THIS JURY WILL BE CALLED UPON  
2 TO DECIDE, AND THE MATERIAL THAT THEY ARE AUTHORIZED  
3 TO CONSIDER, EXCLUDES CONDUCT OF COUNSEL. THEIR  
4 ROLE IS TO DECIDE EVIDENCE AND APPLY THE LAW TO THE

5 EVIDENCE, AND MAKE DETERMINATIONS, AND NOT BE  
6 CONCERNED ABOUT WHO THE LAWYERS ARE, OR WHAT THE  
7 LAWYERS SAY OR DO.

8        THAT'S PERHAPS CONTRARY TO THE IMAGE  
9 LAWYERS HAVE OF THEMSELVES AND THE IMPORTANCE THEY  
10 HAVE IN PROCEEDINGS. BUT THE BOTTOM LINE IS THAT  
11 CASES ARE DECIDED BY THE EVIDENCE AND THE LAW. AND  
12 NO MATTER HOW LAWYERS BEHAVE IN COURT, OR OUTSIDE OF  
13 COURT, ULTIMATELY, THE CASE IS RESOLVED BY THE JURY  
14 BASED ON THE EVIDENCE PRESENTED AND THE INSTRUCTIONS  
15 OF THE COURT.

16        AND I DON'T FIND THAT THERE IS ANYTHING  
17 THAT HAS OCCURRED IN THESE PROCEEDINGS, SPECIFICALLY  
18 IN REGARD TO THESE ALLEGATIONS OF MISCONDUCT, THAT  
19 WILL IN ANY WAY IMPAIR THE RIGHT OF LYLE MENENDEZ TO  
20 AN INDIVIDUALIZED DETERMINATION OF PENALTY, OR THAT  
21 WOULD DENY HIM HIS CONSTITUTIONAL RIGHTS IN THIS  
22 PENALTY PHASE.

23        GOING BEYOND THESE ALLEGATIONS --

24        MR. GESSLER: IF I MAY -- I THOUGHT YOU WERE  
25 FINISHED ON THAT ASPECT.

26        THE COURT: I WANTED TO RESPOND TO ANOTHER  
27 ASPECT OF WHAT YOU SAID.

28        GOING BEYOND THE ALLEGATIONS OF



1 MISCONDUCT OF COUNSEL -- AND BEFORE I DO THAT, LET  
2 ME GO BACK TO ANOTHER OBSERVATION.

3 TO WHATEVER EXTENT THE ROLE OF COUNSEL  
4 IS SIGNIFICANT IN A DETERMINATION BY THE JURY, THAT  
5 WILL BE REALIZED BY ARGUMENT OF COUNSEL AT THE END  
6 OF THE PROCEEDINGS.

7 AND MR. GESSLER HAS GREAT CREDIBILITY  
8 WITH THE COURT AND WITH THE JURY, AND THE JURY WILL  
9 HAVE NO DIFFICULTY IN RECOGNIZING YOU AS COUNSEL FOR  
10 LYLE MENENDEZ, AND DOES NOT IN ANY WAY ATTRIBUTE ANY  
11 MISCONDUCT TO YOU OR YOUR CLIENT THAT MIGHT HAVE  
12 BEEN REFLECTED, IF IT IS REFLECTED, BY ANYTHING THAT  
13 HAS OCCURRED IN REGARD TO COUNSEL FOR THE OTHER  
14 DEFENDANT.

15 BEYOND THAT, THERE'S THIS ARGUMENT MADE  
16 BY LYLE MENENDEZ' COUNSEL, MR. GESSLER, THAT -- AND  
17 WE'LL GET INTO THIS FURTHER IN OTHER PARTS OF YOUR  
18 MOTIONS -- THAT LYLE MENENDEZ IS SORT OF DRAGGED INTO  
19 THE PENALTY PHASE AGAINST HIS WILL AND WOULD PREFER  
20 AND MADE MOTIONS REQUESTING SEPARATE JURY, OR  
21 SEPARATE TRIAL, TO DETERMINE THE ISSUE OF PENALTY.

22 YET, ONE HAS TO REMEMBER THAT DURING THE  
23 GUILT PHASE OF THIS TRIAL, LYLE MENENDEZ RELIED, TO  
24 A GREAT EXTENT, ALMOST EXCLUSIVELY, UPON THE  
25 TESTIMONY OF ERIK MENENDEZ, AND THE CREDIBILITY OF  
26 ERIK MENENDEZ, AS SUPPORTED BY WHICHEVER WITNESSES  
27 WERE CALLED BY ERIK MENENDEZ OR LYLE MENENDEZ ON  
28 THAT SUBJECT.

1           AND AS I SAID THIS MORNING, PART OF THE  
2 EVIDENCE THE JURY IS TO CONSIDER IN DETERMINING  
3 PUNISHMENT IS THE EVIDENCE RELATING TO THE  
4 CIRCUMSTANCES INVOLVED IN THE CRIME ITSELF; AND  
5 CERTAINLY, THE TESTIMONY OF ERIK MENENDEZ IS  
6 SIGNIFICANT IN THAT REGARD.

7           AND TO THE EXTENT THAT LYLE MENENDEZ  
8 BENEFITED FROM THE TESTIMONY OF ERIK MENENDEZ IN THE  
9 GUILT PHASE, HE IS ALSO BENEFITING AND IS SUBJECT TO  
10 THE JURY'S CRITICAL EVALUATION OF THAT TESTIMONY OF  
11 ERIK MENENDEZ IN THE PENALTY PHASE.

12          AND PART OF THAT CRITICAL EVALUATION IS  
13 BASED UPON THE REVIEW OF ANY INCONSISTENT STATEMENTS  
14 THAT HE MIGHT HAVE MADE. THE FACT THAT THOSE  
15 STATEMENTS WERE NOT BROUGHT OUT IN THE GUILT PHASE,  
16 AS IS PRESENTED TO ME NOW, IS BASED UPON, OR IS  
17 DERIVED FROM THE FACT THAT THE PEOPLE DIDN'T HAVE  
18 THIS INFORMATION IN THE GUILT PHASE.

19       MR. GESSLER: YOUR HONOR, I APPRECIATE WHAT  
20 YOU SAID ABOUT MY CREDIBILITY, BOTH WITH THE COURT  
21 AND WITH THE JURY. I'M GLAD THE COURT GIVES ME  
22 CREDIBILITY. I HAVE NO IDEA IF THE JURY GIVES ME  
23 CREDIBILITY. THEY CERTAINLY DID NOT REFLECT THAT IN

24 THEIR FIRST VERDICT.

25 NOBODY CAN KNOW WHAT THESE 12 PARTICULAR  
26 JURORS ARE THINKING OF MY CREDIBILITY, THAT OF MS.  
27 TOWERY, OR THAT OF THE DEFENSE OR DEFENSE WITNESSES  
28 THAT WE HAVE PRESENTED, NOR THE WAY WE HAVE

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1 PRESENTED THIS PENALTY TRIAL.

2 THE SUPREME COURT OF THE UNITED STATES,  
3 AS WELL AS THE SUPREME COURT OF THIS STATE, HAVE  
4 RECOGNIZED THAT ARGUMENT IS A VITAL PART OF THE  
5 CASE, NOT JUST BECAUSE THE LAWYERS LIKE TO HAVE AN  
6 EXALTED OPINION OF WHAT WE DO IN LIFE, BUT BECAUSE  
7 IT DOES GIVE A CERTAIN FLAVOR AND COLORATION TO THE  
8 EVIDENCE WHICH THE JURY HAS HEARD, SO THAT THEY CAN  
9 DECIDE IT BASED ON THE LAW THAT THE COURT GIVES.

10 THAT'S EVEN IN A LITTLE THROWING OF  
11 COCAINE CASE. THAT TO DENY COUNSEL ARGUMENT, OR  
12 EVEN TO FORESHORTEN ARGUMENT, IS A MATTER OF DUE  
13 PROCESS AND REVERSAL, YOUR HONOR, AND THAT'S IN A  
14 NOTHING CASE, BASICALLY, AND WHERE THE FACTS ARE  
15 VERY CLEAR; EITHER SOMEBODY SAW A PERSON THROW IT,  
16 OR HE DIDN'T SEE HIM THROW IT.

17 WHEN WE GET INTO THE DEATH PENALTY REALM  
18 IN WHICH THE UNITED STATES SUPREME COURT HAS TIME

19 AFTER TIME SAID IT'S QUALITATIVELY DIFFERENT FROM  
20 ANY OTHER CASE WE WILL EVER FACE, ANY OTHER MURDER  
21 CASE, ANY OTHER PENAL CASE OR CIVIL CASE, CERTAINLY  
22 ARGUMENT IS EXTREMELY IMPORTANT, AND THE CREDIBILITY  
23 AND SINCERITY OF THE LAWYER MAKING THE ARGUMENT CAN  
24 OFTEN MAKE THE DIFFERENCE BETWEEN GETTING ONE  
25 JUROR -- IF THAT'S WHAT IT TAKES TO HANG IT UP -- OR  
26 LOSING THE CASE TO A DEATH PENALTY VERDICT WHICH  
27 WILL BE CARRIED OUT.

28 SO I CANNOT BELITTLE THE PART THAT

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1 ARGUMENT PLAYS IN A CASE SUCH AS THIS, NOR CAN I  
2 JUST CAST ASIDE THE AMOUNT OF CREDIBILITY THAT THE  
3 JURY MUST HAVE FOR THE LAWYER WHO'S MAKING THAT  
4 PARTICULAR ARGUMENT.

5 AND I WOULD REMIND THE COURT THAT WHEN  
6 YOU STATE THAT WE TOOK ADVANTAGE OF ERIK MENENDEZ'  
7 TESTIMONY AT THE TRIAL HERE, THAT THAT'S KIND OF  
8 LIFTING IT UP BY THE BOOTSTRAPS BECAUSE WHEN WE MADE  
9 OUR ORIGINAL MOTION FOR SEVERANCE, WE DIDN'T WANT  
10 ANYTHING TO DO WITH ERIK MENENDEZ. WE WANTED A  
11 SEPARATE TRIAL FOR GUILT, AS WELL AS FOR INNOCENCE.  
12 THE COURT DENIED OUR MOTION FOR SEVERANCE.

13 THE COURT: BECAUSE THERE WAS NO BASIS TO

14 GRANT IT.

15 MR. GESSLER: WE THOUGHT WE HAD PRETTY GOOD  
16 BRUTON-ARANDA AND OTHER MOTIONS FOR IT, AS WELL AS  
17 WHAT MIGHT HAPPEN IN THE PENALTY PHASE. WE  
18 RESPECTFULLY DISAGREED WITH THE COURT THEN AND NOW,  
19 BUT HERE WE ARE. WE DID NOT ASK FOR A JOINT TRIAL.  
20 WE DIDN'T SAY: "PLEASE LET US BE TRIED TOGETHER SO  
21 WE CAN TAKE ADVANTAGE OF ERIK MENENDEZ' TESTIMONY."

22 WE WOULD HAVE BEEN VERY HAPPY AND ASKED  
23 FOR A SEPARATE TRIAL COMPLETELY APART FROM ERIK  
24 MENENDEZ, WITHOUT HIM HAVING ANY PART OF IT, AND WE  
25 WOULD HAVE TRIED THE CASE DIFFERENTLY. WE MAY OR  
26 MAY NOT HAVE HAD A BETTER RESULT, BUT IT WOULD HAVE  
27 BEEN A TOTALLY DIFFERENT TRIAL, IF WE HAD BEEN ABLE  
28 TO RUN IT OURSELVES, IN THE WAY WE WANTED, WITH JUST

54025

1 OUR EVIDENCE COMING IN.

2 WE WERE DENIED THAT. WE MADE THE BEST  
3 OF WHAT WE WERE GIVEN. WE DID THE BEST, IN OUR  
4 TACTICAL JUDGMENT, WE COULD WITH THE EVIDENCE AS IT  
5 WAS COMING IN AND WITH THE DECISIONS THAT WE MADE.

6 NOW, HERE WE ARE. THAT DOESN'T MEAN  
7 THAT WE SHOULD BE STUCK WITH THIS AT PENALTY TRIAL,  
8 ALL BECAUSE WE BENEFITED FROM ERIK MENENDEZ'

9 TESTIMONY AT THE TRIAL, THAT WAS TOGETHER TO BEGIN

10 WITH THAT WE NEVER WANTED ANYHOW.

11 THE COURT: OKAY. ALL RIGHT.

12 THE FIRST MOTION FOR MISTRIAL, THE

13 ARGUMENT AND RULINGS, AND THE BASIS FOR THAT MOTION

14 IS ON THE RECORD. AND THE MOTION IS DENIED FOR THE

15 REASONS I'VE STATED.

16 ALL RIGHT. LET'S MOVE ON TO YOUR NEXT

17 ARGUMENT, MR. GESSLER, AS TO A MOTION FOR MISTRIAL.

18 MR. GESSLER: MY NEXT ARGUMENT, YOUR HONOR,

19 DEALS WITH THE ANDERSON-TYPE ISSUES, WHICH CAN ONLY

20 BE DECIDED, I THINK, IN A 402 MOTION IN WHICH WE

21 KNOW WHERE THE PROSECUTOR IS HOPING TO GO NOW THAT

22 HE HAS THESE PARTICULAR NOTES OF DR. VICARY'S

23 CONVERSATIONS WITH ERIK MENENDEZ.

24 THERE ARE SEVERAL AREAS THERE WHICH I

25 FEEL ARE CERTAINLY ANDERSON-TYPE ISSUES. I THINK

26 THAT SHOULD BE DONE OUTSIDE THE PUBLIC'S PRESENCE

27 BECAUSE OF THE FACT THAT JURORS STILL MAY READ

28 NEWSPAPERS AND LISTEN TO THE RADIO. AND I THINK IT

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1 NEEDS TO BE DONE ON AN ITEM-BY-ITEM BASIS AS TO

2 WHERE THE DISTRICT ATTORNEY IS GOING BASED ON THE

3 INFORMATION THEY NOW HAVE IN HAND.

4 THE COURT: SO BEFORE THAT ARGUMENT CAN BE  
5 HEARD, YOU WOULD WANT FURTHER OFFERS OF PROOF? YOU  
6 CANNOT PURSUE THIS ARGUMENT BASED UPON WHAT HAS  
7 ALREADY OCCURRED?

8 MR. GESSLER: THAT IS CORRECT, YOUR HONOR. I  
9 CAN'T BECAUSE -- MAY I HAVE JUST A MOMENT?

10 THE COURT: SURE.

11 (ATTORNEYS TOWERY AND GESSLER  
12 CONFER SOTTO VOCE.)

13

14 MR. GESSLER: WELL, WE HAVE HAD TWO QUESTIONS  
15 ASKED BY THE DISTRICT ATTORNEY, EACH OF WHICH  
16 OBJECTIONS WERE -- ONE OBJECTION WAS SUSTAINED, AND  
17 THE OTHER ONE WAS PUT OFF. I THINK YOU TOLD  
18 MR. CONN TO GO TO ANOTHER LINE OF QUESTIONING WHEN  
19 ERIK -- WHEN LYLE MENENDEZ WAS MENTIONED.

20 THE COURT: I THINK I SUSTAINED BOTH.

21 MS. TOWERY: I THINK YOU PUT OFF BOTH, IS MY  
22 RECOLLECTION.

23 THE COURT: I SUSTAINED THEM AND INDICATED  
24 THAT WE'LL DISCUSS ALL THOSE MATTERS AT A LATER  
25 TIME.

26 MR. GESSLER: THAT'S THE TWO THAT HAVE BEEN  
27 GONE INTO SO FAR. I ASSUME THERE MIGHT BE MORE.  
28 I'M NOT SURE THAT THE OBJECTION, EVEN THOUGH

1 SUSTAINED, GIVEN THE CONTENTS OF WHERE WE WERE IN  
2 THE CHANGING OF REPORTS AND ALTERING REPORTS AND  
3 THINGS LIKE THAT, IS EFFECTIVE TO DISASSOCIATE US  
4 FROM THAT MATTER.

5 CERTAINLY THERE ARE OTHER AREAS THERE  
6 THAT I ALSO FEEL THE DISTRICT ATTORNEY SHOULD NOT BE  
7 ALLOWED TO GO INTO.

8 THE COURT: OKAY. DID THE PEOPLE INTEND TO  
9 GO INTO OTHER AREAS OF INQUIRY OTHER THAN THOSE  
10 YOU'VE ALREADY COVERED?

11 MR. CONN: YES. JUST THE TWO. THERE'S TWO  
12 SPECIFIC AREAS THAT WE INTEND TO GO INTO WHICH MAKE  
13 REFERENCE --

14 MR. LEVIN: YOUR HONOR, WE FEEL THAT IF THESE  
15 ARE MATTERS IN WHICH MR. CONN'S GOING TO BE MAKING  
16 REFERENCE TO THE NOTES, THAT IT BE DONE OUTSIDE THE  
17 PRESENCE OF THE PUBLIC; THAT WE STILL CONTEND THAT  
18 THESE MATTERS ARE PRIVILEGED. AND AT THIS POINT WE  
19 WISH TO -- JUST A MOMENT.

20 (ATTORNEYS ABRAMSON AND LEVIN

21 CONFER SOTTO VOCE.)

22

23 MR. LEVIN: YOUR HONOR, WITH RESPECT TO THE  
24 MATTERS THAT I THINK MR. CONN IS GOING TO RAISE AT  
25 THIS TIME IN OPEN COURT, ARE MATTERS THAT WE FEEL  
26 ARE PRIVILEGED AND INADMISSIBLE.



27 THE COURT: WHAT PRIVILEGE IS THIS?

28 MR. LEVIN: WE FEEL THAT THE PRIVILEGE ARISES

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1 RELATING TO THE PSYCHIATRIC-PATIENT COMMUNICATION  
2 PRIVILEGE THAT WAS PREVIOUSLY ACKNOWLEDGED BY THE  
3 COURT WITH RESPECT TO DR. OZIEL, WHICH IS NOT --

4 THE COURT: HASN'T THAT BEEN WAIVED WHEN THE  
5 WITNESS TOOK THE WITNESS STAND?

6 MR. LEVIN: NOT TO ALL MATTERS. THERE WERE  
7 OTHER MATTERS TO WHICH THE PRIVILEGE HAS BEEN  
8 PROPERLY INVOKED.

9 THE COURT: WHICH MATTERS WERE THEY INVOKED  
10 IN? WITH REGARD TO DR. VICARY, I DON'T RECALL ANY  
11 SUCH --

12 MR. LEVIN: WELL, BEFORE WE GET INTO RAISING  
13 SPECIFIC OBJECTIONS, I WOULD WANT TO HAVE AN  
14 OPPORTUNITY TO REVIEW WHAT IT IS MR. CONN'S  
15 REFERRING TO SPECIFICALLY. I THINK I KNOW WHAT HE'S  
16 TALKING ABOUT, BUT I'M UNCERTAIN, AND I JUST DON'T  
17 WANT HIM TO STATE ON THE RECORD, IN OPEN COURT, HAVE  
18 IT REPORTED IN THE PRESS, TO MATTERS WHICH THE COURT  
19 MAY LATER RULE TO BE INADMISSIBLE AND MATTERS NOT  
20 PROPERLY BEFORE THE JURY.

21 THE COURT: ALL RIGHT. ARE THESE MATTERS,

22 MR. CONN, THAT WERE REMOVED FROM THE FIRST VERSION  
23 THAT YOU RECEIVED?  
24 MR. CONN: NO.  
25 THE COURT: I JUST WANT TO TRY AND LOCATE  
26 THEM IN THE NOTES SOMEWHERE.  
27 MR. CONN: ACTUALLY, NOW THAT I LOOK BACK TO  
28 THE QUESTIONS THAT I ASKED DR. VICARY ALREADY, BOTH

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1 OF THESE MATTERS RELATE, OR SIMPLY ARE FOLLOW-UP  
2 QUESTIONS TO THE AREAS I TRIED TO GET INTO WITH HIM  
3 WHEN HE WAS ON THE WITNESS STAND.  
4 THE COURT: TRYING TO CLARIFY THE MATERIAL  
5 THAT WAS DISCUSSED IN QUESTIONS YOU ALREADY ASKED?  
6 MR. CONN: YES.  
7 THE COURT: SO THERE'S NO OTHER MATERIAL IN  
8 THE NOTES THAT YOU'D BE BRINGING IN FRESH THAT  
9 HASN'T ALREADY BEEN DISCUSSED?  
10 MR. CONN: THAT'S CORRECT. THIS RELATES TO  
11 TWO QUESTIONS I PUT TO HIM, ONE OF WHICH HE  
12 ANSWERED. I WANTED TO ASK THE FOLLOW-UP QUESTION.  
13 AND THE OTHER ONE WHICH HE DID NOT  
14 ANSWER, THE COURT DEFERRED UNTIL FURTHER  
15 DISCUSSION.  
16

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1 THE COURT: OKAY. SO THOSE THINGS HAVE ALREADY  
2 BEEN BROUGHT OUT. SO I DON'T SEE ANY HARM IN DISCUSSING  
3 THEM.

4 WHAT ARE THOSE TWO AREAS?

5 MR. CONN: YES. THE TWO AREAS, AND THE WAY WE  
6 BEGAN THIS PART OF THE DISCUSSION WITH MR. GESSLER, WAS  
7 I BELIEVE THAT MR. GESSLER SUGGESTED THAT THERE WAS A  
8 MISTRIAL MOTION BASED UPON THE QUESTIONS ALREADY ASKED  
9 OF THE WITNESS.

10 AS HE NOW MAKES HIS ARGUMENT, IT SOUNDS  
11 LIKE HE'S NOT SO MUCH TALKING ABOUT A MISTRIAL MOTION,  
12 AS MUCH AS HE IS SUGGESTING THAT WE NOW NEED TO

13 DETERMINE THE APPLICATION OF THE ARANDA-BRUTON RULE TO  
14 FUTURE QUESTIONS; THE TWO QUESTIONS THAT I ATTEMPTED TO  
15 GO INTO, AND WHICH WERE NOT FULLY ANSWERED.

16 AND FOR THAT REASON THE MISTRIAL MOTION, IF  
17 INDEED THERE IS ONE, SHOULD BE DENIED AT THIS POINT, TO  
18 THE EXTENT THAT I ASKED DR. VICARY WHETHER ERIK MENENDEZ  
19 HAD TOLD HIM THAT HIS BROTHER TOLD HIM TO WAIT A WEEK,  
20 AND HE TOLD HIS BROTHER THAT HE COULDN'T WAIT ANOTHER  
21 WEEK.

22 THIS WAS A QUESTION WHICH WAS NEVER  
23 ANSWERED BY THE WITNESS.

24 SO SINCE WE HAVE NO ANSWER TO THE QUESTION,  
25 THAT CANNOT POSSIBLY BE THE BASIS FOR A MISTRIAL MOTION.

26 I INTEND TO HAVE HIM ANSWER THAT QUESTION,  
27 AND THEN TO ASK HIM FOLLOW-UP QUESTIONS CONCERNING HOW  
28 THAT WAS EXPLAINED TO HIM.

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1 THE SECOND AREA IS IN REGARD TO THE  
2 STATEMENT OF ERIK MENENDEZ THAT ONE WEEK PRIOR TO THE  
3 KILLINGS HE HAD CONVERSATIONS ABOUT LIFE WITHOUT HIS  
4 PARENTS. AND THIS QUESTION HE WAS PERMITTED TO ANSWER,  
5 BUT I WAS NOT PERMITTED TO ASK THE FOLLOW-UP QUESTION,  
6 WHICH WAS: WITH WHOM DID HE HAVE THESE CONVERSATIONS?

7 SO THE RESULT IS THE FAILURE OF BOTH OF  
8 THESE QUESTIONS TO IMPLICATE LYLE MENENDEZ IN ANY WAY.

9 A MISTRIAL MOTION SHOULD BE DENIED. AND I WOULD ASK  
10 THAT THE COURT ALLOW ME TO ASK THE FOLLOW-UP QUESTIONS  
11 THAT I WANT TO ASK IN REGARD TO BOTH OF THESE AREAS.

12 IT IS OUR CONTENTION THAT THE ARANDA-BRUTON  
13 RULE WOULD NOT BE VIOLATED AT THIS POINT, BECAUSE THE  
14 DEFENDANT HAS ALREADY TESTIFIED IN THIS CASE.

15 THE ANDERSON CASE CITED BY COUNSEL --

16 THE COURT: LET'S NOT GET INTO THE ARGUMENT.  
17 THAT WAS AN ISSUE THAT I BROUGHT UP YESTERDAY.

18 DO YOU HAVE ANY OBJECTION TO PROCEEDING  
19 WITH THIS INQUIRY OUTSIDE THE PRESENCE OF THE JURY,  
20 TAKING TESTIMONY ON THESE SUBJECTS? ANY OBJECTION TO  
21 THAT?

22 MR. CONN: NO, I HAVE NO OBJECTION TO THAT.

23 THE COURT: ANYBODY?

24 MR. GESSLER: NO, YOUR HONOR. I THINK THAT --

25 THE COURT: OKAY. LET'S GET DR. VICARY ON THE  
26 WITNESS STAND.

27 MR. FITZGERALD: IF THE COURT PLEASE, MAY I  
28 IDENTIFY MYSELF?

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1 THE COURT: YES.

2 MR. FITZGERALD: PAUL J. FITZGERALD, YOUR HONOR.  
3 I REPRESENT DR. VICARY.

4 THE COURT: I COULD HAVE GUESSED AS MUCH.

5 MR. FITZGERALD: AND I'M A LITTLE UNCLEAR AS TO

6 DR. VICARY'S EXPOSURE HERE.

7 AND I AM OF A MIND, AS MOST CONSERVATIVE

8 COUNSEL ARE, TO ADVISE MY CLIENT UNDER THE CIRCUMSTANCES

9 TO AVAIL HIMSELF OF HIS RIGHT AGAINST SELF-INCRIMINATION

10 AND TO INVOKE HIS PRIVILEGE.

11 BUT I AM A LITTLE UNCLEAR AS TO THE FOCUS

12 OF THE ISSUES HERE. I UNDERSTAND THERE HAVE BEEN SOME

13 OMISSIONS, OR PURPORTED OMISSIONS, FROM NOTES; HOW THOSE

14 ADMISSIONS CAME TO BE, TO WHAT EXTENT DR. VICARY WAS

15 INVOLVED IN SOME SO-CALLED SUPPRESSION OR OMISSION OF

16 NOTES.

17 CONSEQUENTLY, OUT OF CAUTION, AND UNTIL I

18 CAN CONFER WITH COUNSEL AND GET A LITTLE BETTER

19 PERSPECTIVE AND FRAMEWORK, I WOULD ASK THAT NO

20 QUESTIONING OF DR. VICARY TAKE PLACE.

21 THE COURT: ALL RIGHT.

22 WELL, BEAR IN MIND THAT DR. VICARY IS A

23 WITNESS IN THIS CASE. HE WAS ON THE WITNESS STAND

24 YESTERDAY, AS OF NOON. HE HAS ALREADY TESTIFIED ABOUT

25 THESE SUBJECTS, AND HAS NEVER CLAIMED ANY PRIVILEGE, AND

26 HAS TESTIFIED FULLY ON THESE SUBJECTS.

27 AND IT'S HARD TO SEE THAT HE HASN'T WAIVED

28 ANY PRIVILEGE THAT HE MIGHT OTHERWISE HAVE ON THESE

1 SUBJECTS, ESPECIALLY THE TWO QUESTIONS THAT THE

2 PROSECUTION INDICATES THEY WANT TO ASK.

3 MR. FITZGERALD: WELL, WITH RESPECT TO THE

4 QUESTIONS THE PROSECUTION INTENDS TO ASK, MR. CONN

5 INDICATED THAT HE MAY HAVE SOME FOLLOW-UP QUESTIONS.

6 CERTAINLY, IF THESE QUESTIONS INVOLVE THE

7 MATERIALS THAT I HAVE JUST BROUGHT TO THE COURT'S

8 ATTENTION, THAT IS TO SAY, ANY PURPORTED CONSPIRACY OR

9 ANYTHING WITH MS. ABRAMSON WITH RESPECT TO THE DELETION

10 OF THESE MATERIALS, OR CHRONOLOGY, AND SO ON, HE

11 CERTAINLY HASN'T WAIVED THAT PRIVILEGE.

12 THE COURT: WELL, AT THIS POINT WE'RE NOT TALKING

13 ABOUT THAT. I'M NOT ADDRESSING THAT PARTICULAR SUBJECT.

14 WHETHER I AGREE OR DISAGREE WITH YOU, THAT'S SOMETHING

15 THAT WE CAN DEAL WITH, IF WE HAVE TO.

16 BUT AT THIS POINT I PROPOSE TO TAKE

17 TESTIMONY FROM THE WITNESS ON SUBJECTS THAT WERE BROUGHT

18 OUT DURING HIS EXAMINATION YESTERDAY, AND UNRELATED TO,

19 AT THIS POINT, THIS CONTROVERSY REGARDING THE

20 REDACTIONS.

21 SO WE'RE GOING TO HAVE DR. VICARY ON THE

22 WITNESS STAND.

23 MR. FITZGERALD: WOULD YOU MIND IF I SAT CLOSE TO

24 HIM, PERHAPS AT THE END OF THE JURY BOX?

25 THE COURT: GO AHEAD. THAT'S FINE.

26

27 ///

28 ///

1 WILLIAM VICARY,  
2 CALLED AS A WITNESS UNDER EVIDENCE CODE SECTION 402,  
3 HAVING BEEN PREVIOUSLY SWORN, RESUMED THE STAND AND  
4 TESTIFIED FURTHER AS FOLLOWS:

5  
6 THE COURT: STATE YOUR NAME FOR THE RECORD,  
7 PLEASE.

8 THE WITNESS: WILLIAM VICARY.

9 THE COURT: I WILL REMIND YOU, YOU'RE STILL UNDER  
10 OATH.

11 ALL RIGHT. MR. CONN.

12

13 CROSS-EXAMINATION

14 BY MR. CONN:

15 Q. YES.

16 DOCTOR, I BELIEVE THAT YOU ALREADY  
17 TESTIFIED THAT ERIK MENENDEZ TOLD YOU -- ERIK MENENDEZ  
18 TOLD YOU THAT ONE WEEK PRIOR TO THE KILLING OF HIS  
19 PARENTS HE HAD CONVERSATIONS ABOUT WHAT IT WOULD BE LIKE  
20 TO LIVE WITHOUT HIS PARENTS; IS THAT CORRECT?

21 A. THAT COMES, I THINK, FROM A PAGE IN MY  
22 NOTES.

23 Q. YES.

24 A. CAN YOU CITE THE PAGE FOR ME?

25 Q. YES. MAY I HAVE JUST ONE MOMENT, YOUR



26 HONOR?

27 OKAY. I BELIEVE THAT IS FROM MY PAGE 18,

28 NOT YOURS. LET ME SHOW YOU MY PAGE 18.

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1 A. I HAVE IT HERE.

2 THE COURT: OKAY.

3 Q. BY MR. CONN: OKAY.

4 A. IT'S RIGHT IN THE BOTTOM THIRD OF THE PAGE

5 THERE (POINTING).

6 Q. AND WHO DID ERIK MENENDEZ INDICATE THAT HE

7 HAD THAT CONVERSATION WITH?

8 A. HIS BROTHER.

9 Q. AND DID HE GIVE YOU THE DETAILS OF THAT

10 CONVERSATION?

11 A. NO.

12 Q. DID HE TELL YOU WHAT COMMENTS HE MADE TO

13 HIS BROTHER CONCERNING WHAT IT WOULD BE LIKE WITHOUT HIS

14 PARENTS?

15 A. NO.

16 Q. DID HE GIVE YOU ANY DETAILS CONCERNING WHAT

17 HIS BROTHER SAID TO HIM ABOUT WHAT IT WOULD BE LIKE

18 WITHOUT HIS PARENTS?

19 A. NO.

20 Q. DO YOU REMEMBER ANYTHING FURTHER ABOUT THAT

21 COMMENT TO YOU FROM ERIK MENENDEZ, THAT HE HAD A

22 CONVERSATION WITH HIS BROTHER ABOUT ONE WEEK PRIOR TO  
23 THE KILLINGS CONCERNING WHAT IT WOULD BE LIKE WITHOUT  
24 HIS PARENTS?

25 A. NO. AND IF THERE WAS ANYTHING SIGNIFICANT,  
26 I WOULD HAVE WRITTEN IT IN MY NOTES.

27 Q. THE OTHER QUESTION THAT I BELIEVE YOU HAVE  
28 ALREADY BEEN ASKED IS WHETHER HE TOLD YOU -- WHETHER

-11500

1 ERIK MENENDEZ TOLD YOU THAT HIS BROTHER TOLD HIM TO WAIT  
2 A WEEK, AND THE DEFENDANT TOLD HIS BROTHER: "I CAN'T  
3 TAKE ANOTHER WEEK."

4 DO YOU REMEMBER THAT STATEMENT MADE TO YOU  
5 BY ERIK MENENDEZ?

6 A. IT'S RIGHT IN MY NOTES, IN THE MIDDLE OF  
7 PAGE 20.

8 Q. OKAY. AND WHAT DID THAT CONVERSATION  
9 RELATE TO?

10 A. IT'S NOT CLEAR FROM MY NOTES.

11 Q. WHEN HE SAID -- WELL, I'M ASKING YOU.

12 BASED UPON YOUR RECOLLECTION WHEN THE  
13 DEFENDANT INDICATED TO YOU THAT HIS BROTHER TOLD HIM TO  
14 WAIT A WEEK FOR SOMETHING, WHAT WAS IT THAT HIS BROTHER  
15 WAS ASKING HIM TO WAIT A WEEK FOR?

16 A. IT DOES NOT SAY IN MY NOTES, AND IT'S NOT  
17 CLEAR IN MY MEMORY WHAT THAT MEANS. I KNOW THAT HE SAID

18 IT, BECAUSE I WROTE IT DOWN.

19 Q. SO IS IT YOUR TESTIMONY THEN THAT YOU HAVE  
20 NO RECOLLECTION AS TO WHAT ERIK MENENDEZ WAS REFERRING  
21 TO AT THAT TIME?

22 A. I THINK I HAVE A CONCLUSION THAT I DRAW  
23 FROM WHEN HE WAS SAYING IT, BUT IT'S NOT SOMETHING HE  
24 SPECIFICALLY TOLD ME, YOU SEE. I THINK IT WAS A  
25 THOUGHT --

26 MR. LEVIN: YOUR HONOR, I WOULD OBJECT TO  
27 ANYTHING FURTHER WITH RESPECT TO THIS WITNESS  
28 SPECULATING OR DRAWING CONCLUSIONS.

-11499

1 THE COURT: OVERRULED.

2 THIS IS, AGAIN, AN IN LIMINE HEARING. THE  
3 JURY IS NOT PRESENT.

4 Q. BY MR. CONN: AND THAT CONCLUSION THAT YOU  
5 REACHED -- DID YOU REACH THAT CONCLUSION BECAUSE OF THE  
6 CONTEXT OF THE CONVERSATION THAT YOU WERE HAVING WITH  
7 ERIK MENENDEZ?

8 MR. LEVIN: OBJECTION. IT'S IRRELEVANT WHY HE  
9 DREW A CONCLUSION.

10 THE COURT: OVERRULED. OVERRULED.

11 THE WITNESS: WELL, ACTUALLY, IT'S THE CONTEXT OF  
12 THIS CONVERSATION WITH ERIK, MY PRIOR CONVERSATIONS WITH  
13 ERIK, AND WHAT I KNOW ABOUT THE CASE -- THE FACTS OF THE

14 CASE, ALL RIGHT.

15 THAT'S THE BASIS FOR MY THOUGHT WHEN HE'S

16 TELLING ME THIS.

17 Q. BY MR. CONN: OKAY. AND WHAT WAS YOUR

18 CONCLUSION CONCERNING WHAT ERIK MENENDEZ WAS REFERRING

19 TO WHEN HE TOLD YOU THAT HIS BROTHER ASKED HIM TO WAIT A

20 WEEK FOR SOMETHING?

21 MR. LEVIN: OBJECTION. IRRELEVANT.

22 THE COURT: OVERRULED.

23 THE WITNESS: THAT THEY WERE GOING TO HAVE TO DO

24 SOMETHING DRASTIC ABOUT WHAT WAS GOING ON BETWEEN THEM

25 AND THEIR PARENTS.

26 Q. BY MR. CONN: AND DID HE EVER SPECIFY WHAT

27 WOULD HAVE TO BE DONE THAT WAS DRASTIC?

28 MR. LEVIN: OBJECTION. ASSUMES FACTS NOT IN

-11498

1 EVIDENCE, THAT MY CLIENT USED THE WORD "DRASTIC." THESE

2 ARE HIS OWN PERCEPTIONS AND FEELINGS.

3 THE COURT: REPHRASE THE QUESTION, PLEASE.

4 MR. CONN: YES.

5 Q. DID YOU EVER CLARIFY IN ANY WAY WHAT WAS

6 THE POTENTIAL CONSEQUENCE OF WHAT WAS GOING ON IN THAT

7 HOUSE?

8 MR. LEVIN: OBJECTION. ASSUMES FACTS NOT IN

9 EVIDENCE, AND IT'S VAGUE AND AMBIGUOUS.

10 THE COURT: OVERRULED.

11 THE WITNESS: I THINK THAT TRACKING BACK THROUGH  
12 MY NOTES YOU CAN SEE THAT THERE WERE TERRIBLE PROBLEMS  
13 THAT WERE GOING ON IN THE FAMILY, AND THAT THAT WAS THE  
14 CONTEXT OUT OF WHICH THIS STATEMENT AROSE.

15 THE COURT: ARE YOU SAYING YOU NEVER ASKED THE  
16 DEFENDANT WHAT HE MEANT BY THAT STATEMENT?

17 IS THAT WHAT YOU'RE SAYING?

18 THE WITNESS: CORRECT. YES, YOUR HONOR.

19 THE COURT: HE JUST SAID THAT TO YOU, AND YOU  
20 WROTE IT DOWN AND YOU NEVER PURSUED IT; IS THAT WHAT  
21 YOU'RE SAYING?

22 THE WITNESS: YES.

23 MR. CONN: THANK YOU.

24 I HAVE NO FURTHER QUESTIONS, YOUR HONOR,  
25 THAT I WILL BE ASKING THE WITNESS, YOUR HONOR,  
26 CONCERNING LYLE MENENDEZ.

27 THE COURT: OKAY.

28 MR. GESSLER, DID YOU HAVE AREAS OF INQUIRY

-11497

1 THAT YOU WANTED TO GO INTO THAT YOU FELT HAD TO BE  
2 CLARIFIED ON THE EXAMINATION HERE?

3 MS. TOWERY: CAN WE HAVE JUST A MOMENT?

4 THE COURT: SURE. BEARING IN MIND THAT THE  
5 CONCLUSIONS OF THE WITNESS WERE JUST FOR THE PURPOSE OF

6 THIS HEARING AND NOT -- WOULD NOT BE ADMISSIBLE DURING  
7 THE COURSE OF A PROCEEDING IN FRONT OF THE JURY.

8

9 CROSS-EXAMINATION

10 BY MR. GESSLER:

11 Q. DR. VICARY, DID YOU TAKE THE INFORMATION  
12 CONCERNING THE BROTHER SAID: "WAIT A WEEK," THE  
13 DEFENDANT SAID, "I CAN'T WAIT ANOTHER WEEK."

14 DID YOU TAKE THAT OUT OF YOUR NOTES -- WAS  
15 THAT REDACTED?

16 MR. FITZGERALD: MAY I HAVE AN OPPORTUNITY TO  
17 CONSULT WITH MY CLIENT?

18 THE COURT: SURE.

19 (THE WITNESS AND COUNSEL CONFER  
20 SOTTO VOCE.)

21

22 THE WITNESS: YES. THAT WAS AN ITEM THAT I TOOK  
23 OUT.

24 Q. BY MR. GESSLER: WHY DID YOU DO THAT?

25 A. BECAUSE IN MY CONVERSATION WITH  
26 MS. ABRAMSON, IT WAS NOT CLEAR WHAT THAT MEANT. AND THE  
27 MOST LOGICAL EXPLANATION, BASED UPON WHAT I KNEW LATER,  
28 WAS THAT THEY WERE TALKING ABOUT CONFRONTING THE FATHER

1 ABOUT STOPPING THE MOLESTATION.

2 BUT THIS STATEMENT STANDING ALONE, BY  
3 ITSELF, SEEMS TO INDICATE THE INFERENCE THAT I DREW WHEN  
4 HE FIRST MADE THE STATEMENT TO ME; THEREFORE, DEFENSE  
5 COUNSEL SAID: "WE HAVE TO TAKE THIS OUT, BECAUSE THIS  
6 IS MISLEADING. IT'S PREJUDICIAL. IT'S GOING TO LEAD TO  
7 A WRONGFUL INFERENCE AND A WRONGFUL CONCLUSION."

8 Q. AND AT THAT POINT YOU FELT IT WAS  
9 MISLEADING ALSO?

10 A. YES.

11 Q. THE OTHER COMMENTS THAT YOU'VE BEEN  
12 EXAMINED ON, THE -- THE COMMENT ABOUT ONE WEEK PRIOR HE  
13 TALKED ABOUT WHAT IT WOULD BE LIKE TO BE WITHOUT HIS  
14 PARENTS, DID YOU TAKE THAT OUT OF YOUR NOTES ALSO?

15 A. YES, I DID.

16 Q. WHY DID YOU DO THAT?

17 A. COUNSEL TOLD ME THAT THAT RELATED TO LYLE,  
18 TO THE CO-DEFENDANT; AND THEREFORE, BECAUSE IT INVOLVED  
19 STATEMENTS OF LYLE, IT WOULD HAVE TO COME OUT, JUST LIKE  
20 THE MATERIAL AFTER IT ABOUT THE FATHER TAKING AWAY THE  
21 MONEY FOR HIS TOUPEE.

22 Q. LET'S TALK ABOUT THIS COMMENT THAT WE'RE ON  
23 HERE, THE WEEK PRIOR.

24 THAT COMMENT WAS TAKEN OUT AT THE REQUEST  
25 OF MS. ABRAMSON?

26 A. YES.

27 Q. AND BECAUSE -- AGAIN, BECAUSE IT RELATED TO  
28 LYLE, YOU'RE SAYING; IT WAS A STATEMENT OF LYLE'S? OR

1 DO YOU REMEMBER?

2 A. THAT IS MY MEMORY.

3 Q. AND THE TOTAL MEMORY YOU HAVE OF THAT  
4 STATEMENT AS TO THE WORDS ACTUALLY SAID WERE --  
5 "WONDERED WHAT IT WOULD BE LIKE TO BE WITHOUT THE  
6 PARENTS"?

7 A. YES.

8 Q. IS THAT IN A CONTEXT ABOUT ERIK GOING OFF  
9 TO U.C.L.A., OR DO YOU REMEMBER?

10 A. THAT'S POSSIBLE. I DON'T REMEMBER THAT.

11 Q. DO YOU REMEMBER IF IT WAS IN THE CONTEXT OF  
12 LYLE GOING BACK TO PRINCETON, OR DO YOU REMEMBER?

13 A. I DON'T RECALL THAT.

14 MR. GESSLER: NOTHING ELSE, YOUR HONOR.

15 THE COURT: MR. LEVIN?

16 MR. LEVIN: YOUR HONOR, GIVEN WHAT'S TRANSPIRED,  
17 I DON'T BELIEVE THAT I CAN EFFECTIVELY CROSS-EXAMINE  
18 THIS WITNESS IN LIGHT OF THE FACT MY CO-COUNSEL HAS  
19 TAKEN THE 5TH AMENDMENT.

20 THE COURT: DOES THAT PREVENT YOU FROM TALKING  
21 AND THINKING? HOW DOES IT PREVENT YOU FROM  
22 CROSS-EXAMINING?

23 MR. LEVIN: IT PREVENTS ME FROM GAINING FACTUAL  
24 INFORMATION THAT MIGHT ALLOW ME TO EFFECTIVELY BRING  
25 FORTH MATTERS THAT MAY ASSIST MY CLIENT IN THE PENALTY  
26 PHASE TO OBTAIN A VERDICT FROM THIS JURY OF SOMETHING



27 LESS THAN DEATH.

28 THE COURT: ARE YOU SAYING THAT AS MS. ABRAMSON

-11494

1 WAS CONFERRING WITH HER CLIENT JUST A MOMENT AGO, AND  
2 WHISPERING TO HER CLIENT, AS DR. VICARY WAS ANSWERING  
3 QUESTIONS, THAT MR. FISCHER WAS CONSULTING AND TELLING  
4 HER WHAT TO SAY TO HER CLIENT, AND THAT SHE WAS DOING  
5 THAT WITH SOME CLAIM OF PRIVILEGE IN HER COMMUNICATIONS  
6 WITH HER CLIENT, OR THAT SHE'S OPERATING WITH THAT SAME  
7 CLAIM OF PRIVILEGE WHEN SHE'S TALKING TO YOU?

8 MR. LEVIN: NO. WHAT I'M SAYING, YOUR HONOR, IS  
9 THAT ERIK MENENDEZ IS ENTITLED, PURSUANT TO THE  
10 CONSTITUTION OF THE UNITED STATES OF AMERICA, TO HAVE  
11 CONFLICT-FREE LAWYERS.

12 AND HE IS ENTITLED TO A LEVEL PLAYING  
13 FIELD, AS ANY OTHER DEFENDANT IN A CRIMINAL CASE,  
14 ESPECIALLY IN A CAPITAL CASE, TO PROCEED, ESPECIALLY  
15 WHERE HIS LIFE IS IN JEOPARDY, TO PROCEED WITH  
16 CONFLICT-FREE LAWYERS.

17 HE NOW HAS CONFLICT-INFECTED LAWYERS, OR AT  
18 LEAST ONE, AND I AM NOT IN THE POSITION TO ADVISE  
19 MS. ABRAMSON WHAT SHE SHOULD OR SHE SHOULD NOT DO.

20 THE COURT: NO ONE IS SAYING YOU SHOULD. ALL I  
21 AM ASKING YOU IS WHY YOU CAN'T CROSS-EXAMINE THIS  
22 WITNESS.

23 MR. LEVIN: BECAUSE MS. ABRAMSON'S INVOCATION OF  
24 THE 5TH AMENDMENT PRIVILEGE PRECLUDES ME EVEN FROM  
25 INQUIRING AS TO THOSE MATTERS THAT MIGHT INVOKE  
26 INFORMATION THAT COULD BE FAVORABLE TO ERIK MENENDEZ.

27 IN ESSENCE, IT HAS CREATED A SITUATION  
28 WHERE MS. ABRAMSON HAS CHOSEN TO TAKE A POSITION THAT'S

-11493

1 ADVERSE TO ERIK MENENDEZ.

2 THE COURT: THAT'S ABSURD. ALL YOU HAVE TO DO IS  
3 ASK QUESTIONS OF THE WITNESS. NOTHING THAT HAS OCCURRED  
4 HERE -- ALL I SEE AT THIS POINT IS THAT WE HAVE A  
5 SITUATION THAT AROSE THROUGH ACTIVITY OF MS. ABRAMSON OR  
6 DR. VICARY, HOWEVER IT'S CONSTRUED, AND AT THE SAME TIME  
7 COUNSEL IS ASKING THAT HER CLIENT BE THE BENEFICIARY OF  
8 HER ACTIVITY. THAT'S ALL I CAN SEE AT THIS POINT THAT  
9 IS BEING PRESENTED TO THE COURT.

10 IT DOESN'T AFFECT YOUR ABILITY TO EXAMINE  
11 THIS WITNESS AND QUESTION THIS WITNESS. AND IF YOU  
12 DON'T WANT TO QUESTION THE WITNESS, YOU DON'T HAVE TO.  
13 BUT IT'S YOUR DECISION. YOU CAN'T PUSH IT OFF ON  
14 SOMEONE ELSE; SAYING THAT SOMEONE ELSE'S INVOKING A  
15 PRIVILEGE IN A COURT PREVENTS THAT PERSON FROM TALKING  
16 TO YOU, OR COMMUNICATING TO YOU, OR COMMUNICATING TO HER  
17 CLIENT OR ANYTHING ELSE.

18 IF YOU DON'T WANT TO QUESTION THE WITNESS,

19 DON'T QUESTION THE WITNESS.

20 MS. ABRAMSON: EXCUSE ME, YOUR HONOR.

21 MR. LEVIN: IT'S NOT SOMEONE ELSE --

22 MS. ABRAMSON: YOUR HONOR, COULD WE HAVE FIVE

23 MINUTES SO I CAN DISCUSS MATTERS WITH MR. LEVIN?

24 THE COURT: IF MR. LEVIN DOESN'T WANT TO QUESTION

25 THE WITNESS, I'LL ASK THE PROSECUTION IF THEY HAVE ANY

26 QUESTIONS OF THE WITNESS.

27 MS. ABRAMSON: COULD WE RESERVE THE RIGHT FOR THE

28 ERIK MENENDEZ DEFENSE TO QUESTION THE WITNESS AFTER I

-11492

1 HAVE A CHANCE TO TALK TO MR. LEVIN?

2 THE COURT: SURE. SURE.

3 MS. ABRAMSON: BECAUSE I THINK THE REAL PROBLEM

4 IS MR. LEVIN IS NOT FAMILIAR WITH THE MATERIAL.

5 THE COURT: WELL, THERE'S NOT MUCH THERE, AND HE

6 HAD IT AS OF YESTERDAY. BUT I WILL --

7 MS. ABRAMSON: HE'S BEEN BUSY.

8 THE COURT: I WILL TURN TO THE PROSECUTION AND

9 INQUIRE IF YOU HAVE ANY QUESTIONS OF THE WITNESS TO

10 FOLLOW UP ON WHAT'S BEEN ASKED SO FAR?

11 MR. CONN: NO, YOUR HONOR, I HAVE NO QUESTIONS.

12 THE COURT: OKAY.

13 MR. LEVIN: I WOULD LIKE TO ASK A COUPLE OF

14 QUESTIONS THAT I THINK THAT I HAVE IN MIND.

15 THE COURT: OKAY.

16

17 REDIRECT-EXAMINATION

18 BY MR. LEVIN:

19 Q. DR. VICARY, DID ERIK MENENDEZ EVER ASK YOU

20 TO TAKE ANYTHING OUT OF YOUR NOTES?

21 A. NO.

22 Q. DID YOU TAPE-RECORD THE CONVERSATIONS THAT

23 YOU HAD WITH ERIK MENENDEZ THAT RESULTED IN THE

24 PRODUCTION OF THE NOTES WHICH ARE BEFORE YOU NOW?

25 A. NO.

26 Q. DID YOU PREPARE THOSE NOTES

27 CONTEMPORANEOUSLY, OR AT THE EXACT SAME TIME, THAT THE

28 CONVERSATIONS TOOK PLACE WITH ERIK MENENDEZ, OR DID YOU

-11491

1 PREPARE THEM AT SOME LATER TIME?

2 A. NO. WHEN I WAS TALKING WITH HIM.

3 Q. ARE THERE ANY OTHER VERSIONS OF YOUR NOTES,

4 OTHER THAN THE TWO THAT HAVE BEEN REFERRED TO SO FAR IN

5 THIS COURT; BEING THE ONE IN THE POSSESSION OF MR. CONN

6 THAT WE'VE BEEN CALLING THE UNREDACTED COPY, AND THE

7 COPY THAT YOU BROUGHT WITH YOU TO COURT THAT WE'VE BEEN

8 REFERRING TO AS THE REDACTED COPY?

9 A. NO.

10 MR. LEVIN: YOUR HONOR, I WOULD LIKE FIVE

11 MINUTES.

12 THE COURT: OKAY. LET ME INQUIRE.

13 THE DISCUSSION YOU HAD WITH MS. ABRAMSON  
14 THAT YOU TOLD US ABOUT JUST A FEW MINUTES AGO ABOUT WHY  
15 SOMETHING WAS REMOVED FROM THE NOTES, WAS THAT A  
16 CONVERSATION THAT WAS PART OF A CONVERSATION IN WHICH  
17 ALL REDACTIONS WERE DISCUSSED AT ONE TIME, OR WERE  
18 THERE -- WAS THERE MORE THAN ONE CONVERSATION ON THAT  
19 SUBJECT?

20 THE WITNESS: NO, I THINK THAT THERE WAS ONE  
21 CONVERSATION.

22 THE COURT: AND DID THAT CONVERSATION OCCUR  
23 BEFORE OR -- BEFORE YOU TESTIFIED IN THE FIRST TRIAL?

24 THE WITNESS: YES.

25 THE COURT: AND HOW LONG BEFORE, IF YOU REMEMBER?

26 THE WITNESS: APPROXIMATELY A WEEK AND A HALF.

27 THE COURT: AND WAS THERE ANYONE ELSE PRESENT  
28 BESIDES YOU AND MS. ABRAMSON WHEN THOSE CONVERSATIONS

-11490

1 OCCURRED?

2 THE WITNESS: NO.

3 THE COURT: AND WERE ALL REDACTIONS DISCUSSED, AS  
4 TO REASONS FOR THE REDACTIONS, DURING THIS CONVERSATION?

5 MR. LEVIN: I WOULD RESPECTFULLY OBJECT TO THE  
6 COURT'S QUESTION WITH RESPECT TO "ALL THE REDACTIONS,"

7 AS TO WHAT THE COURT'S REFERRING TO. ALL THE ONES HE'S  
8 TESTIFIED TO?

9 THE COURT: ALL OF THOSE THAT OCCURRED.

10 MR. LEVIN: I DON'T THINK THAT WE HAVE DETERMINED  
11 THAT.

12 THE COURT: WELL, THAT'S WHAT I'M ASKING. I'M  
13 ASKING -- YOUR CONCERN IS THAT SOME OF THESE REDACTIONS  
14 WERE NOT THE PRODUCT OF THAT CONVERSATION; IS THAT WHAT  
15 YOU'RE SAYING?

16 MR. LEVIN: I DON'T KNOW.

17 THE COURT: WELL, LET'S DETERMINE THAT.

18 WERE ALL THE REDACTIONS, REMOVAL OF  
19 MATERIAL IN YOUR NOTES, THE PRODUCT OF THIS CONVERSATION  
20 WITH MS. ABRAMSON?

21 THE WITNESS: YES.

22 THE COURT: AND WERE THERE DIFFERENT REASONS  
23 GIVEN FOR VARIOUS REDACTIONS, OR WERE THE REASONS ALWAYS  
24 THE SAME?

25 THE WITNESS: NO, THERE WERE DIFFERENT REASONS.

26 THE COURT: DO YOU REMEMBER ANY OTHER REASONS  
27 GIVEN FOR REDACTIONS?

28 MS. ABRAMSON: OBJECTION, YOUR HONOR.

-11489

1 MR. LEVIN: MAY I HAVE A MOMENT?

2 MS. ABRAMSON: WE HAVE TO OBJECT, AND ASK TO BE

3 HEARD.

4 THE COURT: WHAT IS THE NATURE OF YOUR OBJECTION?

5 MS. ABRAMSON: BECAUSE SOME OF THE REASONS MAY  
6 HAVE TO DO WITH PRIVILEGE. NOT HIS PRIVILEGE, OTHER  
7 PRIVILEGES, HYPOTHETICALLY. AND OTHER REASONS MIGHT  
8 REVEAL INFORMATION THAT PROPERLY WAS NOT TO BE REVEALED  
9 BASED ON RULINGS OF THIS COURT.

10 AND ALL WE'RE ASKING IS --

11 THE COURT: YOU SAY "NOT TO BE REVEALED." NOT TO  
12 BE BROUGHT OUT IN TESTIMONY BEFORE THE JURY?

13 MS. ABRAMSON: THAT MAY BE -- NOT TO BE BROUGHT  
14 OUT IN FRONT OF THE PUBLIC. THE COURT HAD A SERIES OF  
15 HEARINGS WHERE MATTERS WERE NOT BROUGHT OUT IN FRONT OF  
16 THE PUBLIC.

17 THE COURT: YOU MEAN IN THE FIRST TRIAL, AND ON  
18 ONE LIMITED SUBJECT.

19 MS. ABRAMSON: AND IN THIS TRIAL AS WELL.

20 THE COURT: IT NEVER AROSE IN THIS TRIAL.

21 MS. ABRAMSON: WE'RE GOING BACK TO SOMETHING THAT  
22 HAPPENED BEFORE THE FIRST TRIAL, BEFORE GETTING INTO THE  
23 SUBJECT OF SPECIFIC REDACTIONS, AND THIS WITNESS'  
24 STATEMENT OF THINGS THAT WERE SAID TO THIS WITNESS ABOUT  
25 IT.

26 THE COURT: LET'S GO TO THIS QUESTION THEN. WE  
27 WON'T GO TO EVERY REDACTION.

28 JUST TO TOUCH ON WHAT WAS BROUGHT UP IN

1 QUESTIONING BY MR. GESSLER, I BELIEVE, OR BY MR. CONN,  
2 YOU REFERRED TO PAGE 18 AND THE REFERENCE TO A TOUPEE,  
3 AND "FATHER WOULDN'T PAY."

4 WAS THAT REMOVED FROM THE NOTES?

5 THE WITNESS: YES.

6 THE COURT: AND WAS THERE A CONVERSATION FOR WHY  
7 THAT SHOULD BE REMOVED?

8 THE WITNESS: YES.

9 THE COURT: AND CAN YOU RECALL WHAT THAT WAS?

10 THE WITNESS: THAT AGAIN RELATED MAINLY TO THE  
11 BROTHER, AND IT WAS BASED UPON STATEMENTS THAT THE  
12 BROTHER MADE, RATHER THAN ON STATEMENTS THAT ERIK MADE.

13 THE COURT: OKAY. THESE ARE STATEMENTS MADE TO  
14 ERIK MENENDEZ AND REPORTED BY HIM TO YOU OF WHAT HE SAID  
15 HIS BROTHER TOLD HIM?

16 THE WITNESS: YES.

17 THE COURT: AND THAT WAS THE REASON GIVEN FOR  
18 THIS?

19 THE WITNESS: YES.

20 THE COURT: OKAY. WHAT WAS THAT STATEMENT, BY  
21 THE WAY?

22 THE WITNESS: THAT THE BROTHER HAD A TOUPEE, HE  
23 HAD HAD IT FOR A COUPLE OF YEARS. THAT IT COST ONE TO  
24 \$2000 A YEAR, AND THAT THE FATHER WAS REFUSING TO PAY  
25 FOR IT.

26 THE COURT: DID ERIK MENENDEZ TELL YOU HOW HE  
27 KNEW THESE THINGS?



28 THE WITNESS: HIS BROTHER TOLD HIM.

-11487

1 THE COURT: DID HE SAY WHEN HE HAD TOLD HIM THESE  
2 THINGS?

3 THE WITNESS: HE DIDN'T SPECIFICALLY SAY TO ME.

4 THE COURT: DID YOU EVER ASK HIM?

5 THE WITNESS: NOT SPECIFICALLY.

6 THE COURT: DID HE SAY HOW HE KNEW THAT HIS  
7 BROTHER HAD A TOUPEE?

8 THE WITNESS: HE INITIALLY SAID HE DIDN'T KNOW,  
9 BUT THEN HE LATER FOUND OUT.

10 THE COURT: OKAY. AND DID YOU EVER QUESTION HIM  
11 ON THIS SUBJECT, AS FAR AS HIS KNOWLEDGE OF A PERIOD OF  
12 ONE TO TWO YEARS?

13 THE WITNESS: AS TO WHEN HE KNEW?

14 THE COURT: YES.

15 THE WITNESS: MY UNDERSTANDING WAS THAT HE DIDN'T  
16 KNOW UNTIL THE VERY END.

17 THE COURT: THAT WAS WHAT HE TOLD YOU?

18 THE WITNESS: YES.

19 THE COURT: BUT THEN HE ALSO TOLD YOU THIS  
20 INFORMATION ABOUT HIS BROTHER HAVING IT FOR ONE TO TWO  
21 YEARS?

22 THE WITNESS: BASED UPON WHAT HIS BROTHER TOLD  
23 HIM, YES.

24 THE COURT: BUT HE DIDN'T SAY WHEN HIS BROTHER  
25 TOLD HIM THAT?

26 THE WITNESS: IT'S NOT SPECIFICALLY REFLECTED IN  
27 MY NOTES. MY MEMORY IS THAT IT WAS LATE THAT HIS  
28 BROTHER TOLD HIM THAT. IT WASN'T SOMETHING THAT

-11486

1 HAPPENED A YEAR OR SIX MONTHS EARLIER.

2 THE COURT: AND THIS YOU HAVE A CLEAR  
3 RECOLLECTION OF? IT'S NOT IN YOUR NOTES?

4 THE WITNESS: YES.

5 THE COURT: OKAY.

6 AND THIS WAS NOT SOMETHING YOU INTEND TO GO  
7 INTO, MR. CONN?

8 MR. CONN: NO, YOUR HONOR.

9 THE COURT: AND THE REFERENCE TO THE FATHER  
10 HAVING A HOMOSEXUAL LOVER IN CALIFORNIA, AND THAT WHOLE  
11 THING ON PAGE 94 ABOUT A WARNING ON FRIDAY, AUGUST 18TH,  
12 THAT WAS REMOVED FROM THE NOTES?

13 THE WITNESS: YES, I BELIEVE IT WAS.

14 THE COURT: OKAY. AND WHAT WAS THE REASON GIVEN  
15 FOR THAT TO BE REMOVED?

16 MR. GESSLER: TO WHICH I OBJECT, YOUR HONOR, AND  
17 ASSERT THE PRIVILEGE. THIS IS SOMETHING THAT WE TALKED  
18 ABOUT IN CAMERA.

19 THE COURT: WELL, THIS WAS SOMETHING THAT --

20 MR. GESSLER: I ASSERT THE PRIVILEGE OF LYLE  
21 MENENDEZ IN THIS PARTICULAR MATTER, YOUR HONOR.  
22 THE COURT: OKAY.  
23 MR. GESSLER: THE WITNESS KNOWS THAT THERE IS A  
24 PRIVILEGE ASSERTED.  
25 THE COURT: OKAY. THAT'S FINE. I AM NOT ASKING  
26 FOR ANYTHING THAT THIS WITNESS OBTAINED FROM LYLE  
27 MENENDEZ. I AM ASKING FOR WHATEVER HE OBTAINED FROM  
28 ERIK MENENDEZ.

-11485

1 MR. GESSLER: I ALSO ASSERT THE ATTORNEY-CLIENT  
2 PRIVILEGE AS TO LYLE MENENDEZ, AND ON BEHALF OF ERIK  
3 MENENDEZ, AS TO THIS MATERIAL, YOUR HONOR.  
4 THE COURT: OKAY. I DON'T SEE THAT THERE IS ANY  
5 SUCH PRIVILEGE.  
6 MR. GESSLER: I KNOW YOU DON'T. BUT THE ANSWER  
7 COULD WELL GET INTO THAT, AND IF IT'S NOT ASSERTED NOW,  
8 IT'S WAIVED. SO I HAVE NO ALTERNATIVE OTHER THAN TO  
9 ASSERT IT.  
10 THE COURT: YOU WOULD HAVE TO ARTICULATE MORE TO  
11 ME THAN WHAT YOU HAVE AS TO THE BASIS OF IT.  
12 MR. GESSLER: MAY WE APPROACH, YOUR HONOR?  
13 THE COURT: WHAT WE WILL DO IS TAKE A RECESS AND  
14 GIVE YOU A CHANCE TO GIVE ME THAT INFORMATION, WHICH YOU  
15 ARE ENTITLED TO DO IN A CLOSED SETTING.

16 ALL RIGHT. WE WILL TAKE A RECESS, AND WE  
17 WILL RESUME AT 10 MINUTES AFTER 3:00.  
18 MR. GESSLER: DOES THE COURT WISH ME TO DO THAT  
19 NOW?  
20 THE COURT: SURE, WHY NOT. LET'S DO THAT WITH  
21 THE REPORTER THEN.  
22 (THE FOLLOWING PROCEEDINGS,  
23 PAGES 54052 THROUGH 54054,  
24 WERE HELD IN CAMERA AND  
25 SEALED BY ORDER OF THE COURT:)  
26  
27 (A RECESS WAS TAKEN FROM  
28 3:05 P.M TO 3:15 P.M.)

54055

1 THE COURT: OKAY. WE ARE BACK IN SESSION.  
2 THE DEFENDANTS ARE IN COURT WITH THEIR LAWYERS. THE  
3 PEOPLE ARE HERE.  
4 AS FAR AS THE LAST OBJECTION BY THE  
5 DEFENSE COUNSEL, THE COURT WILL NOT MAKE FURTHER  
6 INQUIRY ON THAT SUBJECT OF THE WITNESS, ON THAT  
7 PARTICULAR QUESTION WITH THE WITNESS.  
8 DID YOU HAVE ANY QUESTIONS, MR. LEVIN?  
9 MR. LEVIN: YES.  
10 MR. GESSLER: YOUR HONOR. JUST FOR A MOMENT,

11 IF I MAY.

12 THE COURT: YES.

13 MR. GESSLER: BECAUSE OF WHAT I REVEALED TO  
14 THE COURT, I WOULD ALSO ASK THAT THE DISTRICT  
15 ATTORNEY AND CO-COUNSEL BE PROHIBITED FROM GOING  
16 FURTHER ON THAT SUBJECT UNDER PEOPLE VERSUS ANDERSON  
17 AND HEARSAY GROUNDS.

18 THE COURT: IT DEPENDS ON HOW THE QUESTIONING  
19 PROCEEDS. CERTAINLY, AS IT PROCEEDED YESTERDAY, I  
20 THINK THAT WAS CERTAINLY WITHIN ADMISSIBLE BOUNDS.  
21 IF IT -- DEPENDING ON THE NATURE OF THE INQUIRY.

22 MR. GESSLER: YES, YOUR HONOR, I'M TALKING  
23 ABOUT FURTHER QUESTIONS ALONG THAT AREA THAT WOULD  
24 VIOLATE PRIVILEGE AND ANDERSON.

25 THE COURT: OKAY. ALL RIGHT. WE'LL HAVE TO  
26 MONITOR WHAT SORT OF QUESTIONS ARE ASKED.

27 MR. LEVIN: I JUST HAVE AN ADDITIONAL  
28 FOLLOW-UP QUESTION TO SOMETHING I ASKED THE WITNESS

54056

1 BEFORE.

2 THE COURT: YES, SURE.

3 Q BY MR. LEVIN: DR. VICARY, I ASKED YOU  
4 BEFORE WHETHER OR NOT ERIK MENENDEZ HAD ASKED YOU TO  
5 MAKE ANY REDACTIONS FROM YOUR NOTES, AND YOUR ANSWER

6 WAS THAT HE DID NOT.

7 MY QUESTION IS: DID ERIK MENENDEZ KNOW  
8 THROUGH YOU THAT YOU HAD MADE ANY REDACTIONS OR  
9 DELETIONS OR CHANGES IN YOUR NOTES?

10 A NO.

11 MR. LEVIN: THANK YOU.

12 NOTHING FURTHER.

13 THE COURT: OKAY. MR. GESSLER, ANY  
14 QUESTIONS?

15 MR. GESSLER: NO, YOUR HONOR.

16 THE COURT: MR. CONN, ANYTHING FURTHER?

17 MR. CONN: NO, YOUR HONOR. I HAVE NOTHING  
18 FURTHER AT THIS TIME.

19 THE COURT: THANK YOU. YOU MAY STEP DOWN.  
20 BUT YOU'RE NOT EXCUSED.

21 OKAY. LET'S THEN PROCEED WITH  
22 MR. GESSLER.

23 YOU HAD ANOTHER MOTION?

24 MR. GESSLER: I DO? I DON'T REMEMBER WHICH  
25 MOTION I'M UP TO BY NOW. THE MISTRIALS WERE DENIED,  
26 I THINK.

27 THE COURT: THERE WAS ONE MOTION FOR  
28 MISTRIAL. YOU HAD A MOTION FOR MISTRIAL BASED UPON

1 VIOLATION OF ANDERSON.

2 MR. GESSLER: WELL, I THINK THAT BASICALLY  
3 THE ANDERSON WAS NOT AS MUCH OF A MISTRIAL AS IT WAS  
4 A PREVENTIVE AREA AT THIS TIME TO OTHER THINGS BEING  
5 GONE INTO.

6 THE TWO QUESTIONS THAT HAVE BEEN ASKED  
7 IS THE PROBLEM, TO WHICH YOU SUSTAINED OBJECTIONS,  
8 AND ARE HANGING THERE. THE PROBLEM I SAW FROM A  
9 MISTRIAL STANDPOINT IS WHETHER OR NOT THE JURY COULD  
10 DISREGARD THOSE QUESTIONS, GIVEN THE CONTEXT THAT  
11 THEY CAME UP IN, WHICH WAS WITH THE POSSIBLE  
12 MISCONDUCT OR THE TAMPERING OF WITNESS NOTES AND THE  
13 OMISSION OF CERTAIN THINGS FROM DR. VICARY.

14 I THINK THAT'S WHERE THE MISTRIAL CAME  
15 UP -- WERE THE BASIS OF THOSE QUESTIONS BEING ASKED  
16 IN AND OF THEMSELVES, AND IN THAT CONTEXT, ARE  
17 SOMETHING THE JURY WOULD NOT BE ABLE TO DISREGARD;  
18 AND THEREFORE, WOULD VIOLATE MY CLIENT'S DUE PROCESS  
19 RIGHTS.

20 THE COURT: THESE TWO WERE FOLLOWED UP BY THE  
21 PROSECUTOR, THIS WAITING --

22 MR. GESSLER: THAT'S CORRECT.

23 THE COURT: THE CONVERSATION ABOUT WAITING A  
24 WEEK, AND A CONVERSATION ABOUT WHAT LIFE WOULD BE  
25 LIKE WITHOUT THE PARENTS.

26 IS THAT RIGHT?

27 MR. GESSLER: THAT'S THE TWO QUESTIONS.

28 THE COURT: COULD YOU ARTICULATE WHAT THE

1 BASIS OF YOUR OBJECTION IS, IF THE PROSECUTION DID  
2 ASK THOSE QUESTIONS OF THE WITNESS?

3 MR. GESSLER: WELL, THE QUESTION -- THE BASIS  
4 FOR THE OBJECTION -- ACTUALLY, THE COURT SUSTAINED  
5 THE OBJECTION.

6 THE COURT: YES. BUT THEY SAY THEY WANT TO  
7 ASK THOSE QUESTIONS.

8 MR. GESSLER: BUT THE OBJECTIONS I WOULD  
9 MAKE, NOW THAT WE HAVE HAD THE 402, IS ASSUMING ERIK  
10 MENENDEZ WAS A WITNESS, AS HE WAS FOR LYLE MENENDEZ,  
11 AT A PORTION OF THIS PROCEEDING, THAT THE QUESTIONS  
12 NOW BEING ASKED, THAT IS, CONCERNING ONE WEEK PRIOR,  
13 A CONVERSATION OF WHAT IT WOULD BE LIKE TO BE  
14 WITHOUT PARENTS, THAT TYPE CONVERSATION, WE KNOW  
15 NOTHING ABOUT THE CONTEXT THAT IT WAS IN. THE  
16 DOCTOR CAN'T REMEMBER ANY FURTHER INFORMATION  
17 CONCERNING IT.

18 I DO NOT SEE IT IS INCONSISTENT WITH ANY  
19 OF THE TESTIMONY PREVIOUSLY GIVEN BY THE WITNESS,  
20 BECAUSE IT'S JUST KIND OF FLOATING OUT THERE. IT  
21 HAS NO MEANING IN AND OF ITSELF IN ORDER TO BE A  
22 PRIOR INCONSISTENT STATEMENT; AND ABSENT BEING A  
23 PRIOR INCONSISTENT STATEMENT, I DON'T THINK IT'S



24 RELEVANT TO GO INTO AT THIS PARTICULAR PENALTY  
25 HEARING FOR WHICH THE DOCTOR HAS BEEN CALLED.  
26 SIMILARLY, FOR WAITING A WEEK -- "I  
27 CAN'T WAIT ANOTHER WEEK." WE AGAIN KNOW NOTHING  
28 ABOUT THE CONTEXT IN WHICH THAT WAS HELD. THE

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1 DOCTOR SPECULATED AS TO IT MIGHT HAVE TO DO WITH  
2 SOLVING THE PROBLEM WITH THE PARENTS. BUT WE HAVE  
3 NO IDEA ABOUT THAT, BECAUSE IT'S JUST HANGING THERE  
4 OUT OF CONTEXT.

5 IT DOES NOT, AGAIN, CONTRADICT OR  
6 IMPEACH ANY STATEMENTS DIRECTLY MADE BY ERIK  
7 MENENDEZ IN THE GUILT TRIAL, AND I DON'T THINK IT'S  
8 RELEVANT IN AND OF ITSELF IN THE PENALTY PHASE IF IT  
9 DOES NOT DIRECTLY IMPEACH SOMETHING SAID EARLIER.

10 THE COURT: WHAT IS THE PEOPLE'S RESPONSE  
11 THEN BASICALLY, THAT THESE ADDITIONAL MATTERS THAT  
12 YOU WANT TO GO INTO ARE NOT REALLY IMPEACHMENT.

13 MR. CONN: WELL, YOUR HONOR, I THINK THEY ARE  
14 STATEMENTS OF THE DEFENDANT THAT WAS APPARENTLY  
15 SIGNIFICANT ENOUGH FOR THIS WITNESS TO DETERMINE  
16 THAT THEY SHOULD BE MEMORIALIZED. AND ALTHOUGH THE  
17 WITNESS NOW CLAIMS THAT HE CANNOT PUT IT INTO A  
18 BROADER CONTEXT, AND GIVE A GREATER MEANING TO THE

19 STATEMENTS, I THINK THAT THAT IS A DETERMINATION  
20 THAT THE JURY SHOULD MAKE. I THINK THE PEOPLE  
21 SHOULD BE ABLE TO BRING OUT THE STATEMENTS SO THAT  
22 THE JURY CAN DRAW REASONABLE INFERENCES FROM THOSE  
23 STATEMENTS AND DRAW -- REACH THEIR OWN CONCLUSIONS  
24 REGARDING THE SIGNIFICANCE OF THOSE STATEMENTS AND  
25 THE INABILITY OF THIS WITNESS, OR THE CLAIMED  
26 INABILITY OF THIS WITNESS. TO GIVE CLARITY OR  
27 FURTHER MEANING TO THOSE STATEMENTS, BEARS UPON THE  
28 CREDIBILITY OF THIS WITNESS IN GENERAL.

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1 SO I THINK THAT THE -- WHAT IS  
2 SIGNIFICANT IS NOT SO MUCH THE SPECIFIC STATEMENTS  
3 THEMSELVES, BUT HIS FAILURE TO RECOLLECT THE  
4 SIGNIFICANCE OR MEANING OF THESE STATEMENTS IS  
5 SOMETHING THAT THE JURY CAN TAKE INTO CONSIDERATION  
6 IN EVALUATING HIS CREDIBILITY.

7 THE COURT: OKAY. PERHAPS WE'RE BEING A  
8 LITTLE IMPRECISE HERE WHEN WE'RE TALKING ABOUT  
9 CREDIBILITY.

10 ARE WE TALKING ABOUT THE CREDIBILITY OF  
11 ERIK MENENDEZ OR OF DR. VICARY?

12 MR. CONN: OH. DR. VICARY. THESE ARE GOING  
13 TO BE PART OF THE FURTHER EXAMINATION OF THE WITNESS

14 CONCERNING HIS ABILITY TO RECALL STATEMENTS MADE TO  
15 HIM BY ERIK MENENDEZ, AND HIS ABILITY TO RECALL  
16 REASONS WHY CERTAIN MATERIAL WAS REDACTED OR WASN'T  
17 REDACTED.

18 SO I THINK THAT TO -- FOR THE JURY TO  
19 EVALUATE HIS CREDIBILITY, THAT IT'S NECESSARY FOR  
20 THE JURY TO HEAR THESE STATEMENTS AND TO LISTEN TO  
21 THE REASONS THAT THE WITNESS MAY GIVE FOR HIS  
22 INABILITY TO RECALL THE SIGNIFICANCE OF THOSE  
23 STATEMENTS.

24 MR. GESSLER: WELL, YOUR HONOR, I THINK THIS  
25 AGAIN GETS INTO WHAT I WAS TALKING ABOUT, IF IT'S  
26 NOT AN INCONSISTENT STATEMENT. NOW WE HAVE  
27 ARANDA-BRUTON-TYPE ERRORS COMING UP IN THIS  
28 PARTICULAR PENALTY TRIAL THAT'S NOT DIRECTLY

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1 CONTRADICTORY OF SOMETHING SAID EARLIER. THIS  
2 IMPACTS ON LYLE MENENDEZ, WITHOUT A CHANCE TO  
3 CROSS-EXAMINE ERIK MENENDEZ ON THIS PARTICULAR  
4 STATEMENT, WHICH IS TOTALLY DIFFERENT FROM --  
5 UNRELATED TO ANYTHING THAT HE SAID AT THE TRIAL.

6 THE COURT: OKAY. NOW MR. GESSLER IS  
7 FOCUSING ON INCONSISTENCIES IN THE TESTIMONY OF ERIK  
8 MENENDEZ, NOT OF DR. VICARY. SO WE HAVE TWO

9 DIFFERENT THEORIES HERE. ONE IS THAT THE PEOPLE  
10 WANT TO USE THIS TO IMPEACH DR. VICARY. THE DEFENSE  
11 FEELS IT'S BEING OFFERED AT THIS POINT TO IMPEACH  
12 ERIK MENENDEZ INDIRECTLY.

13 MR. GESSLER: EITHER WAY, WHAT IT DOES IS  
14 HURT LYLE MENENDEZ, WHO'S NOT A PARTY TO IT ALL.  
15 WHETHER IT'S DONE TO IMPEACH DR. VICARY OR ERIK  
16 MENENDEZ, IT AFFECTS THE ARANDA-BRUTON RIGHTS OF  
17 LYLE MENENDEZ.

18 THE COURT: WHAT IS YOUR RESPONSE THEN?  
19 REALLY, THIS BOILS DOWN TO A WEIGHING PROCESS, AMONG  
20 OTHER THINGS; THAT YOUR PURPOSE IN OFFERING THIS  
21 EVIDENCE, MR. CONN, IS NOT TO IMPEACH ERIK MENENDEZ,  
22 BUT TO IMPEACH DR. VICARY.

23 THEREFORE, I HAVE TO WEIGH THE VALUE AND  
24 THE PROBATIVE VALUE OF THAT EVIDENCE AND THAT  
25 PURPOSE AGAINST THE POTENTIAL PREJUDICE THAT LYLE  
26 MENENDEZ WOULD SUFFER BY USE OF THESE FURTHER  
27 QUESTIONS.

28 MR. CONN: WELL, NO. I'M NOT SAYING IT'S

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1 ENTIRELY OR SOLELY FOR THE PURPOSE OF IMPEACHING  
2 DR. VICARY. THESE ARE STATEMENTS BY ERIK MENENDEZ  
3 IN WHICH CAN BE DRAWN -- A REASONABLE INFERENCE CAN

4 BE DRAWN FROM THESE STATEMENTS WITHIN THE CONTEXT IN  
5 WHICH THEY WERE GIVEN TO DR. VICARY.

6 SO THE STATEMENTS CONCERNING WAITING  
7 ANOTHER WEEK, AND THE STATEMENTS CONCERNING LIFE  
8 WITHOUT THE PARENTS, ARE BOTH STATEMENTS FROM  
9 WHICH -- THAT WOULD BE OFFERED AS ADMISSIONS AGAINST  
10 ERIK MENENDEZ, AND ALSO TO BE CONSIDERED -- TO THE  
11 EXTENT THAT HE IS UNABLE TO EXPLAIN OR TO FURTHER  
12 CLARIFY THE SIGNIFICANCE OF THOSE STATEMENTS, IT  
13 WOULD BE OFFERED TO IMPEACH THE CREDIBILITY OF  
14 DR. VICARY.

15 SO IT'S OFFERED FOR A TWOFOLD PURPOSE.

16 MR. GESSLER: IF PROBATIVE AT ALL, IT WOULD  
17 SEEM TO BE VERY MINIMUM, AND CERTAINLY HAS  
18 TREMENDOUS CONSEQUENCES TO HURT LYLE MENENDEZ. I  
19 WOULD ASK 352 BE APPLIED.

20 THE COURT: WELL, MY QUESTION WOULD BE: WHAT  
21 PART OF ERIK MENENDEZ' TESTIMONY WOULD THIS RELATE  
22 TO? NOT JUST IN GENERAL AS AN ADMISSION BY ERIK  
23 MENENDEZ, BUT IS THIS SOMETHING IMPEACHING OF HIS  
24 TESTIMONY? BECAUSE AT THIS STAGE OF THE  
25 PROCEEDINGS, ALTHOUGH THE PROSECUTION DID NOT HAVE  
26 THIS MATERIAL EARLIER, EVEN IF IT DID, THERE WAS  
27 CERTAIN POTENTIAL CLAIMS OF PRIVILEGE THAT MIGHT  
28 HAVE PREVENTED THE PROSECUTION FROM USING IT DURING

1 THE DEFENSE CASE-IN-CHIEF.

2 MY QUESTION IS NOW WHAT SPECIFICALLY IN  
3 ERIK MENENDEZ' TESTIMONY WOULD IT IMPEACH?

4 MR. CONN: WE BELIEVE THE DEFENDANT TESTIFIED  
5 THAT THE KILLING IN THIS CASE WAS A SPONTANEOUS ACT;  
6 THAT HE AND HIS BROTHER HAD NOT PLANNED TO COMMIT  
7 THIS KILLING, BUT IT WAS SOMETHING THAT OCCURRED  
8 SIMPLY ON THE SPUR OF THE MOMENT.

9 HERE WE KNOW FROM HIS STATEMENTS TO  
10 DR. VICARY THAT HE HAD CONVERSATIONS WITH HIS  
11 BROTHER, IN WHICH HIS BROTHER TOLD HIM TO WAIT A  
12 WEEK, AND HE TOLD HIS BROTHER THAT HE COULD NOT WAIT  
13 ONE FURTHER WEEK.

14 I THINK THE REASONABLE INFERENCE TO BE  
15 DRAWN FROM THAT STATEMENT, YOUR HONOR, IS THAT IT  
16 WAS MADE IN REFERENCE TO ACTION THAT ULTIMATELY TOOK  
17 PLACE RELATING TO THE KILLING OF THE PARENTS. IN  
18 FACT, I UNDERSTOOD HIM TO TESTIFY HERE THAT HE WAS --  
19 HE SPECIFICALLY MADE REFERENCE TO -- OR IT WAS HIS  
20 UNDERSTANDING THAT ERIK MENENDEZ WAS MAKING  
21 REFERENCE TO SOMETHING DRASTIC OCCURRING WITHIN THE  
22 FAMILY AS A RESULT OF THE ONGOING DISPUTE OR RUNNING  
23 PROBLEMATIC ATMOSPHERE WITHIN THE MENENDEZ  
24 HOUSEHOLD.

25 I BELIEVE THE REASONABLE INFERENCE TO BE  
26 DRAWN FROM THIS IS THAT THIS HAS SOME REFERENCE TO  
27 THE ACTUAL KILLINGS IN THIS CASE.

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1 "WELL, I DON'T REMEMBER WHAT IT REFERRED TO," I  
2 DON'T THINK THAT THAT IS SUFFICIENT TO CAUSE THIS  
3 COURT TO EXCLUDE IT AS A STATEMENT OF THE  
4 DEFENDANT. IT IS AN ADMISSION OF THE DEFENDANT.  
5 THE REASONABLE INFERENCE TO BE DRAWN IS THAT IT  
6 RELATES TO THE KILLINGS, AND THE JURY SHOULD BE  
7 PERMITTED TO HEAR IT AND TO GIVE IT THE WEIGHT TO  
8 WHICH THEY FEEL IT'S ENTITLED.

9 THE COURT: DID COUNSEL FOR ERIK MENENDEZ  
10 WISH TO BE HEARD ON THIS SUBJECT?

11 MR. LEVIN: WELL, YOUR HONOR, WHAT I  
12 UNDERSTOOD DR. VICARY TO BE SAYING WAS WHEN HE WAS  
13 ASKED TO SPECULATE --

14 THE COURT: YES. I ALREADY SAID THAT WOULD  
15 NOT BE ADMISSIBLE AS IT WAS BROUGHT OUT. I DON'T  
16 KNOW IF IT COULD COME IN IN QUESTIONING -- IF IT WAS  
17 DEVELOPED IN SOME OTHER WAY THAT MIGHT BE  
18 ADMISSIBLE. AS IT WAS BROUGHT OUT, IT WOULD JUST BE  
19 SPECULATION AND CONCLUSION ON HIS PART. WE'RE NOT  
20 TALKING ABOUT THAT AT THIS POINT. WE'RE TALKING  
21 ABOUT THE ACTUAL QUOTES IN THE NOTES.

22 MR. LEVIN: THE ACTUAL QUOTES IN THE NOTES,

23 WITH RESPECT TO WHAT MR. CONN WAS REFERRING TO, I  
24 DON'T THINK SHOULD BE USED AGAINST ERIK MENENDEZ. I  
25 DON'T THINK IT'S ABSOLUTELY CLEAR FROM THIS WITNESS  
26 THAT ERIK MENENDEZ ACTUALLY SAID WHAT IT IS  
27 DR. VICARY IS ATTRIBUTING TO HIM. IT IS ABSOLUTELY  
28 OUT OF CONTEXT.

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1 WELL, THE WITNESS DOES NOT KNOW IN WHAT  
2 MANNER THAT STATEMENT IS REFERRING. HE INDICATED  
3 THAT HE HAD ALL KINDS OF PRIOR INFORMATION, ALL  
4 KINDS OF INFORMATION PERTAINING TO THIS CASE,  
5 INCLUDING -- AND I DIDN'T KNOW DR. VICARY, NEVER MET  
6 HIM BEFORE I SAW HIM IN THE HALLWAY A COUPLE OF  
7 MONTHS AGO. BUT I'M AWARE HE'S BEEN ON NEWSCASTS  
8 AND BEEN INTERVIEWED BY NEWS MEDIA PEOPLE. HE HAD  
9 INTERVIEWS WITH LOTS OF PEOPLE ABOUT THIS CASE, AND  
10 HE'S PERHAPS WATCHED THE FIRST TRIAL AND PERHAPS  
11 PICKED UP THINGS FROM WATCHING LYLE MENENDEZ'  
12 TESTIMONY. I DON'T KNOW WHERE THIS COMES FROM.

13 AND I THINK THAT UNDER 352 THE COURT HAS  
14 TO BALANCE THE PREJUDICIAL IMPACT TO ERIK MENENDEZ,  
15 NOT ONLY IN LIGHT OF THE FACT THAT THESE ARE RATHER  
16 AMBIGUOUS STATEMENTS, BUT ALSO IN LIGHT OF THE  
17 INABILITY WE HAVE AT THIS TIME TO EFFECTIVELY



18 CROSS-EXAMINE AND CONFRONT HIM.

19       WHAT MS. ABRAMSON POINTS OUT, WHICH IS  
20 WHAT I THOUGHT WAS CLEAR FROM WHAT DR. VICARY  
21 TESTIFIED, WAS THAT THIS PARTICULAR STATEMENT, WHEN  
22 REMOVED FROM DR. VICARY'S NOTES, DOES NOT OCCUR AT A  
23 TIME WHEN ERIK MENENDEZ IS ALLEGEDLY DISCUSSING THE  
24 KILLINGS. IT IS NOT IN THAT CONTEXT THAT THEY APPEAR  
25 IN HIS NOTES. SO THAT ANY INFERENCE THAT THE  
26 PROSECUTION WISHES TO DRAW FROM THAT STATEMENT, THAT  
27 THEY ARE RELATED TO THE KILLINGS, ARE ENTIRELY  
28 PREJUDICIAL TO MY CLIENT; AND AGAIN, UNDER 352,

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1 SHOULD NOT BE ALLOWED.

2       THE COURT: ALL RIGHT. AS TO THE ARGUMENT  
3 UNDER SECTION 352 OF THE EVIDENCE CODE, MORE FOCUSED  
4 ON IMPEACHMENT OF ERIK MENENDEZ AS ARGUED BY THE  
5 PARTIES, IT DOES APPEAR TO THE COURT THAT THE  
6 PROBATIVE VALUE OF THESE REMARKS SUBSTANTIALLY  
7 OUTWEIGHS ANY POTENTIAL PREJUDICE AS TO ERIK  
8 MENENDEZ. IT'S FOR THE TRIER OF FACT TO EVALUATE  
9 WHAT WAS MEANT BY THESE REMARKS. THEY CERTAINLY CAN  
10 BE CONSTRUED, AS THE PROSECUTION ARGUES, AS  
11 IMPEACHMENT OF THE DEFENDANT'S VERSION OF THE  
12 EVENTS. AND I CERTAINLY FIND THAT THE PROBATIVE

13 VALUE SUBSTANTIALLY OUTWEIGHS ITS POTENTIAL FOR

14 PREJUDICE AS TO ERIK MENENDEZ.

15 AS TO LYLE MENENDEZ, THE ARGUMENT GOES

16 BEYOND THE ISSUE OF PREJUDICE, BUT TO THE RIGHT OF

17 CONFRONTATION; AND THAT IS THE AREA OF DISCUSSION

18 THAT WE BRIEFLY TOUCHED ON AND REFERRED TO IN

19 CONVERSATIONS YESTERDAY.

20 CITING THE CASE OF PEOPLE VERSUS

21 ANDERSON, MR. GESSLER, YOU'VE ALREADY ARGUED THIS TO

22 SOME EXTENT.

23 WAS THERE ANYTHING FURTHER YOU WANTED TO

24 SAY IN REGARD TO THAT ASPECT OF IT, ARANDA-BRUTON

25 AND PEOPLE VERSUS ANDERSON?

26 MR. GESSLER: ANDERSON ENCOMPASSES THE

27 ARANDA-BRUTON ISSUE, WITH SEVEN PAGES OF DISCUSSION

28 AS TO WHY IT'S APPLICABLE IN A SITUATION LIKE THIS.

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1 THE COURT: I JUST --

2 MR. GESSLER: BOTH FEDERAL AND STATE.

3 THE COURT: YOU HAD COVERED IT IN YOUR

4 ARGUMENT?

5 MR. GESSLER: I THINK SO.

6 THE COURT: WHAT'S THE PEOPLE'S POSITION AS

7 TO THE RIGHT OF CONFRONTATION AND THE RIGHT OF

8 CONFRONTATION OF LYLE MENENDEZ, WHETHER HE WOULD BE  
9 DENIED THE RIGHT OF CONFRONTATION, SINCE ERIK  
10 MENENDEZ IS NOT AVAILABLE TO HIM AS A WITNESS AT  
11 THIS STAGE OF THE PROCEEDINGS, AND THESE ARE REMARKS  
12 THAT ARE ATTRIBUTED TO LYLE MENENDEZ BY ERIK  
13 MENENDEZ?

14 MS. NAJERA: OUR POSITION IS HE ISN'T  
15 UNAVAILABLE TO THE DEFENDANTS, LYLE MENENDEZ. THAT  
16 THE DEFENDANT, ERIK MENENDEZ, CAN BE RECALLED TO THE  
17 STAND. WE CITE THE COURT TO PEOPLE VERSUS BARBOSA,  
18 B-A-R-B-O-S-A, AT 213 CAL. APP. 2D 441.

19 I BELIEVE THAT THAT CASE CITES THE RULE,  
20 AND CASES THAT SUPPORT THE RULE, THAT IT IS WITHIN  
21 THE DISCRETION OF THE COURT TO ALLOW A PARTY -- THAT  
22 IS THE PROSECUTION IN THIS CASE, BUT IT COULD BE THE  
23 CODEFENDANT -- TO RECALL A DEFENDANT WHO'S  
24 TESTIFIED, EVEN AFTER BOTH PARTIES -- ALL PARTIES IN  
25 FACT, HAVE RESTED. EVEN IF BOTH DEFENDANTS HAVE  
26 RESTED, THEY CAN BE RECALLED.

27 THIS IS AN EXERCISE OF SOUND DISCRETION  
28 BY THE COURT, AND IN SOME INSTANCES IT HAS BEEN

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1 ALLOWED BECAUSE PEOPLE WANTED TO LAY THE FOUNDATION  
2 FOR REBUTTAL, AND THEY HAVE CALLED THEM, AND THE

3 COURT HAS RULED THEY ARE NOT REBUTTAL WITNESSES.

4 AND BASICALLY THE RULE IS HE CAN BE CALLED.

5 SO OUR POSITION IS HE IS NOT UNAVAILABLE  
6 TO LYLE MENENDEZ; THAT IT'S WITHIN THE DISCRETION OF  
7 THE COURT TO ALLOW THE CODEFENDANT, LYLE MENENDEZ,  
8 TO RECALL THE CODEFENDANT, ERIK MENENDEZ, TO THE  
9 STAND TO CONFRONT HIM WITH THESE PARTICULAR  
10 STATEMENTS THAT WERE NOT AVAILABLE TO US PREVIOUSLY  
11 WHEN HE TOOK THE STAND; AND NOT AVAILABLE TO US, I  
12 MIGHT POINT OUT, DUE TO THE ACTIONS OF COUNSEL FOR  
13 ERIK MENENDEZ.

14 THE COURT: OKAY. DID THE DEFENSE WISH TO  
15 RESPOND TO THAT ARGUMENT?

16 MR. GESSLER: I DON'T KNOW IF MS. ABRAMSON  
17 WOULD OBJECT TO MY CALLING HER CLIENT. I HAVE A  
18 HUNCH SHE MIGHT.

19 MS. ABRAMSON: I HAVEN'T READ THE CASE.

20 MR. GESSLER: I'M SURE IT WASN'T A DEATH  
21 PENALTY CASE IF IT WAS IN CAL.APP.2D. THERE IS A  
22 DIFFERENCE IN PENALTY PHASE FOR A TRIAL, EVEN IF IT  
23 IS ANOTHER STAGE.

24 THE COURT: I HAVE NOT READ THAT CASE  
25 EITHER. BUT GOING BEYOND THAT -- AND WE CAN RESERVE  
26 ARGUMENT ON THAT PARTICULAR ASPECT OF THE PEOPLE'S  
27 RESPONSE -- BUT GOING BEYOND THAT TO THE SITUATION  
28 WE HAVE HERE, JUST TO GO BACK THROUGH THE HISTORY OF

1 THIS.

2 TO SOME EXTENT THIS WAS MENTIONED BY  
3 MR. GESSLER IN HIS REMARKS EARLIER THIS AFTERNOON,  
4 OR LATE THIS MORNING, RELATING TO THE MOTION FILED  
5 BY THE DEFENSE FOR SEPARATE TRIALS; AND IT'S TRUE,  
6 THERE WAS A MOTION FILED. AND ONE OF THE BASES OF  
7 THAT MOTION WAS THAT CERTAIN PENALTY-PHASE EVIDENCE  
8 MIGHT NOT BE AVAILABLE, OR MIGHT BE THE SUBJECT OF  
9 PREJUDICE TO THE CODEFENDANT IF OFFERED. AND THIS  
10 WAS AN AREA THAT WAS THE SUBJECT OF DISCUSSION AND  
11 MOTIONS FILED IN THIS COURT IN 1994.

12 INITIALLY IT WAS THE PROCEDURE THAT WHEN  
13 PEOPLE DID NOT INITIALLY OBJECT TO THE PROCEDURE OR  
14 DID NOT FILE ANY WRITTEN OBJECTIONS AND CITATION TO  
15 AUTHORITIES, THAT THE DEFENSE WAS GOING TO PRESENT  
16 TO THE COURT IN CAMERA MATERIALS THAT MIGHT BE  
17 PRESENTED DURING -- WAS POTENTIALLY TO BE PRESENTED  
18 DURING THE PENALTY PHASE THAT MIGHT CAUSE PREJUDICE  
19 TO THE CODEFENDANT; AND THAT THIS WOULD BE PRESENTED  
20 TO THE COURT IN CAMERA ON A CLAIM OF PRIVILEGE AND A  
21 CLAIM OF CONFIDENTIALITY, AND THE COURT WOULD REVIEW  
22 THAT MATERIAL WITH A VIEW TOWARD EVALUATING IT TO  
23 MAKE A DETERMINATION AS TO WHETHER OR NOT THERE  
24 SHOULD BE A SEVERANCE BECAUSE OF POTENTIAL PREJUDICE  
25 IN A PENALTY PHASE.

26           THEREAFTER, THE DISTRICT ATTORNEY  
27 OBJECTED TO EX PARTE OFFERS OF PROOF TO THE COURT,  
28 AND CITED THE COURT TO CASE LAW WHICH SUPPORTED THE

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1 DISTRICT ATTORNEY'S POSITION.

2           AND THE COURT THEN INDICATED THAT IF THE  
3 DEFENSE WISHED TO MAKE OFFERS OF PROOF TO THE COURT  
4 AS TO MATERIAL THAT MIGHT BE PRESENTED IN THE  
5 PENALTY PHASE THAT MIGHT BE PREJUDICIAL TO ONE  
6 DEFENDANT OR THE OTHER, THAT THEY WOULD HAVE TO DO  
7 SO IN A FASHION TO THE COURT SO THAT THE PROSECUTION  
8 WOULD HAVE AN OPPORTUNITY TO REVIEW IT AND RESPOND,  
9 BECAUSE THEY HAD A SUBSTANTIAL POSITION IN REGARD TO  
10 WHETHER THERE WOULD BE ONE OR TWO TRIALS; AND  
11 RIGHTFULLY, THEY SHOULD BE IN A POSITION TO KNOW  
12 WHAT THE COURT WAS PRESENTED WITH AS A BASIS FOR THE  
13 MOTION TO SEVER.

14          THEN, WHEN PRESENTED WITH THAT, THE  
15 DEFENSE ELECTED NOT TO MAKE OFFERS OF PROOF TO THE  
16 COURT AS TO WHAT THE DEFENSE MIGHT PRESENT DURING  
17 ITS EVIDENCE IN PENALTY PHASE. AND THE COURT WAS  
18 NOT PRESENTED WITH ANYTHING, OTHER THAN SOME GENERAL  
19 STATEMENTS OF THE DEFENDANTS' COUNSEL, AS TO WHAT  
20 WAS EXPECTED TO BE PRESENTED DURING THE PENALTY

21 PHASE.

22 I HAVE THOSE MOTIONS HERE DATED  
23 SEPTEMBER 9TH, 1994. THESE WERE FILED UNDER SEAL BY  
24 BOTH DEFENDANT LYLE MENENDEZ AND DEFENDANT ERIK  
25 MENENDEZ. AND NOWHERE IN THOSE MATERIALS DO I FIND  
26 ANY REFERENCE TO DR. VICARY AS A POTENTIAL DEFENSE  
27 WITNESS IN THE PENALTY PHASE WHO WOULD HAVE ANY  
28 EVIDENCE WHATSOEVER THAT WOULD BE PREJUDICIAL TO THE

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1 CODEFENDANT, LYLE MENENDEZ.

2 SO WHEN WE HAD THIS ARGUMENT OR  
3 DISCUSSION EARLIER, MR. GESSLER, WHERE YOU SAID THE  
4 COURT WAS ON NOTICE THESE MATTERS WOULD ARISE,  
5 NOWHERE DID THE DEFENSE INDICATE TO THIS COURT THAT  
6 DR. VICARY WAS A POTENTIAL WITNESS IN THE PENALTY  
7 PHASE WHO HAD ANY MATERIAL THAT WOULD BE SUBJECT TO  
8 THIS SO-CALLED ANDERSON ISSUE.

9 MR. GESSLER: WELL, YOUR HONOR, YOU'RE  
10 RIGHT. WHAT I MADE WAS A GENERALIZED PRESENTATION  
11 TO THE COURT AT THAT TIME.

12 AND, YOU KNOW, I THINK WE'RE PRETTY GOOD  
13 LAWYERS, AND I THINK WE'RE PRETTY GOOD COUNSEL, BUT  
14 WE'RE NOT PSYCHIC. AND I DIDN'T HAVE THE REDACTED  
15 VERSION UNTIL IT CAME UP ON THE STAND. HOW COULD I

16 BE PUT ON NOTICE -- THAT I HAD TO PRESENT TO THE  
17 COURT, IN ORDER TO PROTECT THE PEOPLE VERSUS  
18 ANDERSON RIGHTS AND THE RIGHTS OF MY CLIENT FOR  
19 CONFRONTATION -- OF TWO STATEMENTS MADE BY ERIK  
20 MENENDEZ TO DR. VICARY THAT I DIDN'T KNOW ABOUT? I  
21 CAN'T DO IT UNTIL IT COMES INTO MY HANDS. AND AS  
22 SOON AS IT DID, I HAVE RAISED IT TO THE COURT.  
23 SO I COULDN'T SAY BACK IN 1994 EXACTLY  
24 WHAT WOULD HAPPEN HERE WITH DR. VICARY, BECAUSE I  
25 HAD NO KNOWLEDGE OF THIS UNTIL NOW. BUT I CERTAINLY  
26 -- AS SOON AS I GOT IT, WE RAISED OBJECTIONS, AND  
27 WE BEGAN TO RAISE THIS WITH THE COURT.  
28 SO I JUST DON'T THINK I CAN BE

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1 FORESTALLED FROM SAYING "GEE, MR. GESSLER, YOU  
2 WAIVED THIS BECAUSE YOU DIDN'T PRESENT IT TO ME IN  
3 CHAMBERS IN 1994," WHEN I DIDN'T GET IT UNTIL 1996.  
4 THE COURT: MY OBSERVATION GOES BEYOND THOSE  
5 REMARKS, TO THE FACT THAT MS. ABRAMSON FILED HER  
6 DOCUMENT WITH THE COURT; AND IT AGAIN STATED THERE  
7 MIGHT BE SOME EXPERT TESTIMONY REGARDING HER  
8 CLIENT.  
9 BUT, AGAIN, IT DID NOT IN ANY WAY  
10 DISCLOSE TO THE COURT THAT THIS MATERIAL THAT WE



11 HAVE NOW BEEN DISCUSSING WOULD BE THE SUBJECT OF  
12 THAT EXPERT TESTIMONY. SHE KNEW IT. WHETHER OR NOT  
13 YOU KNEW IT OR NOT, SHE KNEW IT. AND IT WAS NEVER  
14 DISCLOSED TO THE COURT, IS WHAT I'M SAYING.

15 LET ME FINISH.

16 MR. GESSLER: YEAH.

17 THE COURT: IT GOES BEYOND THAT TO SOMETHING  
18 ELSE THAT IS APPARENT, BUT DOESN'T GET STATED VERY  
19 OFTEN HERE.

20 THAT ALTHOUGH WE HAVE DIFFERENT LAWYERS  
21 FOR EACH DEFENDANT, AND THEY ARE SEPARATELY  
22 PRESENTING THEIR ARGUMENTS TO THE JURY AND  
23 PRESENTATION OF EVIDENCE, IT'S QUITE CLEAR THIS WAS  
24 A JOINT DEFENSE FROM START TO FINISH IN THIS TRIAL.  
25 AND IT'S HARD TO VISUALIZE IT ANY OTHER WAY.

26 MS. ABRAMSON: YOUR HONOR, IF I COULD BE  
27 HEARD FOR A MINUTE.

28 I JUST WANT TO MAKE THE RECORD VERY

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1 CLEAR THAT WITH RESPECT TO THE PRESENTATION OF  
2 DR. VICARY, THAT WAS NOT A JOINT DECISION.

3 MR. GESSLER AND MS. TOWERY'S POSITION  
4 WAS THEY DIDN'T WANT TO CALL HIM, AND THEY DIDN'T  
5 WANT ME TO CALL HIM.

6 SO I DON'T THINK IT'S FAIR TO TAKE THE  
7 POSITION THAT ALL DECISIONS HERE WERE JOINT  
8 DECISIONS. WE'VE HAD MANY, MANY STRUGGLES AND  
9 DISAGREEMENTS OVER THE PAST FEW MONTHS, WHICH  
10 OBSERVERS OF OUR MEETINGS COULD ATTEST TO. BUT  
11 CERTAINLY, THE DECISION TO CALL DR. VICARY WAS --  
12 HAD NOTHING TO DO WITH MR. GESSLER OR MS. TOWERY,  
13 AND HE WAS NOT CALLED AS A JOINT WITNESS, AND THEY  
14 WERE OPPOSED TO IT.

15 THE COURT: IS IT FAIR TO OBSERVE THAT YOU  
16 DIDN'T DISCLOSE TO THE COURT THESE ISSUES THAT ARE  
17 NOW THE SUBJECT OF THESE HEARINGS ABOUT STATEMENTS  
18 THAT DR. VICARY WAS TESTIFYING ABOUT THAT WERE  
19 STATEMENTS OF YOUR CLIENT AND WOULD BE IN  
20 CONTRADICTION TO HIS TESTIMONY?

21 MS. ABRAMSON: IT'S FAIR TO SAY I DID NOT PUT  
22 THAT IN THE MOTION.

23 THE COURT: YOU DID NOT GIVE THE COURT ANY  
24 NOTICE THAT DR. VICARY HAD ANY INFORMATION THAT  
25 WOULD BE THE SUBJECT OF THIS SO-CALLED ANDERSON  
26 OBJECTION; IS THAT TRUE? IS THAT FAIR TO SAY?

27 MS. ABRAMSON: I DON'T KNOW. I'D HAVE TO SEE  
28 THE MOTION TO SEE WHAT EXPERT TESTIMONY I MIGHT HAVE

1 BEEN REFERRING TO.

2 THE COURT: YOU WERE REFERRING TO WITNESSES,  
3 EXPERTS IN GENERAL, WHO MIGHT BE REFERRING TO  
4 TESTIMONY OF, OR STATEMENTS OR INFORMATION OF  
5 DR. OZIEL. THAT'S ALL YOU TOLD THE COURT ABOUT.

6 MS. ABRAMSON: I THOUGHT I PRESENTED SOME  
7 INFORMATION FROM DR. VICARY. I'D HAVE TO SEE THE  
8 MOTION, YOUR HONOR.

9 THE COURT: YOU CAN LOOK VERY HARD TO TRY TO  
10 FIND IT.

11 MS. ABRAMSON: I WILL LOOK AND I WILL TRY TO  
12 FIND IT.

13 BUT I'M NOT SURE THE ISSUE -- I'M NOT  
14 SURE THE ANSWER WOULD MAKE A DIFFERENCE.

15 THE QUESTION IS: DID I HAVE IN MIND  
16 EVERY SINGLE WORD IN EITHER VERSION OF DR. VICARY'S  
17 NOTES WHEN THAT WAS WRITTEN? NO, I CERTAINLY DIDN'T  
18 HAVE IN MIND EVERY SINGLE WORD. I NEITHER CONCEALED  
19 EVERY SINGLE WORD FROM THE COURT ON PURPOSE, NOR  
20 INCLUDED IT ON PURPOSE. I DON'T BELIEVE I HAD IT IN  
21 MIND. IT'S THAT SIMPLE.

22 THE COURT: MR. GESSLER, YOU WERE GOING TO  
23 SAY SOMETHING.

24 MR. GESSLER: BASICALLY, THAT OUR MOTION  
25 TALKED ABOUT WITNESSES ERIK MIGHT PRESENT. THAT'S  
26 WHAT THE ANDERSON MOTION WAS ALL ABOUT WAY BACK IN  
27 1994, AS I SAY.

28 THE COURT: YOU NEVER --

1 MR. GESSLER: WE DID NOT KNOW AND CAN'T BE  
2 HELD RESPONSIBLE FOR INFORMATION THAT WAS REDACTED  
3 THAT WE DIDN'T GET.

4 THE COURT: YOU NEVER CONSULTED WITH YOUR  
5 COUNSEL FOR THE CODEFENDANT AS TO WHAT INFORMATION  
6 OR "WHAT EVIDENCE WOULD YOU HAVE BEEN OFFERING THAT  
7 MIGHT BE PREJUDICIAL TO OUR CLIENT, SO WE CAN MAKE A  
8 MOTION TO SEVER HERE, AND WE CAN BE IN A POSITION TO  
9 ARGUE A SEVERANCE MOTION BY TELLING US WHAT EVIDENCE  
10 YOU'LL BE OFFERING"?

11 MR. GESSLER: NO, YOUR HONOR. OUR INDICATION  
12 WAS -- AND I CAN SAY WE TALKED, AND AS MS. ABRAMSON  
13 HAS REVEALED, WE STRONGLY OPPOSED DR. VICARY BEING  
14 CALLED ON THIS OCCASION AT PENALTY AT ALL.  
15 BASICALLY, IT WAS GOING TO BE LIMITED TO P.T.S.D.  
16 AND THE JAIL ASPECT.

17 MS. TOWERY: NO, NO.

18 MR. GESSLER: JUST A MINUTE PLEASE, YOUR  
19 HONOR.

20 (ATTORNEYS GESSLER AND TOWERY  
21 CONFER SOTTO VOCE.)

22

23 MR. GESSLER: I TAKE IT BACK. IT WAS FOR THE  
24 DEMEANOR IN JAIL. I DIDN'T WANT HIM ON THE STAND

25 ANYWAY, WHATEVER IT WAS.

26 BUT THESE PARTICULAR THINGS WITH WHICH  
27 YOU ARE NOW CHARGING ME WITH, HAVING SOME KIND OF  
28 CONSTRUCTIVE KNOWLEDGE OF THESE TWO THINGS THAT WERE

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1 REDACTED FROM THE APPARENT REPORT GIVEN TO  
2 MS. BOZANICH, OR THE REPORTS GIVEN TO US FROM  
3 DR. VICARY, WE DID NOT HAVE KNOWLEDGE OF.

4 THE COURT: I'M NOT CHARGING YOU WITH  
5 CONSTRUCTIVE KNOWLEDGE.

6 MR. GESSLER: YOU'RE CHARGING ME WITH SAYING  
7 I COULD HAVE ASKED MS. ABRAMSON, "GEE, MS. ABRAMSON,  
8 WHAT ELSE WAS OUT THERE?"

9 THE COURT: THAT SEEMS TO ME TO BE A VERY  
10 SIMPLE AND STRAIGHTFORWARD INQUIRY WHEN ONE IS  
11 ASKING FOR A SEVERANCE. AND THE BASIS OF THE MOTION  
12 FOR SEVERANCE IS THAT ONE DEFENDANT MIGHT PUT ON  
13 EVIDENCE THAT MIGHT BE PREJUDICIAL AGAINST THE OTHER  
14 DEFENDANT, AND YOU'D LIKE TO KNOW WHAT IT WAS.

15 MR. GESSLER: BACK IN 1994 I'M SURE  
16 MS. ABRAMSON HAD NO IDEA WHETHER OR NOT SHE'D BE  
17 CALLING DR. VICARY IN A PENALTY PHASE.

18 THE COURT: SHE WANTED TO CALL DR. VICARY IN  
19 THE GUILT PHASE, AND THIS WOULD HAVE ALL ARISEN IN

20 THE GUILT PHASE. ISN'T THAT TRUE? SHE WANTED TO  
21 HAVE DR. VICARY TESTIFY ABOUT THESE MATTERS IN THE  
22 GUILT PHASE. AND INSTEAD OF AT THIS PENALTY PHASE,  
23 WE WOULD BE DISCUSSING THESE SUBJECTS IN THE GUILT  
24 PHASE.

25

26

27

28

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1 MR. GESSLER: EXACTLY. IT WAS PEOPLE VERSUS  
2 ANDERSON STILL APPLYING, BECAUSE ANDERSON ACTUALLY  
3 OCCURRED IN THE GUILT PHASE, EVEN THOUGH IT SLOPPED OVER  
4 AND AFFECTED THE PENALTY PHASE.

5 THE COURT: NO. NO. SHE WANTED VICARY TO  
6 TESTIFY ABOUT THESE MATTERS THAT HE TESTIFIED ABOUT IN  
7 THE PENALTY PHASE, SHE WANTED HIM TO TESTIFY ABOUT THEM  
8 IN THE GUILT PHASE.

9 THE COURT RULED THAT THAT WAS IMPROPER  
10 REBUTTAL, AND FORECLOSED THAT INQUIRY. SO THE WAY THIS  
11 CAME OUT NOW IS IN THE PENALTY PHASE.

12 MR. GESSLER: YOUR HONOR, I REALIZE THAT. I'LL  
13 GO WITH IT. OKAY. LET'S SAY IT HAPPENED A MONTH AGO IN  
14 THE GUILT PHASE. WE'D STILL BE HERE ARGUING THE SAME  
15 WAY.

16 THE COURT: YEAH.

17 MR. GESSLER: BECAUSE ANDERSON WOULD STILL APPLY.

18 PEOPLE VERSUS ANDERSON DID OCCUR IN THE GUILT PHASE.

19 THE COURT: YES. IT DIDN'T OCCUR BECAUSE --

20 MR. GESSLER: THE HARM WAS IN THE PENALTY PHASE.

21 THE COURT: ANDERSON DIDN'T OCCUR IN THE GUILT  
22 PHASE, BECAUSE ERIK MENENDEZ WAS ON THE WITNESS STAND.

23 HE TESTIFIED. HE WAS A WITNESS, AND HE WAS SUBJECT TO

24 CROSS-EXAMINATION.

25 SO THERE WAS NO ANDERSON ERROR OR ISSUE IN

26 THE GUILT PHASE, AS FAR AS I SAW.

27 MR. GESSLER: I STILL THINK THAT THERE WOULD BE

28 CONFRONTATION PROBLEMS INVOLVED HERE ON THESE STATEMENTS

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1 WHICH ARE NOT CONTRARY TO WHAT ERIK MENENDEZ TESTIFIED  
2 TO.

3 REGARDLESS, WE ARE HERE NOW IN THE PENALTY  
4 PHASE WITH -- AND THESE ARE STATEMENTS THAT WERE NOT  
5 GIVEN TO US IN ORDER FOR ME TO GO TO THE COURT AND SAY,  
6 "HERE'S WHAT THEY'RE GOING TO DO, JUDGE, IF YOU DON'T  
7 STOP THEM."

8 THEY WERE STATEMENTS THAT WERE NOT MEANT  
9 APPARENTLY FOR ANYBODY TO SEE. WE DIDN'T GET THEM. THE  
10 DISTRICT ATTORNEY DIDN'T GET THEM ORIGINALLY. AND I  
11 DON'T KNOW THAT MS. ABRAMSON KNEW HE HAD THEM AT THE

12 TIME SHE PUT HIM ON THE STAND. MAYBE SHE DID. MAYBE  
13 SHE DIDN'T. WE SURE DIDN'T.  
14 SO IF I ASK MS. ABRAMSON, WHAT AM I GOING  
15 TO FIND OUT? NOTHING.  
16 SO I REALLY DON'T THINK THAT LYLE MENENDEZ  
17 SHOULD BE PENALIZED FOR ME NOT ASKING MS. ABRAMSON,  
18 "GEE, WHAT ELSE MIGHT BE OUT THERE THAT COULD HURT IF  
19 YOU PUT DR. VICARY ON THE STAND AS YOUR WITNESS?"  
20 IF I AM HELD THAT I SHOULD HAVE FORESEEN  
21 THAT, THEN I BELIEVE THAT LYLE MENENDEZ SHOULD HAVE A  
22 MISTRIAL GRANTED ON MY INEFFECTIVE ASSISTANCE OF  
23 COUNSEL, IF I WAS SUPPOSED TO DO THAT. I AM NOT SURE  
24 THAT I WAS SUPPOSED TO.  
25 AND IF NOT, I WOULD ASK THAT HE BE GRANTED  
26 A MISTRIAL AGAIN ON THE INEFFECTIVE ASSISTANCE OF LESLIE  
27 ABRAMSON, BECAUSE OF THIS WHOLE THING COMING ABOUT WITH  
28 THE LACK OF DISCOVERY, OR HOWEVER YOU WANT TO PUT IT,

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1 WITH THE REDACTION OF THE STATEMENTS.  
2 THE COURT: ALL RIGHT. WELL, THAT MOTION IS  
3 DENIED.  
4 MR. GESSLER: WHICH ONE? THE MISTRIAL, YOUR  
5 HONOR?  
6 THE COURT: THE MISTRIAL ON THE PREVIOUSLY STATED  
7 GROUNDS.



8           AND THE REASON I BRING UP THIS HISTORY IS  
9 TO RESPOND TO SOME OF YOUR REMARKS, BECAUSE TAKEN IN  
10 ISOLATION, ONE LOOKS AT IT AND SAYS, "WELL, THINGS  
11 OCCURRED, AND PERHAPS THERE WAS MERIT TO THE MOTION FOR  
12 SEVERANCE WHEN IT WAS MADE," AND THERE CLEARLY WASN'T.

13           AND THE ISSUE NOW BEFORE THE COURT IS ONE  
14 THAT WOULD HAVE PROPERLY BEEN ADDRESSED HAD MS. ABRAMSON  
15 DISCLOSED IT AT THE TIME THE MOTION FOR SEVERANCE WAS  
16 MADE, NOT NOW.

17           THE MOTION FOR SEVERANCE IS LONG-PAST  
18 DENIED. NOW WE'RE DEALING WITH A DIFFERENT MOTION,  
19 WHICH IS THE MOTION FOR MISTRIAL, AND I THOUGHT IT  
20 APPROPRIATE TO BRING BACK SOME OF THIS HISTORY, SO WE  
21 HAVE SOME RECOLLECTION OF WHAT ACTUALLY TRANSPIRED IN  
22 THESE EARLIER PROCEEDINGS, AND NOT TAKING THINGS IN THE  
23 ABSTRACT HERE.

24           GETTING BACK TO THE ISSUE OF PEOPLE VERSUS  
25 ANDERSON, AND GOING BEYOND THIS ISSUE OF AVAILABILITY OF  
26 ERIK MENENDEZ AT THIS POINT TO LYLE MENENDEZ.

27           WITHOUT HAVING RESEARCHED THE CASE OF  
28 PEOPLE VERSUS BARBOSA, JUST DEALING WITH THE RIGHT TO

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1 HAVE CONFRONTATION, ANDERSON ITSELF WAS A CASE IN WHICH  
2 THE DEFENDANT DID NOT TESTIFY -- THE DECLARANT DID NOT  
3 TESTIFY -- AND THE DEFENDANT WAS DENIED THE RIGHT TO

4 HAVE CONFRONTATION.

5           THAT WAS A CASE IN WHICH THE DEFENSE OF  
6 DIMINISHED CAPACITY WAS OFFERED, AND THE PSYCHIATRIST OR  
7 PSYCHOLOGIST TESTIFIED TO STATEMENTS MADE BY THE -- BY  
8 THAT DEFENDANT IMPLICATING THE CO-DEFENDANT.

9           AND THE DEFENDANT WHO WAS THE SUBJECT OF  
10 THE PSYCHOLOGICAL OR PSYCHIATRIC EXAMINATIONS, THE  
11 DECLARANT, NEVER TESTIFIED, AND THAT DEFENDANT'S  
12 CREDIBILITY WAS NEVER BEFORE THE JURY. THE JURY HAD NO  
13 WAY OF EVALUATING THE CREDIBILITY OF THE DECLARANT.

14           THAT IS CERTAINLY NOT THE SITUATION HERE.

15           THE DEFENDANT, ERIK MENENDEZ, HAS BEEN ON  
16 THE WITNESS STAND. HE WAS ON THE WITNESS STAND, AS  
17 COUNSEL IS QUICK TO POINT OUT, FOR 15 DAYS. AND HIS  
18 CREDIBILITY WAS CLEARLY BEFORE THE JURY.

19           AS IT DEVELOPED, WHETHER IT WAS PRE-PLANNED  
20 STRATEGY OR ONE THAT EVOLVED DURING THE COURSE OF THE  
21 TRIAL, THE END RESULT WAS THAT ERIK MENENDEZ BECAME THE  
22 PRINCIPLE WITNESS FOR LYLE MENENDEZ, AND HIS  
23 CREDIBILITY, THAT OF ERIK MENENDEZ, WAS ONE THAT LYLE  
24 MENENDEZ RELIED UPON DURING THE COURSE OF THE GUILT  
25 PHASE, AND AS WE ARE NOW IN THE PENALTY PHASE.

26           THESE ARE SOME OBSERVATIONS, THE SAME  
27 OBSERVATIONS I MADE BEFORE. THE OTHER CASE CITED BY THE  
28 DEFENSE, PEOPLE VERSUS BLACKINGTON AT 167 CAL.APP.3D

1 1216 IS A CASE THAT I CITED TO COUNSEL DURING EARLIER  
2 DISCUSSIONS RELATING TO DEFENSE OBJECTIONS TO QUESTIONS  
3 ASKED OF ERIK MENENDEZ RELATING TO STATEMENTS HE MADE TO  
4 CIGNARELLI, AND PERHAPS TO DR. OZIEL.

5 IT WAS DURING THOSE DISCUSSIONS I BROUGHT  
6 IT TO COUNSEL'S ATTENTION, THAT'S MY RECOLLECTION, THE  
7 CASE OF PEOPLE VERSUS BLACKINGTON.

8 MR. GESSLER: WHEN WE HAD SIMILAR DISCUSSIONS YOU  
9 BROUGHT UP BLACKINGTON AND WE TALKED ABOUT THAT.

10 THE COURT: AND AGAIN, IN BLACKINGTON, IN THAT  
11 CASE THE DECLARANT DID NOT TESTIFY, AND THE ISSUE WAS  
12 DENIAL OF RIGHT OF CONFRONTATION, BECAUSE THERE WAS  
13 NOTHING FOR THE JURY TO EVALUATE IN CREDIBILITY; NOTHING  
14 FOR THE JURY TO LOOK AT IN DETERMINING CREDIBILITY.

15 AND IT'S CLEARLY DISTINGUISHED FROM THIS  
16 CASE, THE CASE THAT WE HAVE HERE.

17 THE COURT RECALLS, ALTHOUGH COUNSEL SAYS --  
18 YOU KNOW, THERE WERE LOTS OF QUESTIONS YOU WOULD LIKE TO  
19 ASK ERIK MENENDEZ, AND I'M SURE THERE ARE ON VARIOUS  
20 SUBJECTS -- THAT THERE WAS VIRTUALLY NO QUESTIONING OF  
21 ERIK MENENDEZ BY LYLE MENENDEZ DURING THE GUILT PHASE.  
22 HE TESTIFIED AS A WITNESS FOR LYLE MENENDEZ, AND COUNSEL  
23 FOR LYLE MENENDEZ DIDN'T ASK HIM A SINGLE QUESTION.

24 MR. GESSLER: THAT'S RIGHT, YOUR HONOR. I DIDN'T  
25 HAVE TO.

26 THE COURT: OR IF YOU DID, YOU ASKED ONE OR TWO  
27 QUESTIONS. I THINK THERE WAS AN ISOLATED ISSUE THAT YOU  
28 MIGHT HAVE ASKED HIM ABOUT.

1 MR. GESSLER: YOU'RE RIGHT, I BELIEVE, ON ONE  
2 ASPECT. IT WAS THE SHOES AND THE CAR. I BELIEVE I DID  
3 TAKE OVER THE QUESTIONING ON THAT ASPECT AFTER AN  
4 OBJECTION BY THE PEOPLE.

5 THE COURT: SO MY OBSERVATION NOW IS HOW IS THIS  
6 A DENIAL OF THE RIGHT OF CONFRONTATION IF THE  
7 PROSECUTION BRINGS FORTH ONE OR TWO ISOLATED  
8 CONVERSATIONS BETWEEN THE TWO DEFENDANTS, WHEN SO MANY  
9 OTHER CONVERSATIONS BETWEEN THE DEFENDANTS WERE BROUGHT  
10 OUT DURING THE ENTIRETY OF ERIK MENENDEZ' TESTIMONY BY  
11 THE DEFENSE?

12 MR. GESSLER: WELL, YOUR HONOR, THE ONE OR TWO  
13 ISOLATED CONVERSATIONS SEEM TO BE OF SOME IMPORTANCE,  
14 SINCE WE'RE SPENDING ALL DAY ON THEM. THEY MUST BE OF  
15 ENOUGH IMPORTANCE TO THE DISTRICT ATTORNEY TO FEEL THAT  
16 THEY WILL MAKE THE DIFFERENCE BETWEEN LIFE AND DEATH IN  
17 THIS PARTICULAR MATTER.

18 SO I DON'T THINK THEY'RE JUST ISOLATED.  
19 THEY'RE VERY IMPORTANT ONES. BUT THERE'S TWO THINGS.

20 NUMBER ONE, WE DID NOT HAVE THIS IN OUR  
21 HAND TO MAKE A DECISION WHETHER OR NOT I WOULD HAVE  
22 ASKED ERIK MENENDEZ ABOUT THOSE PARTICULAR THINGS WHEN  
23 HE WAS ON THE STAND. I CAN'T SAY WHAT I WOULD HAVE DONE  
24 IF I'D HAD THEM.

25 AND THE SECOND THING IS THAT CREDIBILITY IS

26 AN ISSUE, YOUR HONOR. YOUR HONOR INSTRUCTED THE JURY AT  
27 THE TIME, AND MOST JURIES ARE INSTRUCTED, THAT IF A  
28 WITNESS IS MATERIALLY FALSE ON ONE POINT, IT MEANS YOU

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1 CAN LOOK AT THE REST OF HIS TESTIMONY WITH KIND OF A  
2 CAUTION. BUT YOU DON'T AUTOMATICALLY REJECT IT. YOU  
3 EVALUATE EACH PART OF THAT WITNESS' TESTIMONY, AND EVERY  
4 SUBJECT AND EVERY PART OF IT SEPARATELY.

5 SO THE FACT THAT ERIK MENENDEZ HAS  
6 TESTIFIED ON A NUMBER OF SUBJECTS AND HAS BEEN PERHAPS  
7 REJECTED BY THE JURY IN PART, AND PERHAPS AFFIRMED BY  
8 THE JURY IN PART, OR BY SOME JURORS FOR SOME OF HIS  
9 TESTIMONY AND NOT FOR OTHERS, WE DON'T KNOW.

10 IT DOESN'T MEAN THAT JUST BECAUSE HE'S BEEN  
11 SUBJECT TO THEIR CREDIBILITY ON HIS TESTIMONY BEFORE,  
12 THAT THEY WOULD AUTOMATICALLY GO ONE WAY OR THE OTHER ON  
13 THESE TWO QUESTIONS WHERE THEIR CREDIBILITY IS NOT  
14 TESTED, IS NOT CONFRONTED.

15 SO I DON'T THINK THAT BECAUSE HE TESTIFIED  
16 ON OTHER POINTS, THAT SAYS OKAY, LYLE MENENDEZ, YOU'VE  
17 HAD YOUR DAY OF CONFRONTATION. NOW WE'RE GOING TO ASK  
18 HIM ABOUT ANYTHING WE WANT TO. WE WILL ASK HIM ABOUT  
19 THE WEATHER OR ABOUT SATELLITES OR WHATEVER, AND WE WILL  
20 JUST LET THE JURY ASSESS HIS CREDIBILITY BASED ON WHAT  
21 HE SAID AT AN EARLIER TIME.

22 SO I STILL RENEW THE ARANDA-BRUTON  
23 CREDIBILITY ISSUE, THE CONFRONTATION ISSUES HERE, AND DO  
24 NOT FEEL THEY ARE WAIVED SIMPLY BECAUSE HE TESTIFIED ON  
25 OTHER SUBJECTS IN A DIFFERENT PHASE OF THE CASE.

26 THE COURT: OKAY. ALL RIGHT.

27 WHAT I WILL DO IS DEFER FINAL RULING ON  
28 THIS UNTIL I LOOK AT THE BARBOSA CASE.

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1 AGAIN, LET ME BACK UP AND SAY NOTHING THAT  
2 HAS OCCURRED SO FAR IN THE QUESTIONING OF THE WITNESS,  
3 AND THE STATUS OF THE RECORD SO FAR, IN MY VIEW,  
4 VIOLATES PEOPLE VERSUS ANDERSON.

5 AND THE ONLY ISSUE NOW IS THE DISCUSSION AS  
6 TO WHETHER OR NOT THE PEOPLE SHOULD BE PERMITTED TO ASK  
7 FURTHER QUESTIONS ON THESE SUBJECTS THAT THEY INDICATED  
8 THEY WISHED TO DO, AND I'LL DEFER RULING ON THAT UNTIL I  
9 LOOK AT THE BARBOSA CASE, AND WHATEVER OTHER CASES I CAN  
10 FIND THAT RELATE TO THAT SUBJECT, AND WE'LL HAVE A  
11 RULING ON THAT ON MONDAY, WITH THE UNDERSTANDING THAT  
12 DR. VICARY HAS FURTHER TESTIMONY TO OFFER, I ASSUME, ON  
13 VARIOUS POINTS, AND WE'LL BE BACK ANYWAY.

14 MR. GESSLER: WELL, I DON'T KNOW ABOUT THAT,  
15 BECAUSE I THOUGHT WE WENT INTO THE ONLY SUBJECTS THE  
16 DISTRICT ATTORNEY WAS GOING TO ASK ABOUT.

17 IF THERE'S OTHER SUBJECTS, I WANT TO KNOW

18 ABOUT THEM IN ADVANCE, BECAUSE THERE COULD BE ANDERSON  
19 ISSUES THERE ALSO HAVING NOTHING TO DO WITH REDACTION  
20 OR NON-REDACTION.

21 THE COURT: I THOUGHT THIS WAS THE ONLY AREA YOU  
22 WANTED TO GO INTO THAT DEALT WITH LYLE MENENDEZ.

23 MS. NAJERA: YOUR HONOR, I'M SORRY.

24 THE COURT: YES.

25 MS. NAJERA: TWO THINGS ON THIS SUBJECT.

26 THERE WAS ONE OTHER POINT THAT I SHOULD  
27 HAVE TOLD MR. CONN ABOUT, THAT WE SHOULD HAVE GOTTEN  
28 INTO, AND WE CAN DEAL WITH IT RIGHT NOW. IT IS VERY

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1 SHORT, AND IT'S ON PAGE 95, IF YOU'D LIKE TO LOOK AT IT.

2 THERE IS A LINE THERE THAT SAYS "LYLE'S  
3 INCESTUOUS RELATIONSHIP WITH HIS MOTHER IN HIS HEAD,"  
4 AND THEY REDACTED OUT "IN HIS HEAD," AND THAT WOULD BE  
5 THE --

6 THE COURT: OKAY. THE PURPOSE OF GOING INTO THAT  
7 IS WHAT?

8 MS. NAJERA: WELL, I BELIEVE THAT MS. TOWERY IS  
9 THE ONE WHO GOT OUT FROM THE WITNESS, JAMIE PISARCIK, AS  
10 PART OF THEIR EVIDENCE, THE PART OF THE NOTE AND THE  
11 ADMISSION BY LYLE MENENDEZ THAT HIS MOTHER HAD MOLESTED  
12 HIM, AND COUNSEL ARGUED THAT.

13 AND THIS APPARENTLY IS A STATEMENT THAT WAS

14 MADE BY ERIK MENENDEZ THAT'S INCONSISTENT WITH THAT TO  
15 DR. VICARY, AND THEN AN ATTEMPT WAS MADE TO CHANGE THE  
16 MEANING. THE ENTIRE STATEMENT WAS: "LYLE'S INCESTUOUS  
17 RELATIONSHIP WITH M," MEANING MOTHER, "IN HIS HEAD."

18 AND THE ONLY PART THAT WAS REDACTED OUT OF  
19 THAT BY THE DEFENSE WHEN THEY CHANGED THESE NOTES WAS  
20 "IN HIS HEAD."

21 MR. GESSLER: WHEN WE SAY "BY THE DEFENSE", YOUR  
22 HONOR, THIS WAS NOT THE DEFENSE OF LYLE MENENDEZ THAT  
23 DID ANY REDACTING.

24 THE COURT: OKAY. I DON'T SEE THAT PARTICULAR  
25 STATEMENT AS IMPEACHING OF ERIK MENENDEZ IN ANY WAY, AND  
26 TO WHATEVER EXTENT IT MIGHT BE IMPEACHING OF THE  
27 WITNESS, DR. VICARY, OR THE FACT HE DELETED THAT  
28 REFERENCE, I JUST DON'T SEE THAT THAT IS -- IT'S TAKING

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1 BASICALLY A STATEMENT OF LYLE MENENDEZ, APPARENTLY, OR A  
2 CONCLUSION OF ERIK MENENDEZ, ONE OR THE OTHER, AND USING  
3 IT TO IMPEACH SOMETHING THAT OCCURRED IN THE GUILT  
4 PHASE, WHICH THE PEOPLE WERE AWARE OF WAS PART OF  
5 PISARCIK'S TESTIMONY. YOU KNEW THAT SHE WAS GOING TO  
6 SAY THAT, YOU PUT HER ON. AND THAT'S WHAT SHE SAID  
7 THAT WAS IN THE NOTE.

8 I JUST DON'T SEE THAT'S IMPEACHING OF  
9 ANYTHING.



10 MS. NAJERA: AND YOUR HONOR, THERE IS ONE OTHER  
11 CASE WITH BARBOSA, THAT IS A CALIFORNIA SUPREME COURT  
12 CASE WE WANTED TO CITE THE COURT AND COUNSEL TO AS WELL,  
13 IF I MAY.

14 THE COURT: YES.

15 MS. NAJERA: PEOPLE VERSUS ROSOTO, R-O-S-O-T-O,  
16 58 CAL.2D 304, PAGES 352 AND 353.

17 THE COURT: OKAY.

18 MS. NAJERA: THANK YOU.

19 THE COURT: ALL RIGHT.

20 LET'S MOVE ON THEN. I THINK WE HAVE  
21 EXHAUSTED, IF NOT MR. GESSLER, AT LEAST HIS MOTIONS AT  
22 THIS POINT, AND WE WILL GO TO COUNSEL FOR ERIK MENENDEZ.

23 YOU HAVE SOME MOTIONS OF SOME SORT; IS THAT  
24 CORRECT?

25 MR. LEVIN: YES, YOUR HONOR, AND I WILL DEFER TO  
26 THE COURT IN THE ORDER THAT WE CAN DISPOSE OF THESE.

27 ONE IS THAT THERE IS A MOTION ON BEHALF OF  
28 ERIK MENENDEZ FOR MISTRIAL, AND THE OTHER AREA THAT I

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1 WANT TO DISCUSS IS WITH RESPECT TO ANY FURTHER TESTIMONY  
2 THAT THE PROSECUTION MAY BE OFFERING AGAINST ERIK  
3 MENENDEZ BY THE WITNESS, DR. VICARY.

4 WE WOULD -- WE WOULD ASK THAT WE BE  
5 PROVIDED WITH THAT INFORMATION SO THAT WE KNOW HOW TO

6 PROCEED WITH RESPECT TO HIM.

7 THE COURT: WELL, FIRST OF ALL, LET'S HEAR YOUR  
8 MOTION FOR MISTRIAL.

9 MR. LEVIN: WELL, YOUR HONOR, RATHER THAN  
10 DELINEATING ANY SPECIFIC GROUNDS, I WOULD JUST PREFER TO  
11 ARGUE THE MOTION FOR MISTRIAL IN THE TERMS THAT I WOULD  
12 CHARACTERIZE AS BEING GENERAL, WHETHER THEY COME ACROSS  
13 AS A MOTION FOR MISTRIAL BASED ON INEFFECTIVE ASSISTANCE  
14 OF COUNSEL, AND WHETHER THERE WAS INEFFECTIVE ASSISTANCE  
15 OF COUNSEL WITH RESPECT TO MS. ABRAMSON, OR EVEN PERHAPS  
16 MYSELF, BECAUSE I DON'T KNOW HOW ONE CAN ARGUE THE  
17 INEFFECTIVE ASSISTANCE OF CO-COUNSEL WITHOUT IN SOME WAY  
18 ARGUING ONE'S OWN INEFFECTIVE ASSISTANCE OF COUNSEL; FOR  
19 WHAT MAY HAVE BEEN DETERMINED OR MAY BE CONSTRUED TO BE  
20 MISCONDUCT ON BEHALF OF MS. ABRAMSON, MAY VERY WELL BE  
21 CONSTRUED TO BE NEGLIGENCE ON MY PART.

22 SO I DON'T KNOW EXACTLY HOW TO SEPARATE OR  
23 DELINEATE ARGUMENT ON INEFFECTIVE ASSISTANCE OF COUNSEL  
24 WITHOUT PREFACING THOSE REMARKS.

25 THE FIRST AREA THAT I WISH TO ADDRESS IS  
26 WITH RESPECT TO MS. ABRAMSON'S INVOCATION OF THE 5TH  
27 AMENDMENT PRIVILEGE THAT SHE RECENTLY DID IN THIS COURT.

28 THE PROBLEM THAT I SEE, AND THE REASON WHY

1 THIS COURT SHOULD GRANT THE MISTRIAL WITH RESPECT TO

2 THAT, IS CERTAINLY BECAUSE WE ARE NOW FACED WITH THE  
3 IRRECONCILABLE CONFLICT WHICH PREVENTS CONSTITUTIONALLY  
4 ADEQUATE AND COMPETENT REPRESENTATION OF ERIK MENENDEZ  
5 IN VIOLATION OF HIS RIGHTS UNDER THE 5TH, 6TH, 8TH AND  
6 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND  
7 THE EQUIVALENT STATE'S RIGHTS IN THOSE AREAS, IN THAT  
8 DR. VICARY, DEEMED THE CHIEF PSYCHIATRIC WITNESS CALLED  
9 BY THE DEFENSE, PUT ON BY MS. ABRAMSON, STANDS IN THE  
10 SHOES OF THE PERSON FOR WHOM HE HAS BEEN CALLED TO  
11 TESTIFY FOR, BEING THE DEFENDANT, ERIK MENENDEZ.

12 MS. ABRAMSON IS NOW IN THE POSITION WHERE  
13 SHE MUST MAKE AN ELECTION, AND THAT ELECTION IS WHETHER  
14 TO IMPEACH OR ATTEMPT TO LESSEN OR MITIGATE THE EFFECT  
15 OF DR. VICARY'S TESTIMONY AS IT PRESENTLY STANDS BEFORE  
16 THE JURY, OR ATTEMPT TO, IN SOME FASHION, REHABILITATE  
17 HIM IN SOME FASHION SO THAT HE CAN BE AT LEAST VIEWED AS  
18 A CREDIBLE WITNESS WITH RESPECT TO THE REMAINDER OF HIS  
19 TESTIMONY THAT DOES NOT PERHAPS INVOLVE THE DESTRUCTION  
20 OF, OR ATTEMPTED DESTRUCTION OF, DOCUMENTS THAT ARE IN  
21 THE POSSESSION OF THE PROSECUTION.

22 MS. ABRAMSON CERTAINLY CANNOT BE A WITNESS.  
23 SHE CAN'T BE CALLED TO TESTIFY BECAUSE OF THE INVOCATION  
24 OF THE 5TH AMENDMENT AT THIS TIME TO EXPLAIN ANY  
25 DISCREPANCIES.

26 THE COURT: THAT'S HER DECISION, NOBODY ELSE'S.

27 MR. LEVIN: WELL, THE POINT --

28 THE COURT: THAT'S THE BOTTOM LINE. NOBODY ELSE

1 MAKES THAT DECISION BUT MS. ABRAMSON.

2 MR. LEVIN: BUT MS. ABRAMSON MADE THE DECISION TO  
3 CREATE THE CONFLICT OF INTEREST, AND THERE IS AN  
4 IRRECONCILABLE CONFLICT OF INTEREST. WHETHER IT WAS  
5 CREATED BY MS. ABRAMSON OR NOT, THE CONFLICT STILL  
6 EXISTS WITH RESPECT TO ERIK MENENDEZ.

7 AND AS I STATED BEFORE, ERIK MENENDEZ IS  
8 ENTITLED TO A CONFLICT-FREE ATTORNEY.

9 NOW, THERE MAY BE REMEDIES. THERE MAY BE  
10 FUTURE HEARINGS WITH RESPECT TO ANY IMPUTATION OF  
11 MISCONDUCT -- PURPORTED MISCONDUCT ON THE PART OF  
12 MS. ABRAMSON, BUT THAT'S CERTAINLY --

13 THE COURT: MY PURPOSE IS TO SEE THAT THIS TRIAL  
14 IS CONCLUDED IN THE LEGALLY PROPER WAY. I AM NOT REALLY  
15 CONCERNED ABOUT SUCH EXTRANEIOUS MATTERS AT THIS POINT.

16 MR. LEVIN: WELL, THE EXTRANEIOUS MATTER THAT I  
17 WOULD HOPE THE COURT WOULD FOCUS ON IS THE FACT THAT  
18 THESE PROCEEDINGS, OR THE EVENTS THAT OCCURRED JUST  
19 YESTERDAY, HAVE CREATED A SITUATION THAT'S SO UNTENABLE  
20 AND PREJUDICIAL TO ERIK MENENDEZ, THAT IT'S NO LONGER  
21 POSSIBLE FOR HIM TO RECEIVE A FAIR PENALTY PHASE TRIAL,  
22 AND THAT ANY IMPOSITION OF THE DEATH PENALTY BY THIS  
23 JURY WOULD BE ARBITRARY AND CAPRICIOUS, AND BE IN  
24 VIOLATION OF THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS TO  
25 THE UNITED STATES CONSTITUTION.

26 THE EFFECTS OF ANY OF THESE VIOLATIONS

27 CANNOT BE CURED BY ANY LIMITING OR CAUTIONARY  
28 INSTRUCTION, OR BY STRIKING DR. VICARY'S TESTIMONY.

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1       THERE IS SIMPLY NO WAY THAT I CAN SEE THAT  
2 MS. ABRAMSON CAN PROCEED AS ERIK MENENDEZ' COUNSEL, AND  
3 ERIK MENENDEZ, AT THE LEAST -- AT THE VERY LEAST --  
4 SHOULD BE ENTITLED TO THE APPOINTMENT OF INDEPENDENT,  
5 CONFLICT-FREE COUNSEL TO EXAMINE THESE RECORDS, TO  
6 EXAMINE THE PROCEEDINGS, TO CONDUCT THE INVESTIGATION  
7 THAT CONFLICT-FREE COUNSEL FEELS THAT THEY SHOULD, AND  
8 GIVE ADVICE, INDEPENDENT ADVICE TO ERIK MENENDEZ AS TO  
9 HOW TO PROCEED.

10       AND I DON'T THINK THAT I CAN DO THAT. ERIK  
11 MENENDEZ AT THIS TIME HAS VARIOUS AVAILABLE REMEDIES TO  
12 HIM THAT HE COULD RAISE IN COURT, INCLUDING THE  
13 INVOCATION OR THE REQUEST OF THE COURT TO CONDUCT THE  
14 HEARING UNDER MARSDEN, AND I THINK THAT IT ONLY -- OR  
15 COULD ONLY OCCUR FROM THE APPOINTMENT OF CONFLICT-FREE  
16 COUNSEL.

17       MS. ABRAMSON: MR. LEVIN, DO YOU SMELL SMOKE?

18       THE COURT: ALL RIGHT.

19       WE'LL ASK THE BAILIFF TO INVESTIGATE  
20 WHETHER THERE IS SOME SMOKE -- SOMETHING HERE.

21       THE COURT: GO AHEAD, MR. LEVIN.

22       MR. LEVIN: THE ONLY WAY IN WHICH ERIK MENENDEZ

23 CAN PROCEED IS FOR THIS COURT TO APPOINT HIM  
24 CONFLICT-FREE COUNSEL TO ADVISE HIM OF HIS RIGHTS AS  
25 THEY PRESENTLY EXIST.  
26 AND SO I THINK THAT (1), THE COURT SHOULD  
27 GRANT THE MISTRIAL BASED ON THE CONFLICT OF INTEREST  
28 THAT NOW EXISTS BETWEEN DR. VICARY AND LESLIE ABRAMSON,

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1 IN THAT DR. VICARY HAS TAKEN OR HAS STATED CERTAIN  
2 OPINIONS WITH RESPECT TO REDACTIONS THAT OCCUR IN HIS  
3 NOTES THAT MAY BE DIFFERENT TO THE RECOLLECTIONS AND TO  
4 THE UNDERSTANDING OF MS. ABRAMSON. IN FACT, MAY NOT  
5 HAVE OCCURRED.

6 THE BAILIFF: IT'S A FLUORESCENT LIGHT.

7 MR. LEVIN: AND MS. ABRAMSON IS NOT IN A POSITION  
8 AT THIS TIME THAT SHE CAN REHABILITATE DR. VICARY, NOR  
9 CAN SHE TESTIFY AS A WITNESS.

10 AND ALSO -- AND ABOVE AND BEYOND THAT, HER  
11 CREDIBILITY IN FRONT OF THE JURY HAS BEEN SO SEVERELY  
12 TARNISHED AND DAMAGED, THAT ANY ARGUMENTS THAT  
13 MS. ABRAMSON MAKES WILL BE VERY -- IT'LL BE VERY  
14 UNLIKELY THAT ANY ARGUMENTS WILL BE PERSUASIVE ON BEHALF  
15 OF HER CLIENT.

16 IF ERIK MENENDEZ HAD A NEW PENALTY PHASE  
17 TRIAL WITH CONFLICT-FREE COUNSEL TO COME IN ON A LEVEL  
18 PLAYING FIELD AND DEAL WITH THESE ISSUES, AND ARGUE TO

19 THE JURY, CONFLICT-FREE, WHATEVER THE EVIDENCE IS THAT  
20 EXISTS AT A NEW PENALTY PHASE DETERMINATION, ERIK  
21 MENENDEZ MAY HAVE A CHANCE. HE WOULD HAVE CONFLICT-FREE  
22 COUNSEL, AND HE WOULD HAVE THE BENEFIT OF HAVING HIS  
23 ARGUMENTS PRESENTED BY COUNSEL WHO WOULD BE CREDIBLE AND  
24 PERSUASIVE.

25 AND THAT'S NOT THE CASE, AND THAT'S NOT THE  
26 SITUATION AT THIS JUNCTURE OF THE TRIAL.

27 AND I DON'T KNOW OF ANY OTHER WAY THAT THIS  
28 CAN BE CURED OTHER THAN FOR THE COURT TO GRANT A

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1 MISTRIAL.

2 THE COURT: OKAY. LET ME HEAR THE PEOPLE'S  
3 RESPONSE.

4 MR. CONN: I THINK THAT, EVEN AS I ARGUED THIS  
5 MORNING, THAT THERE IS NO BASIS UPON WHICH COUNSEL FOR  
6 LYLE MENENDEZ CAN ARGUE THAT LYLE MENENDEZ IS SOMEONE  
7 TARNISHED BY ANY BEHAVIOR OF MS. ABRAMSON, I WOULD  
8 SUBMIT THAT THE SAME HOLDS TRUE FOR ERIK MENENDEZ,  
9 DESPITE THE FACT THAT THERE IS OBVIOUSLY A CLOSER  
10 RELATIONSHIP BETWEEN ERIK MENENDEZ AND HIS ATTORNEY THAN  
11 THERE IS BETWEEN LYLE MENENDEZ AND MS. ABRAMSON.

12 THE FACT REMAINS THAT THERE IS ABSOLUTELY  
13 NO EVIDENCE WHATSOEVER THAT ERIK MENENDEZ AUTHORIZED OR  
14 INSTIGATED IN ANY WAY THE BEHAVIOR OF MS. ABRAMSON. AND

15 IN FACT COUNSEL, IN THE EXAMINATION OF DR. VICARY,  
16 ELICITED FACTS WHICH WOULD SUPPORT THE CONCLUSION THAT  
17 ERIK MENENDEZ HAD ABSOLUTELY NOTHING TO DO WITH  
18 DECISIONS MADE BY MS. ABRAMSON, OR ANY ACTIONS THAT SHE  
19 TOOK DURING HER DEALINGS WITH DR. VICARY.

20 SO I WOULD SUBMIT THAT IT WOULD CALL FOR  
21 SPECULATION FOR THE JURY TO ATTRIBUTE SUCH BEHAVIOR TO  
22 ERIK MENENDEZ, OR TO HOLD ERIK MENENDEZ RESPONSIBLE FOR  
23 SUCH BEHAVIOR, AND I ANTICIPATE THAT IN FACT THAT  
24 MR. LEVIN WOULD BE ASKING FOR A LIMITING INSTRUCTION  
25 THAT WOULD -- A CURATIVE INSTRUCTION AT THE CONCLUSION  
26 OF THE PENALTY PHASE THAT WOULD ADMONISH THE JURY NOT TO  
27 CONSIDER SUCH BEHAVIOR OF MS. ABRAMSON AGAINST ERIK  
28 MENENDEZ.

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1 COUNSEL HAS NOW CONCEDED THAT SUCH A  
2 LIMITING INSTRUCTION WOULD NOT BE HELPFUL IN ANY WAY.  
3 SO I TAKE IT THAT COUNSEL IS NOT GOING TO BE ASKING FOR  
4 ANY LIMITING INSTRUCTION IN THAT REGARD.

5 NEVERTHELESS, THE COURT, IF APPROPRIATE,  
6 SHOULD GIVE SUCH AN INSTRUCTION.

7 I DISAGREE WITH COUNSEL'S SUGGESTION THAT  
8 THIS WAS THE CHIEF PSYCHIATRIC WITNESS CALLED BY THE  
9 DEFENSE. TO THE CONTRARY. I BELIEVE IT IS MR. WILSON  
10 WHO THEY SELECTED TO PRESENT THEIR DEFENSE, THEIR



11 PSYCHIATRIC DEFENSE. I THINK DR. VICARY PLAYED A MUCH  
12 MORE MINOR ROLE THAN DR. WILSON, WHO WAS ON THE STAND  
13 FOR ABOUT FOUR DAYS ON DIRECT EXAMINATION ALONE.

14 SO I DON'T THINK THAT HE WAS THE CHIEF  
15 PSYCHIATRIC WITNESS. AND I THINK THAT COUNSEL IS NOW  
16 ATTEMPTING TO GIVE MORE SIGNIFICANCE TO THE TESTIMONY OF  
17 DR. VICARY THAN SHOULD BE ATTACHED TO HIS TESTIMONY IN  
18 THIS CASE.

19 BUT REGARDLESS OF WHETHER HE'S THE CHIEF  
20 PSYCHIATRIC WITNESS OR NOT, COUNSEL THEN PROCEEDS TO  
21 ARGUE THAT MS. ABRAMSON WOULD HAVE TO TESTIFY IN THIS  
22 CASE IF SHE IS IN FACT GOING TO IMPEACH THE TESTIMONY OF  
23 DR. VICARY, OR THAT SHE MIGHT HAVE TO TESTIFY TO ENHANCE  
24 HIS CREDIBILITY, OR SHED ANY LIGHT ON HIS CREDIBILITY.

25 I THINK THAT THE PROBLEM BEFORE THE COURT  
26 IS THAT COUNSEL'S ARGUMENT IS ROOTED IN SPECULATION.  
27 THERE IS NO EVIDENCE BEFORE THE COURT WHATSOEVER AS TO  
28 WHAT MS. ABRAMSON WOULD SAY TO IMPEACH DR. VICARY OR

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1 ENHANCE HIS CREDIBILITY, OR AFFECT HIS CREDIBILITY IN  
2 ANY WAY.

3 SO I DON'T THINK THAT COUNSEL CAN ASSUME  
4 THAT MS. ABRAMSON HAS TESTIMONY THAT WOULD IMPACT UPON  
5 THE JURY'S DETERMINATION ONE WAY OR THE OTHER.

6 AND FINALLY, COUNSEL ARGUES THAT ERIK

7 MENENDEZ IS ENTITLED TO CONFLICT-FREE COUNSEL.

8           AND I WOULD SUBMIT THAT MR. LEVIN HAS  
9 REPRESENTED MR. MENENDEZ THROUGHOUT THESE PROCEEDINGS IN  
10 AN APPROPRIATE MANNER, AND HE IS CONFLICT-FREE COUNSEL.  
11 I THINK THAT MR. LEVIN GOES TOO FAR TO TRY TO SUGGEST  
12 THAT HE IS IN A CONFLICTED SITUATION AT THIS PARTICULAR  
13 MOMENT. I SIMPLY DON'T SEE IT.

14           I THINK THAT HE RECOGNIZES HIS OBLIGATION  
15 TO PUT HIS CLIENT ABOVE HIS RELATIONSHIP WITH LESLIE  
16 ABRAMSON, AND I THINK HE HAS FULFILLED THAT OBLIGATION  
17 THROUGHOUT THESE PROCEEDINGS. AND I THINK THAT BY  
18 CONTINUING TO FULFILL THAT OBLIGATION, HE IS  
19 CONFLICT-FREE COUNSEL.

20           ERIK MENENDEZ IS ADEQUATELY REPRESENTED BY  
21 MR. LEVIN, AND MR. MENENDEZ NEEDS NO ADDITIONAL COUNSEL  
22 TO REPRESENT HIM.

23           INSOFAR AS MS. ABRAMSON'S CREDIBILITY BEING  
24 TARNISHED, I THINK THAT MR. LEVIN NEEDS TO MAKE A  
25 DETERMINATION AS TO THE ROLE OF MS. ABRAMSON FOR THE  
26 REMAINDER OF THE PROCEEDINGS, AND THAT IS SOMETHING THAT  
27 HE CAN ADDRESS TO THE COURT IF HE FEELS THERE IS A  
28 DISPUTE BETWEEN HIMSELF AND MS. ABRAMSON CONCERNING THAT

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1 ROLE.

2           BUT I THINK THAT BECAUSE MR. LEVIN HAS NO

3 BASIS UPON WHICH HE CAN ARGUE THAT HIS CREDIBILITY IS IN  
4 ANY WAY TARNISHED BEFORE THIS JURY, MR. LEVIN IS MORE  
5 THAN PREPARED TO PROCEED WITH THIS CASE, REPRESENTING  
6 ERIK MENENDEZ, AND THE MOTION SHOULD BE DENIED.

7 THE COURT: OKAY.

8 MR. LEVIN: IF I MAY BRIEFLY RESPOND, YOUR HONOR.

9 THE COURT: YES.

10 MR. LEVIN: AND WHILE I THANK MR. CONN FOR THE  
11 ACCOLADES IN BEING SO HONEST A LAWYER AND FORTHRIGHT IN  
12 DEFENSE OF MY CLIENT, IT WAS MR. CONN WHO IMPUTED MY  
13 CREDIBILITY AND IMPUGNED MY CREDIBILITY TO THIS JURY BY  
14 THE TESTIMONY -- OR THROUGH THE TESTIMONY OF DR. JOHN  
15 WILSON, WHEN MR. CONN SUGGESTED THAT I HAD CONCOCTED THE  
16 ENTIRE POST-TRAUMATIC STRESS DISORDER DEFENSE BY  
17 SUGGESTING THAT I HAD WRITTEN A BOOK, WHICH WAS  
18 COMPLETELY AND UTTERLY IRRELEVANT.

19 BUT NONETHELESS, THE JURY IS AWARE THAT I  
20 HAVE WRITTEN A BOOK ON THE VERY NATURE OF THE UNDERLYING  
21 MENTAL DEFENSE THAT'S BEEN PRESENTED TO THEM THROUGH  
22 DR. WILSON.

23 THE OBVIOUS IMPORT -- AND I KNOW THE COURT  
24 DISAGREES WITH ME, BECAUSE AT THE TIME THE COURT THOUGHT  
25 THAT IT WAS A COMPLIMENT. I DIDN'T TAKE IT AS A  
26 COMPLIMENT. I TOOK IT AS EXACTLY WHAT IT WAS.

27 AND WHY WOULD A PROSECUTOR -- WHY WOULD A  
28 PROSECUTOR IN A CAPITAL CASE SEEK TO BOLSTER THE

1 CREDIBILITY OF THE DEFENSE LAWYER OF THE DEFENDANT HE'S  
2 TRYING TO KILL?

3       AND THE OBVIOUS IMPORT OF WHAT MR. CONN DID  
4 TO THIS JURY INDIVIDUALLY, COLLECTIVELY, IN ANY WAY THAT  
5 IT WAS TAKEN BY THE JURY, WAS TO SUGGEST THAT BECAUSE  
6 MR. LEVIN WROTE A BOOK ON POST-TRAUMATIC STRESS  
7 DISORDER -- AND IT HADN'T COME TO THE JURY BEFORE IN THE  
8 FIRST TRIAL, AND IT HADN'T BEEN MENTIONED BEFORE; AND  
9 DR. WILSON AND I HAD SOME KIND OF A RELATIONSHIP -- THAT  
10 I HAD COACHED ERIK MENENDEZ HOW TO CREATE A  
11 POST-TRAUMATIC STRESS DISORDER DEFENSE, AND THEN GOTTEN  
12 MY OLD PAL, DR. JOHN WILSON, TO COME IN HERE WITH ALL  
13 HIS YEARS OF CREDIBILITY, HIS WHOLE LIFE'S WORK, AND  
14 PUTS IT ON THE LINE FOR ERIK MENENDEZ, TO PERJURE  
15 HIMSELF INTO PRESENTING A FALSE MENTAL STATE DEFENSE.

16       NOW, I DON'T LOOK AT THAT ANY OTHER WAY,  
17 AND I BROUGHT IT UP TO THE COURT AT THAT TIME. BUT  
18 THAT'S WHAT OCCURRED.

19       AND THAT WAS THEN, AND THIS IS NOW. AND  
20 THE WAY I LOOK AT IT, YOUR HONOR, ALL ERIK MENENDEZ HAS  
21 LEFT IN THIS TRIAL IS ME. AND I DON'T KNOW WHAT I'M  
22 GOING TO ARGUE TO THIS JURY, AND I DON'T KNOW WHAT I  
23 COULD SAY TO THIS JURY, AND I DON'T KNOW HOW TO APPROACH  
24 THIS JURY WITH RESPECT TO WHAT THEY MIGHT UNDERSTAND TO  
25 BE THE PRESENT SITUATION OF MS. ABRAMSON'S CREDIBILITY.

26       AND THE POINT IS THAT WHEN YOU TAKE THESE  
27 SITUATIONS TOGETHER -- AND THEY MUST BE VIEWED

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1 ONLY MY CLIENT, BUT IN BOTH COUNSEL, INDIVIDUALLY AND  
2 COLLECTIVELY. AND ONE FAULT MAY BE MS. ABRAMSON'S, BUT  
3 THE OTHER ONE IS MR. CONN'S.

4 AND IF THERE IS A TIME WHEN A DEFENDANT IN  
5 A CAPITAL CASE HAS EVER IN THE HISTORY THAT WE HAVE HAD  
6 CAPITAL PUNISHMENT IN THIS STATE, OR ANYWHERE IN THIS  
7 COUNTRY, NEEDED CREDIBLE COUNSEL, IT IS ERIK MENENDEZ  
8 RIGHT NOW. AND HE DOESN'T HAVE THAT.

9 AND I THINK FOR THAT REASON THE COURT  
10 SHOULD GRANT THE MISTRIAL, AND I DON'T BELIEVE, IN  
11 ACCORDANCE WITH WHAT MR. CONN HAS STATED, THAT ANY  
12 LIMITING INSTRUCTION AT THIS POINT WOULD HAVE ANY IMPACT  
13 ON THIS JURY AT ALL.

14 AND IF I MIGHT JUST HAVE ONE MOMENT.

15 I SUBMIT IT, YOUR HONOR.

16 THE COURT: OKAY. ALL RIGHT.

17 AS TO THE MOTION FOR A MISTRIAL, I AGREE  
18 WITH THE ANALYSIS THAT -- ALTHOUGH MR. LEVIN HAS MADE A  
19 VERY IMPASSIONED PRESENTATION -- I AGREE WITH THE  
20 ANALYSIS THAT MR. LEVIN DOES REPRESENT CONFLICT-FREE  
21 COUNSEL, AND THAT IS THE FIRST OBSERVATION I MAKE, THAT  
22 ANY ADVICE TO ERIK MENENDEZ CAN COME FROM MR. LEVIN  
23 WITHOUT CONFLICT.

24 FURTHER, I AM NOT PRESENTED WITH -- AND I  
25 AGREE WITH THE OBSERVATION OF THE PROSECUTION -- I AM  
26 NOT PRESENTED WITH ANYTHING THAT WOULD INDICATE TO ME  
27 WHAT IT IS THAT MS. ABRAMSON WOULD SAY AS A WITNESS.  
28 THEREFORE, THE FACT THAT SHE IS CLAIMING AN

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1 ASSERTION THIS MORNING OF HER 5TH AMENDMENT RIGHT NOT TO  
2 RESPOND; NUMBER ONE, I DON'T KNOW IF THAT WOULD OCCUR IF  
3 SHE ACTUALLY WAS INVOLVED AS A WITNESS, AFTER FURTHER  
4 CONTEMPLATION.

5 AND SECONDLY, I DON'T KNOW WHAT SHE WOULD  
6 SAY IF SHE DID TESTIFY. AND I WON'T KNOW AND WOULDN'T  
7 KNOW UNLESS SHE ACTUALLY DID TESTIFY.

8 AND THEREFORE, THERE IS NO BASIS TO BELIEVE  
9 THERE IS A CONFLICT BETWEEN HER AND THE DEFENDANT.

10 MR. LEVIN: YOUR HONOR, THE PROBLEM THAT I SEE AT  
11 THIS MOMENT IS -- AND I THINK I KNOW HOW THE COURT VIEWS  
12 THE SITUATION -- BUT I CANNOT HAVE A SITUATION WHERE ON  
13 ONE HAND I AM ADVERSE TO MS. ABRAMSON. SHE IS MY  
14 PARTNER. I HAVE GREAT ADMIRATION AND RESPECT FOR HER.  
15 WE'RE IN THIS --

16 THE COURT: SHE IS NOT YOUR PARTNER.

17 MR. LEVIN: WE ARE IN THIS -- SHE IS MY PARTNER  
18 IN THIS CASE.

19 THE COURT: LEGALLY YOU SHARE A LAW PRACTICE?

20 MR. LEVIN: NO, YOUR HONOR. I MEAN IT IN THE --

21 MS. ABRAMSON: TEAMMATE.

22 THE COURT: YOU ARE CO-COUNSEL IN A CASE IN WHICH  
23 EACH ONE OF YOU HAS BEEN APPOINTED BY THE COURT.

24 MR. LEVIN: I DON'T MEAN IT AS WE ARE LEGAL  
25 PARTNERS, I MEAN IT IN THIS CASE.

26 BUT I MEAN, ON THE ONE HAND I CANNOT HAVE A  
27 RELATIONSHIP AGAINST AND ADVERSE TO MS. ABRAMSON, AND ON  
28 THE OTHER HAND HAVE A RELATIONSHIP WHERE WE ARE PARTNERS

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1 IN THIS CASE, WE ARE CO-COUNSEL IN THIS CASE, MAKING THE  
2 DECISIONS THAT AFFECT THE LIFE AND DEATH OF OUR CLIENT,  
3 WHERE WE ARE SHARING IN THE RESPECTIVE DUTIES AS WE  
4 CONTINUE ALONG IN THIS PENALTY PHASE, WHICH NOW I VIEW  
5 AS A DEATH MARCH.

6 AND I DON'T FEEL COMFORTABLE AT THIS  
7 JUNCTURE IN TURNING TO MR. FISCHER AND SAYING, "CAN I  
8 INTERVIEW YOUR CLIENT, MS. ABRAMSON?"

9 NOW, MAYBE MS. ABRAMSON HAS CREATED THE  
10 SITUATION, AND I SENSE THAT THAT'S WHAT THE COURT HAS  
11 VIEWED, AND THAT'S WHAT THE COURT IS GOING TO  
12 ESSENTIALLY HOLD.

13 BUT IT IS A UNIQUE SITUATION, AND I DON'T  
14 KNOW WHAT MY OBLIGATIONS ARE. I DON'T KNOW IF I SHOULD  
15 TELL MS. ABRAMSON, "WOULD YOU PLEASE MEET ME IN MY

16 OFFICE IN AN HOUR WITH YOUR ATTORNEY, BECAUSE I'D LIKE  
17 TO INTERVIEW YOU CONCERNING THE FACTS AND CIRCUMSTANCES  
18 UPON WHICH THE COURT MADE ITS INQUIRY, SO THAT I MAY  
19 DETERMINE IF YOU HAVE INFORMATION THAT I CAN THEN  
20 PRESENT TO THE COURT THAT WOULD BE INCONSISTENT WITH  
21 WHAT I UNDERSTAND DR. VICARY'S PREVIOUS TESTIMONY TO  
22 BE."

23 I AM NOT GOING TO DO THAT.

24 THE COURT: WELL, THAT --

25 MR. LEVIN: NOW THAT MAY MAKE ME INEFFECTIVE.

26 THE COURT: THAT WOULD BE YOUR DECISION. AND IF  
27 COUNSEL WANT TO MANUFACTURE REASONS FOR A MISTRIAL, YOU  
28 CAN TRY TO DO THAT. BUT THOSE EFFORTS WILL FAIL,

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1 BECAUSE AS OF NOW, I HAVE BEEN PRESENTED WITH NO BASIS  
2 FOR GRANTING A MOTION FOR MISTRIAL.

3 MR. LEVIN: WELL, I -- GIVEN THAT'S THE COURT'S  
4 DISPATCH, I THINK SINCE AT THE PRESENT TIME THE COURT  
5 HAS FOUND THAT I AM CONFLICT-FREE LAWYER, I AM ADVISING  
6 MY CLIENT TO BRING A MARSDEN MOTION.

7 THE COURT: WELL, YOU BETTER EXPLAIN TO HIM WHAT  
8 A MARSDEN MOTION IS, AND YOU CAN DISCUSS IT WITH HIM,  
9 AND IF HE CHOOSES TO DO THAT, AND WISHES TO HAVE  
10 MS. ABRAMSON RELIEVED, THEN I WILL CONSIDER THAT.

11 MR. LEVIN: THAT'S WHAT I'M DOING, YOUR HONOR.



12 THE COURT: OKAY. WELL, I'LL HAVE TO HEAR IT  
13 FROM HIM. IF THAT'S HIS CHOICE, HE WILL HAVE TO ADDRESS  
14 THE COURT, AND WE'LL HAVE HEARINGS IN THAT REGARD.  
15 BUT YOU ARE CLEARLY CONFLICT-FREE AND  
16 CAPABLE OF FULLY ADVISING YOUR CLIENT ON ALL THESE  
17 MATTERS. THERE IS NOBODY IN A BETTER POSITION TO DO SO.  
18 NO ONE COULD EVER BE IN A BETTER POSITION  
19 TO DO SO, CONSIDERING THE STATUS OF THIS CASE AND THE  
20 POSITION OF THE CASE AT THIS STAGE, AFTER ALL THE LENGTH  
21 OF THIS TRIAL. NOBODY WOULD BE IN A BETTER POSITION  
22 THAN YOU TO ADVISE HIM ON THESE SUBJECTS.  
23 MR. LEVIN: I DON'T FEEL THAT WAY, YOUR HONOR. I  
24 AM SORRY.  
25 THE COURT: TO GET SOMEBODY ELSE IN HERE FROM  
26 OUTSIDE AND SAY: "WELL, WHY DON'T YOU SIT DOWN FOR SIX  
27 MONTHS AND REVIEW THE TRANSCRIPT, AND REVIEW ALL THE  
28 MATERIAL, AND COME BACK AND GIVE US YOUR OPINION, AND

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1 CONSULT WITH THE DEFENDANT AND TELL HIM WHAT HE SHOULD  
2 DO," IS TOTALLY IMPRACTICAL, AND IS NOT GOING TO HAPPEN.  
3 I JUST DON'T SEE THAT THERE IS A BASIS FOR  
4 THAT WHEN WE HAVE COUNSEL RIGHT HERE, IN THE PERSON OF  
5 MR. LEVIN, WHO IS FULLY CAPABLE AND IS WITHOUT CONFLICT  
6 IN THIS MATTER.  
7 AND AS FAR AS I AM CONCERNED, AT THIS POINT

8 MS. ABRAMSON IS WITHOUT CONFLICT. I HAVEN'T SEEN  
9 ANYTHING THAT WOULD INDICATE THAT SHE HAS ANY CONFLICT.

10 MR. LEVIN: YOUR HONOR, JUST SO IT'S CLEAR, I AM  
11 ASKING FOR THIS COURT TO APPOINT INDEPENDENT COUNSEL TO  
12 ADVISE ERIK MENENDEZ ON THE VARIOUS MATTERS THAT I HAVE  
13 PREVIOUSLY RAISED.

14 THE COURT: OKAY. THAT MOTION IS DENIED, AND IF  
15 THERE IS A REQUEST FOR A HEARING UNDER MARSDEN BY THE  
16 DEFENDANT, ERIK MENENDEZ, AFTER HE HAS BEEN ADVISED AS  
17 TO WHAT THAT ENTAILS, I WILL BE GLAD TO CONDUCT THAT  
18 HEARING AS I AM REQUIRED TO DO.

19 MR. LEVIN: OKAY. VERY WELL, YOUR HONOR.

20 I AM REQUESTING THAT THE DISTRICT ATTORNEY  
21 AT THIS TIME PROVIDE US WITH NOTICE AS TO WHAT IT IS  
22 OFFERING AGAINST ERIK MENENDEZ FOR THE REMAINDER OF  
23 DR. VICARY'S TESTIMONY.

24 THE COURT: OTHER THAN WHAT HAS ALREADY BEEN  
25 ASKED AT THIS TIME?

26 MR. LEVIN: YES, AND WHAT HAS BEEN PRESENTED BY  
27 WAY OF THE PREVIOUS HEARING, IF THERE IS ANYTHING.

28 MS. ABRAMSON: COULD I HAVE A MOMENT, YOUR HONOR?

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1 (DEFENSE ATTORNEYS ABRAMSON

2 AND LEVIN CONFER SOTTO VOCE.)

3

4 THE COURT: THE RECORD WILL REFLECT THAT  
5 MR. LEVIN AND MS. ABRAMSON ARE CONFERRING WITHOUT  
6 MR. FISCHER'S PRESENCE.

7 MR. LEVIN: WELL, YOUR HONOR, THE RECORD SHOULD  
8 REFLECT THAT MS. ABRAMSON AND I ARE STILL CO-COUNSEL.

9 MS. ABRAMSON: AND THAT THE COURT STILL HAS THE  
10 SAME WRY SENSE OF HUMOR AS ALWAYS.

11 THE COURT: THE RECORD WILL REFLECT WHAT THE  
12 COURT CHOOSES IT TO REFLECT. OKAY.

13 MS. ABRAMSON: THE CONCERN, YOUR HONOR, IS WITH  
14 RESPECT TO OFFERS OF PROOF, OR ANY OFFERS OF PROOF  
15 HAVING TO DO WITH ANY OF THE MATTERS THAT WERE REDACTED,  
16 APART FROM THOSE THAT HAVE ALREADY BEEN GONE INTO, BOTH  
17 ON THE RECORD IN FRONT OF THE JURY, AND EARLIER TODAY  
18 WITH RESPECT TO LYLE MENENDEZ.

19 WE WOULD ASK THAT -- WE ARE ASKING FOR A  
20 402 HEARING ON ANY OF THOSE MATTERS, PLUS ANY OTHER  
21 MATTERS INSIDE -- WITHIN THE NOTES THAT ARE NOT CLEARLY  
22 IMPEACHMENT, AND WE WOULD ASK THAT THAT BE CONDUCTED,  
23 PARTICULARLY THE HEARING WITH RESPECT TO REDACTED  
24 MATERIAL, OUTSIDE THE PRESENCE OF THE PUBLIC.

25 THE COURT: WHY?

26 MS. ABRAMSON: BECAUSE OF THE SENSITIVE NATURE OF  
27 THE MATERIAL WITH RESPECT TO THIRD PARTIES.

28 THE COURT: WELL, I HAVEN'T HEARD THAT THE

1 PROSECUTION INTENDS TO GO INTO THOSE OTHER MATTERS.

2 MS. ABRAMSON: THAT'S WHAT I'M TRYING TO FIND  
3 OUT.

4 THE COURT: YOU SAID YOU WEREN'T, OR MAYBE I'M  
5 WRONG.

6 DID YOU INTEND TO GO INTO OTHER REDACTED  
7 MATERIAL?

8 MR. CONN: OH, YES. I INTEND TO GO INTO A LOT OF  
9 THIS REDACTED MATERIAL. I WAS JUST MAKING REFERENCE TO  
10 STATEMENTS CONCERNING LYLE MENENDEZ.

11 THE COURT: OKAY.

12 MR. CONN: BUT THERE IS OTHER MATERIAL THAT WE  
13 WANT TO GO INTO, AND THIS IS CROSS-EXAMINATION. WE  
14 DON'T HAVE TO GIVE THE DEFENSE A PREVIEW OF ALL THE  
15 MATTERS WE WANT TO GO INTO IN CROSS-EXAMINATION.

16 MS. ABRAMSON: WE ARE MAKING A 402 MOTION IN  
17 LIMINE, RATHER THAN A DISCOVERY REQUEST.

18 MR. GESSLER: AND I AM ASKING FOR A 402 BECAUSE  
19 OF AGAIN, ANDERSON CONSIDERATIONS, BECAUSE WHAT  
20 MR. CONN THINKS MAY NOT DIRECTLY AFFECT LYLE MENENDEZ, I  
21 STILL NEED TO KNOW WHERE WE'RE GOING SO I CAN MAKE THAT  
22 ASSESSMENT BEFORE THE DAMAGE IS DONE IN FRONT OF THE  
23 JURY.

24 MR. LEVIN: AND ALSO, YOUR HONOR, I THINK THERE  
25 IS 402 CONCERNS WITH RESPECT TO THE NATURE OF THE  
26 INQUIRY, IN THAT IT DOES NOT TOUCH UPON ANY FURTHER  
27 MISCONDUCT OR PURPORTED MISCONDUCT ON BEHALF OF  
28 MS. ABRAMSON; IN THAT THAT WOULD BE A NON-STATUTORY,

1 IMPERMISSIBLE FACTOR IN AGGRAVATION TO USE AGAINST ERIK  
2 MENENDEZ, AND FURTHER BORNE OUT BY WHAT THE COURT NOW  
3 KNOWS, THAT ERIK MENENDEZ HAD NOTHING TO DO WITH ANY  
4 REDACTIONS, DIDN'T KNOW THAT THEY OCCURRED, DIDN'T ASK  
5 THAT THEY OCCUR.

6 MS. ABRAMSON: WE NEED MORE HEARINGS, I THINK,  
7 YOUR HONOR, WITH RESPECT TO DR. VICARY AS WELL ON THIS  
8 ISSUE OF REDACTION, AND THE PROPRIETY OR IMPROPRIETY OF  
9 SAME, WITH HIS COUNSEL PRESENT.

10 MR. FITZGERALD: YES. IT WOULD BE VERY HELPFUL  
11 IF WE KNEW WHETHER THE PROSECUTION IS GOING TO GO INTO  
12 THE CIRCUMSTANCES SURROUNDING ANY FURTHER REDACTIONS.

13 THE COURT: WELL, DID YOU INTEND TO GO INTO THAT  
14 AREA?

15 MR. CONN: YES, YOUR HONOR.

16 THE COURT: OKAY. I REALLY DON'T SEE A NEED FOR  
17 A HEARING OTHER THAN IN AREAS THAT MIGHT IMPLICATE THE  
18 CO-DEFENDANT. I DON'T SEE A REASON TO HAVE HEARINGS.  
19 WHAT IS IT THERE WOULD BE HEARINGS ABOUT?

20 IF YOU CAN IDENTIFY PARTICULAR THINGS IN  
21 THE NOTES THAT YOU HAVE OBJECTION TO, AND THEN WE'LL  
22 DETERMINE WHETHER OR NOT THE PROSECUTION INTENDED TO GO  
23 INTO IT, WE CAN DO IT THAT WAY.

24 JUST TO FOLLOW UP ON SOMETHING HERE, I  
25 DON'T FIND -- JUST TO FOLLOW UP ON THE MOTION FOR

26 MISTRIAL, I DON'T FIND THAT ANYTHING THAT HAS OCCURRED  
27 THUS FAR WILL HAVE ANY IMPACT, OR WOULD HAVE AN IMPACT  
28 ON THE JURY'S DETERMINATION AS TO EVALUATING THE

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1 EVIDENCE AND MAKING ITS DECISION AS TO PUNISHMENT AS TO  
2 ERIK MENENDEZ.

3 ANY OF THESE REFERENCES TO CONDUCT OF  
4 COUNSEL IS SEPARATE AND APART FROM THE JURY'S  
5 DETERMINATION AS TO PUNISHMENT, AND THE JURY IS FULLY  
6 CAPABLE OF MAKING THOSE DISTINCTIONS.

7 AND IF COUNSEL FEELS THE NEED TO --  
8 CONTRARY TO THEIR BELIEF THAT THERE IS NO BENEFIT TO BE  
9 DERIVED FROM LIMITING INSTRUCTIONS -- IF YOU FEEL THAT  
10 SUCH SHOULD BE PRESENTED TO THE COURT, AND WOULD BE OF  
11 ASSISTANCE TO THE COURT, THEN I INVITE SUCH TO REINFORCE  
12 JUST THAT; THAT THE JURY'S DECISION IS MADE ON THE  
13 EVIDENCE, AND NOT ON THE CONDUCT OF COUNSEL, WHETHER  
14 IT'S CONDUCT OR MISCONDUCT.

15 MR. LEVIN: I JUST WANT TO ASK, IS THE COURT  
16 INDICATING THAT IT'S GOING TO ALLOW MR. CONN TO CONTINUE  
17 TO ASK QUESTIONS IN THE AREA AS TO THE NATURE OF THE  
18 REDACTIONS, AND THE FACT THAT THEY WERE RELATED TO THE  
19 DISCUSSIONS WITH MS. ABRAMSON?

20 THE COURT: WELL, I WOULD NEED TO HEAR WHAT THE  
21 QUESTIONS ARE, AND AT SOME POINT HAVE AN OFFER OF PROOF

22 BY THE PROSECUTION AS TO WHY THE REASON FOR THE  
23 DELETIONS, OR REDACTIONS, IS A NECESSARY SUBJECT OF  
24 FURTHER QUESTIONING.

25 THE FACT OF THE REDACTION, NUMBER ONE, IS  
26 THAT RELEVANT? AND IF IT IS, AS TO WHAT PURPOSE?

27 AND THEN SECONDLY, THE REASON FOR THE  
28 REDACTION; IS THAT RELEVANT, AND FOR WHAT PURPOSE?

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1 SO IF THE PROSECUTION INTENDS TO GO INTO  
2 SUCH AREAS, THEN I WOULD REQUIRE AN OFFER OF PROOF AS TO  
3 WHY THOSE AREAS WOULD BE SUBJECT TO FURTHER QUESTIONING.

4 MS. ABRAMSON: YOUR HONOR --

5 THE COURT: BUT CERTAINLY MATERIAL THAT HAS BEEN  
6 REDACTED IS FAIR GAME AS FAR AS EXAMINATION OF THE  
7 WITNESS IF IT IS OTHERWISE ADMISSIBLE EVIDENCE, AND NOT  
8 SUBJECT TO SOME OTHER OBJECTION.

9 MS. ABRAMSON: JUST FOR THE RECORD THEN, THE  
10 PEOPLE HAVE GIVEN US A LIST OF PAGES, AND I DON'T KNOW  
11 IF THOSE ARE EXCLUSIVELY THE PAGES WHERE THEY BELIEVE  
12 THERE HAS BEEN -- THERE IS A DIFFERENCE BETWEEN ONE SET  
13 OF NOTES AND ANOTHER. BUT THE LIST OF PAGES WHICH I  
14 HAVE MADE -- WE MADE COPIES OF FOR THE COURT.

15 AND WE WOULD OBJECT TO -- WITHOUT GETTING  
16 INTO THE SUBJECT MATTER IN AN OPEN HEARING, WE WOULD  
17 OBJECT TO ANY OF THE MATTERS THAT WERE SUBJECT TO

18 REDACTION OR NON-REDACTION, IF YOU WILL, ON PAGE 22,  
19 PAGE 28, PAGE 29, PAGE 62, PAGE 74, PAGE 95 -- AND THE  
20 COURT'S ALREADY RULED ON ONE OF THOSE MATTERS -- AND  
21 PAGE 96, ON THE GROUNDS THAT THOSE MATTERS ARE  
22 IRRELEVANT AND ARE PREJUDICIAL UNDER 352, AND THE COURT  
23 HAD ALREADY SO RULED IN THIS TRIAL, AS WELL AS IN THE  
24 PREVIOUS TRIAL.

25 THE COURT: OKAY. AND WHICH WERE THE SUBJECT OF  
26 THE RULINGS IN THIS TRIAL, WHAT PAGE?

27 MS. ABRAMSON: THE SUBJECT OF THE RULINGS IN THIS  
28 TRIAL WERE 28, 29, 62, 74 -- I'M SORRY -- 28, 29, 62, 74

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1 AND 96.

2 WE WOULD ALSO OBJECT TO ANY OF THE  
3 MATERIALS RELATED TO PAGE 7 ON THE GROUNDS OF PRIVILEGE.  
4 NOT -- ON THE THE GROUNDS OF PRIVILEGE, WHICH I WILL  
5 EXPLAIN IN A HEARING, IF NECESSARY, IN CAMERA WITH THE  
6 COURT.

7 THE COURT: ARE YOU TALKING ABOUT MATERIALS THAT  
8 WERE REDACTED, OR --

9 MS. ABRAMSON: RIGHT NOW I AM ONLY TALKING ABOUT  
10 MATERIALS THAT WERE REDACTED.

11 AND WHAT I'D LIKE TO DO IS SEE IF THERE ARE  
12 OTHER SIMILAR MATERIALS SUBJECT TO VALID OBJECTION BASED  
13 ON PRIOR RULINGS OF THE COURT, OR UNDER 350 AND 352, IN



14 ADDITION TO THOSE.

15 I RECOGNIZE THAT THE COURT HAS RULED THAT  
16 EVERYTHING IN THESE NOTES BASICALLY IS FAIR GAME, OR AT  
17 LEAST HAS GIVEN THAT IMPRESSION, BUT I AM NOT SURE  
18 THAT -- YOU KNOW, I DON'T THINK THE COURT HAS RULED  
19 THAT, BECAUSE SOME OF THOSE THINGS IN THOSE NOTES ARE  
20 NOT FAIR GAME BECAUSE OF THE ANDERSON CASE, AND THAT  
21 INCLUDES THE REDACTED COPY AS WELL. THERE IS A LOT OF  
22 INFORMATION THERE THAT IS ANDERSON, OR SUBJECT TO  
23 ANDERSON, SO --

24 THE COURT: WELL, I ALSO HAVEN'T MADE ANY RULINGS  
25 ON MATERIAL THAT HASN'T BEEN PRESENTED TO ME. SO IT'S  
26 MUCH TOO --

27 MR. GESSLER: MY UNDERSTANDING IS THE PEOPLE HAVE  
28 TOLD US EVERYTHING THEY'RE GOING TO USE THAT RELATES TO

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1 LYLE MENENDEZ, WHETHER REDACTED OR UNREDACTED.

2 THE COURT: THAT IS MY UNDERSTANDING.

3 MR. GESSLER: I AM RELYING UPON THAT.

4 THE COURT: THAT'S MY UNDERSTANDING.

5 IS THAT CORRECT, MR. CONN?

6 MR. CONN: YES, YOUR HONOR.

7 THE COURT: AND THE REST OF THIS MATERIAL IS  
8 MATERIAL THAT ONLY RELATES TO ERIK MENENDEZ.

9 AND ON PAGE 28, I DON'T SEE ANYTHING THERE

10 THAT IS SUBJECT TO ANY HEARING. I AM NOT SAYING ANY OF  
11 THAT IS ADMISSIBLE OR INADMISSIBLE, BUT IT CERTAINLY IS  
12 NOT SUBJECT TO ANY HEARING.

13 MS. ABRAMSON: WELL, IT'S OUR POSITION THAT IT'S  
14 INADMISSIBLE UNDER 352, AND THE PEOPLE SHOULDN'T BE  
15 PERMITTED TO GO INTO IT.

16 THE COURT: I DON'T SEE ANYTHING THERE THAT WOULD  
17 BE SUBJECT TO 352 OBJECTION ON PAGE 22 AS TO WHAT IT IS  
18 THE PEOPLE --

19 MS. ABRAMSON: ARE YOU LOOKING AT THE UNREDACTED?

20 THE COURT: YEAH.

21 MS. ABRAMSON: TWENTY-TWO IS A DIFFERENT ISSUE,  
22 YOUR HONOR. TWENTY-EIGHT -- WELL, I CAN'T BE HEARD ON  
23 THIS IN OPEN COURT, WHEN I AM ASKING TO HAVE A CLOSED  
24 COURT HEARING, SO I CAN ADDRESS THE ISSUES ON 28. I  
25 DON'T KNOW WHY THE COURT DOESN'T SEE WHAT'S --

26 THE COURT: I AM TALKING ABOUT 22.

27 MS. ABRAMSON: OH, 22. THAT IS A DIFFERENT  
28 ISSUE.

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1 THE COURT: TWENTY-TWO, I DON'T SEE ANY ISSUE.

2 TWENTY-EIGHT -- DID YOU INTEND TO GO INTO  
3 THE BOTTOM HALF OF PAGE 28, MR. CONN?

4 MR. CONN: YES, YOUR HONOR. I THINK THAT WHAT WE  
5 HAVE HERE IS -- WHETHER WE PLACE THE BLAME AT THE FEET

6 OF LESLIE ABRAMSON, OR WE PLACE THE BLAME AT THE FEET OF  
7 DR. VICARY, SOMEONE DECIDED TO THROW THIS -- THESE NOTES  
8 IN THE GARBAGE CAN.

9 THE COURT: NO. NO. I AM NOT TALKING ABOUT THE  
10 FACT THAT THEY WERE REDACTED. I AM TALKING ABOUT THE  
11 SUBJECT MATTER.

12 DID YOU INTEND TO GO INTO IT?

13 MR. CONN: YES, I DO.

14 THE COURT: THAT'S THE SUBJECT MATTER YOU WANT TO  
15 GO INTO?

16 MR. CONN: YES, YOUR HONOR, I DO INTEND TO GO  
17 INTO IT, BECAUSE I THINK THE JURY SHOULD MAKE A  
18 DETERMINATION AS TO WHETHER OR NOT THIS WITNESS IS  
19 BIASED. IS HE TRYING TO PRESENT A CERTAIN TYPE OF  
20 PICTURE OF ERIK MENENDEZ TO THIS JURY?

21 THE JURY NEEDS TO KNOW WHAT HE THREW IN THE  
22 GARBAGE CAN IN ORDER TO DETERMINE WHETHER OR NOT HE IS A  
23 FAIR AND OBJECTIVE WITNESS. I THINK THEY NEED TO KNOW  
24 EVERYTHING THAT -- WITH THE EXCEPTION OF THE MATERIAL  
25 THAT RELATES TO LYLE, WHICH WE WILL CONCEDE -- I THINK  
26 THE JURY NEEDS TO KNOW EVERYTHING HE THREW IN THE  
27 GARBAGE CAN CONCERNING ERIK MENENDEZ, SO THEY CAN THEN  
28 DETERMINE WHETHER HE'S PRESENTING A FAIR PICTURE OF ERIK

2 THE COURT: OKAY. AND IS THAT THE ONLY REASON  
3 THAT YOU WOULD BE GOING INTO THESE MATERIALS, BECAUSE OF  
4 THEIR VALUE TO IMPEACH THE WITNESS, DR. VICARY?

5 MR. CONN: NO, THAT'S NOT THE ONLY REASON. I  
6 THINK SOME RELATE TO THE CREDIBILITY OF ERIK MENENDEZ AS  
7 WELL. I'D HAVE TO GO THROUGH IT LINE BY LINE AND MAKE  
8 AN ARGUMENT.

9 THE COURT: WELL, THAT'S WHAT I NEED, BECAUSE  
10 THERE ARE DIFFERENT ISSUES AND A WEIGHING PROCESS, AND  
11 THE CREDIBILITY OF DR. VICARY AND THE CREDIBILITY OF THE  
12 DEFENDANT ARE SEPARATE ISSUES, AND I'D HAVE TO REVIEW  
13 THEM WITH THOSE BALANCING TESTS IN MIND.

14 SO WHAT I WILL DO IS ALLOW YOU TO PICK  
15 THROUGH WHAT IT IS THAT YOU WANT TO PROCEED WITH, AND  
16 IDENTIFY THOSE MATTERS THAT YOU WANT TO PURSUE AS TO  
17 TESTING VICARY'S CREDIBILITY, OR AS TESTING THE  
18 DEFENDANT'S CREDIBILITY, AND THEN WE WILL HAVE A  
19 DISCUSSION OF THAT ON MONDAY.

20 MR. CONN: ALL RIGHT.

21 THE COURT: AS FAR AS THE TESTIMONY OF THE  
22 WITNESS, I EXPECT IT TO RESUME ON MONDAY MORNING IN  
23 FRONT OF THE JURY, AND I EXPECT THAT IF THERE ARE ANY  
24 OTHER WITNESSES THAT THE DEFENSE INTENDS TO CALL, THAT  
25 THEY BE AVAILABLE AND READY ON MONDAY.

26 AND IF THE PEOPLE HAVE ANY OTHER WITNESSES  
27 THAT THEY INTEND TO CALL IN REBUTTAL, THAT THEY LIKEWISE  
28 BE AVAILABLE ON MONDAY.

1           AND FURTHER, AS TO JURY INSTRUCTIONS, I  
2 WOULD EXPECT THAT COUNSEL WOULD PROVIDE THE COURT WITH  
3 REQUESTED JURY INSTRUCTIONS BY 1:30 ON MONDAY.

4           OKAY. ANYTHING ELSE AT THIS POINT BEFORE  
5 WE TAKE A RECESS?

6           MS. ABRAMSON: WELL, YOUR HONOR, BEFORE THE  
7 WITNESS TAKES THE STAND AGAIN ON MONDAY, I THINK WE NEED  
8 TO BE HEARD ON THE ISSUE OF THE PEOPLE INQUIRING ABOUT  
9 REDACTIONS, AND WHY THERE WERE REDACTIONS, AND THE  
10 NATURE OF REDACTIONS, SO A DECISION CAN BE MADE AS TO  
11 WHETHER OR NOT I WILL CONTINUE TO MAINTAIN MY PRIVILEGE  
12 OR BECOME A WITNESS. I NEED TO KNOW WHAT THE WITNESS IS  
13 GOING TO SAY TO MAKE THAT DECISION.

14          THE COURT: WELL -- YES, MR. GESSLER?

15          MR. GESSLER: I WAS GOING TO SAY, ON A DIFFERENT  
16 TOPIC, YOUR HONOR, WE STILL HAVE TO HAVE AN OFFER OF  
17 PROOF REGARDING BRIAN ANDERSEN, IF HE IS GOING TO BE A  
18 PEOPLE'S WITNESS ON MONDAY, AS TO WHAT IT IS HE IS GOING  
19 TO SAY. WE HAVEN'T RESOLVED THAT ISSUE YET.

20          THE COURT: OKAY. DID THE PEOPLE INTEND TO  
21 PURSUE THOSE WITNESSES?

22          MR. CONN: YES, YOUR HONOR. WE SUBMITTED THE  
23 MATERIALS TO THE COURT AND GAVE A COPY TO COUNSEL OF THE  
24 MATERIAL.

25          MR. GESSLER: WHAT HE SUBMITTED WAS THE QUESTIONS  
26 HE WAS GOING TO ASK, YOUR HONOR, BUT HE DIDN'T SUBMIT

27 WHAT THE WITNESS IS GOING TO SAY IN RESPONSE TO THE  
28 QUESTIONS.

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1 MR. CONN: I THINK HE HAS INDICATED IN PRIOR  
2 TESTIMONY AND STATEMENTS GIVEN TO THE INVESTIGATING  
3 OFFICER THE NATURE OF THE RELATIONSHIP TO THE VICTIMS IN  
4 THIS CASE, THEIR EARLY HISTORY TOGETHER, THE CONTACT  
5 THAT HE HAD WITH THE VICTIMS OVER THE YEARS, THE  
6 CIRCUMSTANCES OF THEIR RELATIONSHIP, THE NATURE OF THEIR  
7 RELATIONSHIP, AND ALL OF THOSE OTHER ITEMS WHICH WE  
8 IDENTIFIED IN THE MATERIAL THAT WE SUBMITTED TO THE  
9 COURT AND TO COUNSEL.

10 MR. GESSLER: I THINK WE STILL -- WELL, I TAKE IT  
11 THAT IT'S NOTHING OUTSIDE OF WHAT WAS IN THE POLICE  
12 REPORTS.

13 MR. CONN: WE HAVE NO ADDITIONAL DISCOVERY BEYOND  
14 WHAT IS IN THE POLICE REPORTS.

15 WE INTEND TO ASK BOTH BRIAN ANDERSON AND  
16 HIS BROTHER THE SAME QUESTIONS CONCERNING THESE SUBJECT  
17 MATTERS THAT WERE IDENTIFIED IN THE MATERIAL SUBMITTED  
18 BY COUNSEL.

19 MR. GESSLER: WELL, WHAT I AM ASKING FOR IS --  
20 THE ANSWERS, I TAKE IT, ARE THOSE, AND NOTHING BEYOND  
21 WHAT IS GIVEN US IN THE POLICE REPORT.

22 I UNDERSTAND THE QUESTIONS BEING ASKED. I

23 NEED TO UNDER THE SUBSTANCE OF THE ANSWERS. AND I AM  
24 GATHERING FROM THIS THAT THAT IS IN THE POLICE REPORTS  
25 WE HAVE BEEN SUBMITTED, AND THERE IS NOTHING FURTHER  
26 THAT WE CAN EXPECT BY WAY OF ANSWER.

27 MR. CONN: WE DID NOT INTERVIEW EITHER BRIAN  
28 ANDERSEN OR MILTON ANDERSEN SPECIFICALLY FOR THE PENALTY

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1 PHASE. WE HAVE INTERVIEWED BOTH OF THEM IN THE PAST.  
2 WE HAVE PROVIDED DISCOVERY TO COUNSEL IN THE PAST.

3 WE OBJECTED TO COUNSEL ASKING THE TYPE OF  
4 QUESTIONS THEY ASKED OF THEIR WITNESSES IN THIS  
5 PROCEEDING, AND NOW THAT THE COURT HAS ALLOWED COUNSEL  
6 TO --

7 THE COURT: NO. NO. YOU'RE TALKING ABOUT  
8 DIFFERENT THINGS HERE. VICTIM IMPACT, AND THE OTHER  
9 ASPECT AS TO WHAT THESE INDIVIDUALS THINK IS THE  
10 APPROPRIATE PUNISHMENT. THEY ARE SEPARATE ISSUES. ONE  
11 THING IS VICTIM IMPACT. SOMETHING ELSE IS THE SUBJECT  
12 OF A DIFFERENT OBJECTION.

13 MR. CONN: RIGHT.

14 MR. LEVIN: SHOULD THERE NOT BE A --

15 MR. GESSLER: AN OBJECTION IS STILL MADE UNDER  
16 BOOTH VERSUS MARYLAND, YOUR HONOR, AS TO THE OTHER  
17 ASPECT.

18 MR. LEVIN: SHOULD THERE NOT BE A THRESHOLD

19 INQUIRY AS TO WHAT IT REBUTS?

20 THE COURT: THAT IS THE ISSUE HERE, AS TO

21 REBUTTAL. MY FEELING IS THAT AT MOST THERE IS AN AREA

22 OF INQUIRY AS TO VICTIM IMPACT, AS TO HOW THEY, AS

23 INDIVIDUALS, ARE IMPACTED BY THE DEATH OF THE VICTIMS.

24 I DON'T FIND THAT THE TESTIMONY OFFERED BY

25 THE DEFENSE IN RELATIONSHIP TO THE FAMILY OF JOSE

26 MENENDEZ HAS OPENED THE DOOR TO ANY REBUTTAL ON THE

27 SUBJECT OF WHAT THESE INDIVIDUALS THINK IS THE

28 APPROPRIATE PUNISHMENT. THAT WOULDN'T BE REBUTTAL.

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1 THAT WOULD BE SOMETHING -- THEIR OPINION, AND THEY'RE

2 NOT REBUTTING WHAT THE WITNESSES FOR THE DEFENSE SAID.

3 THEY'RE JUST GIVING THEIR OWN VIEW.

4 REBUTTAL WOULD BE A WITNESS WHO CAME IN AND

5 SAID, "NO, I REALLY THINK MARTA CANO SAID THEY SHOULD

6 GET THE DEATH PENALTY, BECAUSE SHE TOLD ME THAT," OR

7 SOMETHING ALONG THOSE LINES. NOT OFFERING SOME OTHER

8 EVIDENCE WHICH, AT MOST, WOULD BE CHARACTERIZED AS

9 EVIDENCE THAT THE PEOPLE SHOULD HAVE OFFERED IN THEIR

10 CASE-IN-CHIEF, IF THEY WERE GOING TO OFFER IT.

11 MR. CONN: YOUR HONOR, I THINK THAT IF THEY BRING

12 IN SOME MEMBERS OF THE FAMILY TO SAY THAT WHETHER OR NOT

13 THEY WANT ERIK MENENDEZ AND LYLE MENENDEZ TO LIVE, AND

14 THEY ARE PERMITTED TO ANSWER THAT QUESTION, I THINK THAT



15 WE SHOULD BE PERMITTED TO CALL OTHER MEMBERS OF THE SAME  
16 FAMILY TO DEMONSTRATE THAT WHAT THESE WITNESSES ARE  
17 TESTIFYING TO IS NOT, AS SUGGESTED BY THE DEFENSE, A  
18 UNIVERSAL OPINION HELD AMONG ALL FAMILY MEMBERS.

19 THAT IS PRECISELY WHAT THEY REPRESENTED TO  
20 THIS COURT BEFORE THIS JURY, THAT ALL RELATIVES OF ERIK  
21 AND LYLE MENENDEZ ARE OPPOSED TO THE DEATH PENALTY, AND  
22 WANT TO SEE THESE DEFENDANTS --

23 THE COURT: WELL, THE PROBLEM WITH THAT IS I  
24 ASKED FOR A CITATION TO AUTHORITY -- TO THE TRANSCRIPTS  
25 RATHER, OF THE PROCEEDINGS, AND ALL THAT I WAS GIVEN WAS  
26 WHAT YOU GAVE ME, WHICH RELATED SOLELY TO THE MENENDEZ  
27 SIDE OF THE FAMILY, NOTHING FROM THE ANDERSON SIDE OF  
28 THE FAMILY.

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1 AND THEY ARE DIFFERENT FAMILIES, AND --  
2 THEY ARE. THERE IS NO RELATIONSHIP OF ONE FAMILY TO THE  
3 OTHER, OTHER THAN AS IT INTERSECTS IN THE DEFENDANTS.  
4 THERE IS NO OTHER RELATIONSHIP THERE.

5 SO UNLESS -- I JUST DON'T SEE THE REBUTTAL  
6 TO THE SPECIFIC EVIDENCE THAT WAS OFFERED.

7 MR. CONN: YOUR HONOR, I THINK THE REASONABLE  
8 INFERENCE TO BE DRAWN FROM THE EVIDENCE THAT THEY  
9 PRESENTED IS THAT THE JURY IS GOING TO BE LEFT WITH THE  
10 IMPRESSION THAT ALL THE RELATIVES OF THESE DEFENDANTS

11 FEEL THAT THEY DO NOT DESERVE THE DEATH PENALTY, AND

12 THAT IS SIMPLY NOT THE CASE. AND I DON'T THINK --

13 THE COURT: AS I SAID -- LET ME INTERRUPT,

14 BECAUSE I DON'T WANT TO PROLONG THIS.

15 IF THERE IS OTHER MATERIAL IN THE

16 TRANSCRIPTS THAT REFERS TO -- THAT BROADENS THE SCOPE OF

17 THE TESTIMONY OF THOSE WITNESSES THAN WHAT YOU PROVIDED

18 ME, I WILL BE GLAD TO LOOK AT IT.

19 WHAT YOU PROVIDED ME A COUPLE OF DAYS AGO

20 REALLY WAS LIMITED TO THE MENENDEZ SIDE OF THE FAMILY.

21 MR. CONN: RIGHT. WELL, THEY ONLY CALLED TWO

22 WITNESSES TO TESTIFY TO THEIR FEELINGS CONCERNING THE

23 DEATH PENALTY, AND WITH THOSE TWO WITNESSES THEY LEFT

24 THE JURY WITH THE IMPRESSION THAT ALL RELATIVES OF ERIK

25 AND LYLE MENENDEZ ARE OF THE BELIEF THAT THEY SHOULD NOT

26 GET THE DEATH PENALTY.

27 THE COURT: SHOW ME WHERE IT IS IN THE TESTIMONY

28 THAT IS THE -- THAT WOULD BE THE IMPRESSION ONE WOULD

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1 GET. NOT JUST THE FACT THAT THEY TESTIFIED, BUT WHAT

2 THEY SAID, WHAT THEY -- THE CONTENT OF THEIR TESTIMONY

3 THAT WOULD GIVE ONE THAT IMPRESSION.

4 MR. CONN: WHEN THE WITNESS SAID -- WHEN THE

5 WITNESS WAS ASKED: "HOW WOULD THAT MAKE YOU FEEL?"

6 AND THE WITNESS SAID: "NOT ONLY ME, MY

7 WHOLE FAMILY. IT'S A DESTRUCTION OF THAT SIDE OF THE  
8 FAMILY. IT'S JOSE AND KITTY AND THE TWO KIDS."  
9 THE COURT: THAT'S THAT SIDE OF THE FAMILY.  
10 THAT'S WHAT I AM POINTING TO, THAT WHAT YOU GAVE ME ONLY  
11 RELATED TO THAT SIDE OF THE FAMILY.  
12 MR. CONN: YES. BUT IF THEY PRESENT ONLY THAT  
13 SIDE OF THE FAMILY, THE JURY IS GOING TO SAY: "WE HEARD  
14 NOTHING FROM THE OTHER SIDE OF THE FAMILY, SO WHY SHOULD  
15 WE CONCLUDE THAT THE ANDERSEN SIDE OF THE FAMILY FEELS  
16 ANY DIFFERENTLY?"  
17 THE DEFENSE PRESENTED NOTHING CONCERNING  
18 THE ANDERSEN SIDE OF THE FAMILY, SO THAT WOULD LEAD TO  
19 THE REASONABLE CONCLUSION HERE THAT -- AND WE HAD JOAN  
20 VANDERMOLLEN SITTING IN THE AUDIENCE AND HUGGING  
21 MS. ABRAMSON THROUGHOUT THE PROCEEDINGS. THE JURY IS  
22 GOING TO BE LEFT WITH THE CLEAR IMPRESSION THAT THAT  
23 REPRESENTS ALL THE RELATIVES OF THE DEFENDANTS.  
24 I THINK THAT THE PROSECUTION SHOULD BE  
25 PERMITTED TO SHOW THAT THERE IS ANOTHER POINT OF VIEW  
26 HERE HELD BY THE DECEASED'S BROTHERS, WHO FEEL  
27 DIFFERENTLY ABOUT THE DEATH PENALTY.  
28 THE COURT: ALL RIGHT.

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1 AS I SAID, IF THERE IS SOMETHING ELSE IN  
2 THE TRANSCRIPT THAT YOU DIDN'T PROVIDE ME -- AND YOU

3 CERTAINLY DIDN'T PROVIDE ME WITH ALL THE TESTIMONY, YOU  
4 ONLY PROVIDED ME WITH THE DIRECT EXAMINATION -- THAT IS  
5 IT. PERHAPS THERE WAS SOMETHING ON REDIRECT, I DON'T  
6 KNOW. I'LL CERTAINLY CONSIDER IT.

7 AS FAR AS THAT VIDEOTAPE IS CONCERNED, I  
8 DID REVIEW THE VIDEOTAPE. IT BEARS THE DATE OF AUGUST  
9 THE 9TH, 1989, WHICH IS 11 DAYS BEFORE THE MURDERS IN  
10 THIS CASE, AND IT SHOWS THE DEFENDANT, ERIK MENENDEZ,  
11 THE TWO VICTIMS, AND BRIAN ANDERSEN, IN FLIGHT FROM  
12 APPARENTLY ILLINOIS TO MICHIGAN.

13 AND MY VIEW IS THAT IT DOES TEND TO AND  
14 WOULD BE SUPPORTIVE OF VICTIM IMPACT EVIDENCE, IN THAT  
15 IT TENDS TO HUMANIZE THE VICTIMS AND PUT THEM IN LIGHT  
16 OF HOW THEY ACTUALLY LOOKED AND APPEARED ON AUGUST THE  
17 9TH, 1989, AND HOW THE DEFENDANT, ERIK MENENDEZ,  
18 APPEARED AT THAT TIME, AND CERTAINLY ALSO CONTRADICTS  
19 SOME OF THE TESTIMONY THAT WE'VE HEARD PRESENTED IN THE  
20 PENALTY PHASE OF THE DEMEANOR AND BEHAVIOR, ESPECIALLY  
21 OF MRS. MENENDEZ.

22 AND LOOKING AT THAT VIDEOTAPE, CERTAINLY  
23 THE PROBATIVE VALUE SUBSTANTIALLY OUTWEIGHS ANY UNDUE  
24 PREJUDICE, AND IS RELEVANT EVIDENCE.

25 MR. LEVIN: CAN WE ARGUE THAT, YOUR HONOR?

26 THE COURT: SURE, IF YOU'D LIKE TO.

27 MR. LEVIN: I WOULD.

28 THE COURT: GO AHEAD.

1 MR. LEVIN: I WOULD LIKE THE OPPORTUNITY TO ARGUE  
2 THE RELEVANCY AND ADMISSIBILITY OF THAT VIDEO.

3 THE COURT: SURE.

4 MR. LEVIN: DID YOU WANT TO DO IT NOW?

5 THE COURT: IF YOU'D LIKE TO, SURE.

6 MR. LEVIN: COULD WE DEFER THAT, YOUR HONOR?

7 THE COURT: YES, BUT I'VE ALREADY TOLD YOU MY  
8 VIEW, AND I'VE HEARD IN THE EARLIER HEARING YOUR VIEWS  
9 ON THE MATTER, SO I KNOW WHAT YOUR POSITION IS.

10 MR. LEVIN: I HAVE NEVER MADE ANY COMMENTS.

11 THE COURT: NOT PERHAPS YOU, BUT THERE HAVE BEEN  
12 REMARKS BY COUNSEL, AND THAT VIDEOTAPE WAS DISCUSSED.

13 MS. ABRAMSON: WELL, WE DON'T CHOOSE TO SUBMIT ON  
14 REMARKS IN PASSING, YOUR HONOR. WE WOULD LIKE TO HAVE  
15 SOME DIRECTED REMARKS MONDAY, WITH THE COURT'S  
16 PERMISSION.

17 THE COURT: THEN YOU CAN REGARD MY VIEW AS AN  
18 INDICATED RULING ON THAT SUBJECT.

19 MS. ABRAMSON: THANK YOU.

20 THE COURT: ALL RIGHT.

21 ANYTHING ELSE NOW BEFORE WE TAKE OUR BREAK  
22 UNTIL MONDAY MORNING? OKAY. WE WILL BE IN RECESS UNTIL  
23 MONDAY MORNING AT 8:30.

24 OH, ONE ADDITIONAL MATTER, MR. GESSLER.

25 IN REGARD TO THE TRANSCRIPTS OF THE  
26 PROCEEDINGS YESTERDAY AFTERNOON, I DID REVIEW THEM, AND  
27 I DON'T SEE ANYTHING IN THEM THAT WOULD PREVENT THE

-11417

1 MR. GESSLER: THREE PAGES, IF I MAY, YOUR HONOR.

2 53519, BEGINNING AT LINE 12, TO 53921, LINE 8, IS THE

3 SUBJECT MATTER WHICH WE DISCUSSED IN THE HALL REGARDING

4 PRIVILEGE.

5 THE COURT: OKAY. LET ME LOOK AT THAT THEN.

6 MR. GESSLER: THAT PART ONLY I BELIEVE SHOULD

7 REMAIN SEALED FROM THE DISTRICT ATTORNEY AND FROM THE

8 PUBLIC.

9 MR. LEVIN: AND I'D LIKE TO BE HEARD AS WELL,

10 YOUR HONOR.

11 THE COURT: OKAY. YES.

12 MR. LEVIN: YOUR HONOR, WHEN THIS MATTER AROSE

13 YESTERDAY, THE DEFENSE WAS ESSENTIALLY -- AT LEAST I

14 WAS -- PUT ON NOTICE FOR THE VERY FIRST TIME THAT IT

15 REQUIRED AN IMMEDIATE RESPONSE, AND THE REMARKS THAT I

16 GAVE WERE A CULMINATION UP UNTIL THAT TIME OF

17 COMMUNICATIONS THAT I HAD WITH CO-COUNSEL, WITH MY

18 CLIENT, WERE ATTORNEY/CLIENT PRIVILEGE.

19 I WAS JUST TRYING TO GIVE THE COURT THE

20 CONTEXT OF HOW I VIEWED THE POTENTIAL ISSUES THAT WOULD

21 ARISE FROM WHAT WE WERE DISCUSSING AT THE TIME. I FELT

22 THAT THEY WERE APPROPRIATE FOR IN CAMERA DISCLOSURE,

23 PRIVILEGED INFORMATION.

24           IT WAS MY UNDERSTANDING OF MY FEELINGS AND  
25 CO-COUNSEL'S FEELINGS THAT THESE WERE RATHER DELICATE  
26 MATTERS THAT HAD TO DO WITH CERTAIN ATTORNEY-CLIENT  
27 RELATIONSHIPS, CERTAIN ATTORNEY-CLIENT CONVERSATIONS  
28 THAT HAD OCCURRED, AND I THINK THAT IT WOULD BE ABSOLUTE

-11416

1 PREJUDICE -- OR IT WOULD BE PREJUDICIAL TO ERIK  
2 MENENDEZ, AND ALSO SOMEHOW COULD RESULT IN AN UNFAIR  
3 CHARACTERIZATION OF MY FEELINGS OF THE PARTICULAR ISSUES  
4 THAT I WAS ADDRESSING AT THE TIME, AND IT COULD RAISE  
5 CERTAIN PROBLEMS WITH RESPECT TO THE MEDIA IN  
6 MISINTERPRETING MY INITIAL STATEMENTS AND COMMENTS AT  
7 THAT TIME, OR COULD RESULT IN MATERIALS BEING PUBLISHED  
8 IN THE PRESS, AND PERHAPS SOMEHOW INFECTING NOT ONLY THE  
9 PUBLIC'S VIEW, BUT THE -- COULD SOMEHOW AFFECT THIS  
10 JURY'S DETERMINATION DURING THE PENALTY PHASE.

11           WE HAVE HEARD AND SEEN WHERE NEWSPAPER  
12 ARTICLES HAVE INADVERTENTLY FOUND THEIR WAY INTO THE  
13 JURY ROOM. THIS IS NOT A SEQUESTERED JURY. THEY HAVE  
14 BEEN EXPOSED TO INFORMATION FROM HEADLINES, HEARING  
15 THINGS ON THE RADIO. THEY HAVE SEEN THINGS, EVEN IN  
16 THIS COURTROOM. FRIENDS, GIRLFRIENDS HAVE TOLD THE  
17 JURORS -- AT LEAST ONE JUROR THEIR FEELINGS ABOUT THE  
18 DELIBERATIONS AND THE VERDICTS, AND I THINK THAT IT'S --  
19 AT LEAST AT THIS TIME, FOR ALL THE REASONS I STATED,

20 THAT THESE IN CAMERA MATTERS SHOULD REMAIN SEALED AND  
21 CONFIDENTIAL.

22 THE COURT: ALL RIGHT. I WILL CONSIDER YOUR  
23 OBJECTION. BUT YOU'LL HAVE TO GIVE ME SPECIFICS AS TO  
24 WHAT IT IS ON MONDAY, AND I WILL HOLD OFF A RULING ON  
25 THAT UNTIL MONDAY, WHEN YOU CAN TELL ME WHICH PORTIONS  
26 OF THAT TRANSCRIPT YOU OBJECT TO BEING DISCLOSED.

27 MR. LEVIN: I WILL, YOUR HONOR.

28 THE COURT: OKAY. WE'LL BE IN RECESS UNTIL

-11415

1 MONDAY AT 8:30.

2 YES?

3 MS. GOLLER: IF YOU'RE GOING TO BE DISCUSSING THE  
4 ISSUE -- IF YOU'RE GOING TO BE HEARING THE ISSUE OF  
5 SEALING THE TRANSCRIPT ON MONDAY, WE WOULD LIKE THE  
6 OPPORTUNITY TO BE HEARD AS WELL, THE LOS ANGELES TIMES.

7 THE COURT: WE'LL SEE YOU HERE ON MONDAY.

8 MS. GOLLER: WOULD THAT BE THE FIRST THING THAT'S  
9 GOING TO BE DONE?

10 THE COURT: I REALLY CAN'T SAY.

11

12 (AT 5:05 P.M. PROCEEDINGS WERE  
13 ADJOURNED UNTIL MONDAY,  
14 APRIL 8, 1996 AT 8:30 A.M.)

15



1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 FOR THE COUNTY OF LOS ANGELES  
3 DEPARTMENT NW "N" HON. STANLEY M. WEISBERG JUDGE  
4  
5 THE PEOPLE OF THE STATE OF )  
6 CALIFORNIA, )  
7 )  
8 PLAINTIFFS, )  
9 )  
10 VS. ) NO. BA 068880  
11 )  
12 ERIK GALEN MENENDEZ, AND )  
13 JOSEPH LYLE MENENDEZ, )  
14 )  
15 DEFENDANTS. )

)

11

12 REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

13 FRIDAY, APRIL, 4, 1996

14 VOLUME 322

15 (SEALED PAGES 53961 THROUGH 53971)

16 (SEALED PAGES 53053 THROUGH 53054)

17

18

19

20

APPEARANCES:

21 (SEE APPEARANCE PAGE)

22

23

24

25

26

27

28

1 APPEARANCES:

2

FOR THE PEOPLE: GIL GARCETTI

3

DISTRICT ATTORNEY

BY: DAVID CONN, DEPUTY

4

AND

CAROL NAJERA, DEPUTY

5

18000 CRIMINAL COURTS BLDG.

210 WEST TEMPLE STREET  
LOS ANGELES, CA 90012

6

7

8

FOR THE DEFENDANT

9 JOSEPH LYLE MENENDEZ: MICHAEL P. JUDGE,  
PUBLIC DEFENDER

10 BY: CHARLES GESSLER, DEPUTY  
AND

11 TERRI TOWERY, DEPUTY

210 WEST TEMPLE

12 LOS ANGELES, CA 90012

13

14

FOR THE DEFENDANT

15 ERIK GALEN MENENDEZ: LESLIE ABRAMSON  
ATTORNEY AT LAW

16 4929 WILSHIRE BOULEVARD

SUITE 940

17 LOS ANGELES, CA 90010

18

BARRY LEVIN, ESQ.

11661 SAN VICENTE BOULEVARD

19 LOS ANGELES, CA 90049

20

21

MARY LU MURPHY

22 CSR NO. 5178

MARILYN FADALE,

23 CSR NO. 4547

OFFICIAL REPORTERS

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26

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28

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2	DAY	DATE	SESSION	PAGE	VOL.
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4 FRIDAY, APRIL 5, 1996 A.M. 53961 322  
 FRIDAY, APRIL 5, 1996 P.M. 54007 322

6 PROCEEDINGS

7 MOTION FOR MISTRIAL  
 8 BY MR. GESSLER 53974 322

9 5TH-AMENDMENT RIGHTS  
 INVOKED BY MS. ABRAMSON 54008 322

10 MOTION FOR MISTRIAL  
 11 BY MR. GESSLER 54011 322

12 RULING 54019 322

13 RULING 54025 322

14 RULING 54066 322

15 MOTION FOR MISTRIAL  
 BY MR. LEVIN 54087 322

16 RULING 54100 322

17 MOTION FOR APPOINT  
 18 COUNSEL 54101 322

19 RULING 54101 322

20 CHRONOLOGICAL INDEX OF WITNESSES

22 WITNESSES: DIRECT CROSS REDIRECT RECROSS VOL.

23 VICARY,  
 WILLIAM  
 24 (402) 54034-C  
 54039-G 54044-L 322

28 LEGEND:

- 1  
A = MS. ABRAMSON  
2 C = MR. CONN  
G = MR. GESSLER  
3 K = MS. TOWERY  
L = MR. LEVIN  
4 N = MS. NAJERA

1 EXHIBITS INDEX

2 EXHIBITS: MARKED RECEIVED VOL.  
(NONE MARKED THIS VOLUME.)

3