

1 VAN NUYS, CALIFORNIA; TUESDAY, APRIL 9, 1996

2 9:15 A.M.

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

4 (APPEARANCES AS HERETOFORE NOTED)

5 (MARY LU MURPHY, OFFICIAL REPORTER)

6
7 (PAGES 54204 THROUGH 54221 WERE

8 HELD OUT IN CAMERA AND SEALED

9 BY ORDER OF THE COURT:)

10
11 (A RECESS WAS TAKEN FROM

12 9:40 A.M. TO 10:15 A.M.)

1 (THE FOLLOWING PROCEEDINGS WERE
2 HELD IN OPEN COURT OUT OF THE
3 PRESENCE OF THE JURY:)

4
5 THE COURT: IN THE TRIAL, BOTH DEFENDANTS ARE IN
6 COURT WITH THEIR LAWYERS AND THE PEOPLE ARE HERE.

7 AND WE'RE OUTSIDE THE PRESENCE OF THE JURY
8 FOR THE PURPOSE OF PROCEEDING WITH ISSUES RELATING TO
9 THE TESTIMONY OF DR. VICARY.

10 AND WHEN WE BROKE ON FRIDAY, THE INQUIRY
11 RELATED TO AREAS IN WHICH THE PROSECUTION WOULD SEEK TO
12 QUESTION THE WITNESS ABOUT REDACTIONS IN THE NOTES AND
13 OBJECTIONS BY THE DEFENSE ON GROUNDS OF SECTION 352 OF
14 THE EVIDENCE CODE AND THE GROUNDS OF RELEVANCY TO
15 CERTAIN AREAS OF INQUIRY, AND ALSO POTENTIAL CLAIMS OF
16 PRIVILEGE TO CERTAIN ISSUES.

17 AND THE PEOPLE HAD, AS I RECALL IT, TWO
18 THEORIES FOR FURTHER QUESTIONING OF DR. VICARY ON
19 MATTERS REFERRED TO IN THE NOTES, SPECIFICALLY CERTAIN
20 REDACTED PORTIONS OF THE NOTES. ONE THEORY WAS TO
21 ATTACK THE CREDIBILITY OF DR. VICARY, AND THE OTHER
22 THEORY WAS TO ATTACK THE CREDIBILITY OF ERIK MENENDEZ.

23 AND I THINK TO A GREAT EXTENT YOU HAVE
24 STATED YOUR REASONS WHY YOU FELT, IN GENERAL ANYWAY,
25 THESE QUESTIONS WILL IMPEACH THE TESTIMONY OF THE

26 WITNESS AND DR. VICARY. AND I DON'T THINK WE HAVE HEARD
27 FURTHER FROM YOU, MR. CONN, AS TO WHY YOU FELT THESE
28 AREAS WOULD TEND TO IMPEACH THE DEFENDANT, ERIK

-11313

1 MENENDEZ', TESTIMONY OR BE RELEVANT IN THAT REGARD TO
2 ASSIST THE COURT IN BALANCING UNDER SECTION 352 OF THE
3 EVIDENCE CODE.

4 MR. GESSLER: YOUR HONOR, BEFORE WE PROCEED IN
5 THAT MATTER, I HAVE A MOTION THAT I NEED TO BRING BEFORE
6 THE COURT UNDER PEOPLE VERSUS MCKENZIE AND GLASSER
7 VERSUS UNITED STATES.

8 THE COURT: AND THAT MOTION IS WHAT?

9 MR. GESSLER: THAT MOTION, YOUR HONOR, IS THAT AT
10 THIS POINT I MUST ASK THE COURT, AND I DO THIS
11 RELUCTANTLY, BECAUSE SHE'S BEEN A GOOD FRIEND, AND I
12 ADMIRE HER AS A LAWYER, BUT I MUST ASK THE COURT TO
13 RELIEVE LESLIE ABRAMSON AS AN ATTORNEY FROM FURTHER
14 RESPONSIBILITIES IN THIS CASE.

15 I DO THAT UNDER THE FEDERAL CONSTITUTION
16 AND THE 6TH, 8TH, 14TH AMENDMENTS, AND PARTICULARLY AS
17 SET FORTH IN GLASSER VERSUS UNITED STATES AT 350 U.S. 60
18 ON THE COURT'S OBLIGATION TO ASSURE THAT A CRIMINAL
19 DEFENDANT, IN THIS CASE LYLE MENENDEZ, IS AFFORDED A
20 BONA FIDE AND FAIR ADVERSARY ADJUDICATION. UPON THE
21 TRIAL JUDGE RESTS THE DUTY OF SEEING THAT THE TRIAL IS

22 CONDUCTED WITH THE SOLICITUDE FOR THE ESSENTIAL RIGHTS
23 OF THE ACCUSED.

24 IN PEOPLE VERSUS MCKENZIE, YOUR HONOR, THE
25 STATE CASE, 34 CAL.3D 616 AT PAGE 630, THE COURT STATES:

26 "WHILE WE RECOGNIZE THAT COURTS
27 SHOULD EXERCISE THEIR POWER TO REMOVE
28 DEFENSE COUNSEL WITH GREAT CIRCUMSPECTION,

-11312

1 THEY NEVERTHELESS RETAIN THE OBLIGATION TO
2 SUPERVISE THE PERFORMANCE OF DEFENSE
3 COUNSEL TO ENSURE THAT ADEQUATE
4 REPRESENTATION IS PROVIDED."

5 YOUR HONOR, IN THIS MATTER WE'VE HAD THE
6 JURY OUT NOW THURSDAY AFTERNOON, FRIDAY MORNING, ALL DAY
7 YESTERDAY AND STILL THIS MORNING, DOING NOTHING BUT
8 SPECULATING AS TO WHAT IS GOING ON HERE AFTER DR. VICARY
9 SAID THAT LESLIE ABRAMSON TOLD HIM TO REMOVE CERTAIN
10 THINGS FROM HIS NOTES.

11 THERE HAS BEEN HUGE ARTICLES IN THE
12 NEWSPAPERS, INCLUDING THE TIMES, INCLUDING A PICTURE IN
13 THE COURTROOM OF MS. ABRAMSON. THERE HAS BEEN A LOT OF
14 COVERAGE ON THE RADIO, INCLUDING THIS MORNING ON KNX IN
15 WHICH THEY MENTIONED THEIR VIEW THAT THIS WOULD BE
16 VERBOTEN, A GREAT VIOLATION TO HAVE DONE THIS; THAT
17 MS. ABRAMSON WOULD BE LUCKY TO KEEP HER LICENSE TO

18 PRACTICE LAW IF THIS ALLEGATION IS PROVEN.

19 WE HAVE NEWSPAPER AND RADIO ACCOUNTS. I

20 DON'T FOLLOW T.V., BUT PROBABLY THERE, TOO, THAT

21 MS. ABRAMSON, IN COURT, OUTSIDE THE PRESENCE OF THE

22 JURY, TOOK THE 5TH AMENDMENT.

23 I KNOW THE COURT HAS TOLD THE JURY TO

24 REFRAIN FROM HEARING ANYTHING OR READING ANYTHING ABOUT

25 THE CASE, BUT AT TIMES IT'S IMPOSSIBLE.

26 YOU HAVE A RADIO ON AND YOU DON'T TURN IT

27 OFF UNTIL YOU'VE HEARD SOME MENTION OF MENENDEZ, AND THE

28 FIRST MENTION IS MS. ABRAMSON TOOK THE 5TH AMENDMENT.

-11311

1 I REALIZE THAT THAT DOES NOT GIVE ANY

2 CRIMINAL LIABILITY TO ANYBODY, BUT I CERTAINLY THINK

3 THAT JURORS WILL LOOK AT THAT AS THOUGH SHE WOULD NOT

4 HAVE DONE THAT HAD SHE NOT DONE SOMETHING TERRIBLY WRONG

5 IN THIS CASE.

6 AT THIS POINT, I CANNOT SEE ANYTHING EXCEPT

7 THAT MS. ABRAMSON HAS CONFLICT BETWEEN HER OWN INTERESTS

8 IN PROTECTING HER LEGAL CAREER, HER LICENSE TO PRACTICE

9 LAW, HER REPUTATION AS AGAINST DR. VICARY, WHO HAS

10 ACCUSED HER OF WHAT APPEARS TO BE A CERTAIN MISCONDUCT

11 IN TAKING OUT FROM HIS NOTES MATERIAL THAT WOULD HAVE

12 SEEMED TO HIM TO HAVE BEEN RELEVANT.

13 AND IF THERE IS ANY CONFLICT OF INTEREST,

14 EVEN THOUGH SHE IS PRIMARILY REPRESENTING ERIK MENENDEZ,
15 CERTAINLY THIS WILL COME OVER ONTO LYLE MENENDEZ, AS THE
16 COURT HAS POINTED OUT, WHO RELIED UPON ERIK MENENDEZ'
17 TESTIMONY IN THIS TRIAL.

18 THERE WERE MANY WITNESSES WHO WERE JOINTLY
19 CALLED UPON WHOM WE RELIED UPON IN THE TRIAL ITSELF, AND
20 THOSE CIRCUMSTANCES OF THE CRIME AT LEAST COME OVER INTO
21 THIS PARTICULAR PENALTY PHASE. THERE HAVE BEEN SOME
22 WITNESSES AT THE PENALTY PHASE THAT WERE JOINTLY CALLED.

23 IF, IN FACT, THE JURY, OR ANY ONE OF THE
24 JURORS, ATTACHES ANYTHING TO MS. ABRAMSON FROM THIS
25 TESTIMONY OF DR. VICARY CONCERNING HER TAKING OUT NOTES,
26 THIS CERTAINLY WILL AFFECT LYLE MENENDEZ, NOT ONLY AS
27 CO-DEFENDANT, WHERE ANY CO-DEFENDANT WOULD BE AFFECTED
28 IN A CASE WHERE BOTH DEFENDANTS ARE CHARGED WITH THE

-11310

1 SAME CRIME, BUT PARTICULARLY BECAUSE THEY ARE BROTHERS.

2 AND I THINK A JURY, AS I HAVE POINTED OUT
3 BEFORE, IS MUCH MORE LIKELY TO TREAT TWO BROTHERS THE
4 SAME WAY THAN THEY WOULD TWO PEOPLE WHO HAPPEN TO BE
5 JOINED AS CODEFENDANTS, EACH WITH THEIR LIFE ON THE
6 LINE, BEFORE THE SAME JURY.

7 THE BIG PROBLEM IS THAT IF THERE IS ANY
8 FURTHER TESTIMONY BY DR. VICARY, OR EVEN WITH WHAT WE
9 HAVE NOW, AND THE -- MS. ABRAMSON'S CONTINUED

10 REPRESENTATION IN THE CASE, THAT THE JURY VERDICT ON
11 LIFE AND DEATH IS VERY LIKELY TO BE A REFERENDUM ON
12 MS. ABRAMSON AND HOW THEY FEEL ABOUT HER AND HOW THEY
13 ASSESS HER CONDUCT IN THIS PARTICULAR CASE.

14 AND THE ONLY WAY, IF THEY FEEL NEGATIVELY
15 TOWARD HER, TO SHOW THAT IS TO COME IN WITH A DEATH
16 VERDICT IN THEIR MIND, EVEN THOUGH THAT WOULD BE
17 IMPROPER UNDER THE CONSTITUTION AND UNDER THE STATUTES
18 OF THE STATE OF CALIFORNIA.

19 AND THE ONLY WAY THAT I CAN SEE TO PREVENT
20 THAT, AND I TAKE THIS ACTION REGRETFULLY, IS TO ASK THE
21 COURT TO RELIEVE MS. ABRAMSON BECAUSE OF WHAT I BELIEVE
22 IS A CONFLICT OF INTEREST AT THIS POINT.

23 MR. LEVIN: AND, YOUR HONOR, ON BEHALF OF ERIK
24 MENENDEZ, I JOIN IN THAT MOTION, AND ADOPT AND JOIN.

25 MS. ABRAMSON: WELL, I WOULD OBJECT TO

26 MR. LEVIN --

27 MR. LEVIN: I HAVE A RIGHT TO SPEAK.

28 MS. ABRAMSON: EXCUSE ME. I WOULD OBJECT TO

-11309

1 MR. LEVIN MAKING THIS MOTION IN OPEN COURT, GIVEN WHAT
2 THE COURT ALREADY IS AWARE OF. AND HE DID NOT CONSULT
3 WITH HIS CLIENT BEFORE HE STOOD UP TO MAKE THAT MOTION,
4 YOUR HONOR.

5 THE COURT: WELL, AS FAR AS MR. LEVIN IS

6 CONCERNED, ANY ISSUES RELATING TO A MOTION SUCH AS YOU
7 WOULD PROPOSE TO MAKE HAS BEEN DEFERRED PENDING FURTHER
8 HEARING, WHICH WE ARE ABOUT TO CONDUCT, ON THE SUBJECT
9 RELATING TO THE TESTIMONY OF DR. VICARY.

10 SO BEFORE WE GET INTO ANYTHING FURTHER ON
11 YOUR BEHALF -- OR ON BEHALF OF YOUR CLIENT BY YOU, WE
12 WILL CONDUCT THIS HEARING.

13 MR. LEVIN: I JUST WANT TO MAKE SURE THAT IT'S
14 THE COURT DEFERRING IT. I'M NOT WAIVING IT ON MY
15 CLIENT'S BEHALF.

16 THE COURT: NO. WE HAD ALREADY DISCUSSED THAT.
17 PART OF WHAT WE WILL BE DOING TODAY IS CONDUCTING A
18 HEARING TO GET MORE INFORMATION ABOUT THE SCOPE OF THE
19 EXAMINATION OF DR. VICARY, AND MORE DETAIL ABOUT THE
20 EVENTS SURROUNDING THE USE OF THESE NOTES IN WHATEVER
21 FASHION THEY'VE BEEN USED.

22 AS FAR AS MR. GESSLER'S MOTION IS
23 CONCERNED, IT'S REALLY A RENEWAL OF, OR A REPETITION OF,
24 THE MOTION YOU MADE LAST WEEK WITH AMPLIFICATION
25 RELATING TO NEWS COVERAGE, BUT BASICALLY IT'S THE SAME
26 MOTION YOU MADE LAST WEEK.

27 MR. GESSLER: LAST WEEK'S, YOUR HONOR, WAS A
28 MOTION FOR MISTRIAL, WHICH WAS DENIED.

-11308

1 WITHOUT WITHDRAWING MY MOTION FOR MISTRIAL,

2 BECAUSE I STILL BELIEVE IT WAS WELL-TAKEN, I AM NOW
3 ASKING THE COURT TO TAKE THE NEXT STEP. I DON'T KNOW
4 THAT IT WILL MAKE UP FOR A MISTRIAL. I DON'T THINK THAT
5 IT WILL, BUT AT LEAST IT WILL HELP PRESERVE LYLE
6 MENENDEZ' RIGHTS TO A FAIR JURY DETERMINATION AS TO HIS
7 LIFE AND DEATH IN THIS MATTER.

8 THE COURT: OKAY.

9 WITHOUT RULING UPON YOUR MOTION AT THIS
10 POINT, I AM PROPOSING TO GO AHEAD WITH THIS HEARING TO
11 GET MORE INFORMATION SO THAT THE COURT WILL HAVE A
12 BETTER BASIS FOR EVALUATING WHAT IT IS YOU'RE
13 REQUESTING, AND THE MERITS OF YOUR REQUEST.

14 MR. GESSLER: ALSO, YOUR HONOR, THERE IS ANOTHER
15 MOTION FOR A MISTRIAL ON BEHALF OF LYLE MENENDEZ BECAUSE
16 OF STATEMENTS MADE BY DR. VICARY IN FRONT OF THE JURY,
17 AND I REFER TO PAGE 53883 OF THE TRANSCRIPT, IN WHICH HE
18 SAID THAT EVERYBODY GOT AN ORIGINAL COPY, ALL THE
19 LAWYERS AND THE JUDGE.

20 YOU WERE ABLE TO SAY YOU NEVER GOT ONE AND
21 DIDN'T WANT ONE. WE WERE NOT ABLE TO SAY ANYTHING AS
22 ATTORNEYS.

23 IN TRUTH, WE NEVER RECEIVED THIS
24 ORIGINAL -- WHAT WE WOULD CALL UNREDACTED COPY. TO THE
25 BEST OF MY KNOWLEDGE, PRECEDING COUNSEL THREE YEARS AGO
26 DID NOT RECEIVE SUCH A DOCUMENT.

27 THE JURY NOW BELIEVES THAT WE ALSO WERE
28 AWARE OF THESE CHANGES THAT WERE MADE. THAT IS UNTRUE.

1 I WAS NOT AWARE, MS. TOWERY WAS NOT AWARE, AND TO THE
2 BEST OF MY KNOWLEDGE, MS. LANSING WAS NOT AWARE OF
3 THESE.

4 WE ARE NOW IN A POSITION WHERE OUR OWN
5 CREDIBILITY IS AT ISSUE, AND THERE IS NOTHING WE CAN DO
6 EXCEPT TAKE THE STAND IN FRONT OF THE JURY AND SAY WE
7 DIDN'T GET IT.

8 THE COURT: WELL, CERTAINLY THERE IS NOTHING TO
9 INDICATE FROM THE TESTIMONY OF THE WITNESS THAT YOU WERE
10 AWARE OF ANY REDACTIONS, OR HAD EVER RECEIVED A REDACTED
11 VERSION OF THE EVIDENCE. AT MOST, IF THAT WAS WHAT THE
12 WITNESS SAID REGARDING THE UNREDACTED VERSION, THAT
13 EVERYBODY HAD POSSESSION OF THE UNREDACTED VERSION, NOT
14 THE REDACTED VERSION.

15 MR. LEVIN: THE OTHER WAY AROUND.

16 MR. GESSLER: WHAT HE REFERRED TO WAS THE
17 ORIGINAL COPY. TO ME THAT WOULD MEAN UNREDACTED. IF IT
18 MEANS REDACTED --

19 MS. TOWERY: IT'S NOT CLEAR.

20 MS. ABRAMSON: BEFORE HE INDICATED THERE HAD BEEN
21 A REDACTED AND UNREDACTED. HE WAS TALKING ABOUT THE
22 ORIGINAL NOTES IN THE FILE.

23 MR. GESSLER: WELL, I CERTAINLY THINK THAT'S
24 UNCLEAR TO THE JURY, YOUR HONOR. AND IT DOES PUT US IN
25 A VERY UNFAIR POSITION IN THIS MATTER.

26 THE COURT: I THINK THAT CAN BE WORKED OUT IN

27 SOME FASHION TO REMOVE THAT LAST ISSUE. I WOULD --
28 PERHAPS THE PEOPLE WOULD BE WILLING TO STIPULATE TO THAT

-11306

1 FACT.

2 MR. GESSLER: IF THE PEOPLE ARE WILLING TO
3 STIPULATE, WE CERTAINLY WILL ACCEPT THE STIPULATION,
4 YOUR HONOR.

5 MR. CONN: YES. WE WILL STIPULATE THAT NEITHER
6 THE DEFENSE NOR THE PROSECUTION RECEIVED A COPY OF THE
7 NOTES.

8 MS. ABRAMSON: WELL, THAT'S NOT TRUE.

9 THE COURT: YOU'RE TALKING ABOUT DEFENSE FOR LYLE
10 MENENDEZ?

11 MR. CONN: I'M SORRY?

12 THE COURT: WHICH DEFENSE ARE YOU TALKING ABOUT?

13 MR. CONN: YES. THAT NEITHER COUNSEL FOR LYLE
14 MENENDEZ NOR THE PROSECUTION RECEIVED A COPY OF
15 DR. VICARY'S ORIGINAL UNREDACTED NOTES FROM DR. VICARY
16 OR MS. ABRAMSON.

17 MR. GESSLER: WE JOIN IN THE STIPULATION.

18 MS. ABRAMSON: EVERY -- WAIT.

19 MR. CONN: RIGHT.

20 MS. ABRAMSON: YOUR HONOR, I WOULD LIKE TO BE
21 HEARD FOR A MOMENT IN THE MIDDLE OF ALL THIS.

22 THE COURT: AGAIN, WE CAN WORK OUT THE DETAILS OF

23 THE STIPULATION LATER ON.

24 MS. ABRAMSON: IT'S NOT A DETAIL.

25 THE COURT: AT THIS POINT IT'S A DETAIL, BECAUSE

26 YOU ARE AGAIN GETTING AWAY FROM WHAT I SAID WAS GOING TO

27 BE DONE RIGHT NOW, WHICH IS RESUME THIS HEARING.

28 MS. ABRAMSON: AND I WOULD LIKE TO ADDRESS WHAT

-11305

1 THE COURT SAID IS GOING TO BE DONE RIGHT NOW, BRIEFLY.

2 YOUR HONOR, ON FRIDAY, APRIL THE 5TH, I

3 ASSERTED THE PRIVILEGE OF SELF-INCRIMINATION IN RESPONSE

4 TO THE COURT DIRECTING CERTAIN QUESTIONS TO ME ABOUT

5 WHAT THE COURT HAS INDICATED TODAY IS ONE OF THE ISSUES

6 HERE, WHICH HAS TO DO WITH THE EVENT CONCERNING THE

7 REDACTION OF THESE NOTES AND THEIR USE.

8 AS I INDICATED TO THE COURT IN CAMERA

9 YESTERDAY, I AM WITHDRAWING THE ASSERTION OF THAT

10 PRIVILEGE. IT WAS HASTELY MADE, BASED ON VERY BRIEF

11 CONTACT WITH MY COUNSEL, WHO DID NOT HAVE AN OPPORTUNITY

12 TO VIEW THE DOCUMENTS, AND I DO NOT FEEL THAT THERE IS

13 ANY NECESSITY FOR ME TO ASSERT A 5TH AMENDMENT

14 PRIVILEGE, AND I DO WITHDRAW IT.

15 AS THE COURT ALSO KNOWS, I HAVE OFFERED

16 REPEATEDLY, AND AM OFFERING AGAIN, TO ANSWER QUESTIONS

17 CONCERNING THIS AREA OF DR. VICARY AND THE PREPARATION

18 OF ANY NOTES OF HIS IN ORDER TO FULLY INFORM THIS COURT

19 OF THOSE THINGS THAT I AM PERSONALLY AWARE OF IN THIS
20 REGARD.

21 BUT I HAVE SAID ALL ALONG, AND I REPEAT
22 AGAIN, THAT I THINK THE APPROPRIATE INQUIRY IS THAT ANY
23 DISCOVERY-TYPE ISSUE, WHICH WOULD BE IN CAMERA, SO THAT
24 THE COURT COULD BE AWARE OF THE PRECISE FACTS HERE WHICH
25 MIGHT RESOLVE VERY WELL SOME OF THE MATTERS THAT THE
26 COURT MAY BE SEEKING TO HAVE PIECEMEAL STIPULATIONS ON.

27 I HAVE MADE THAT OFFER. I THINK THAT IS
28 APPROPRIATE FOR AN INQUIRY OF THIS TYPE HAVING TO DO

-11304

1 WITH MATERIALS TURNED OVER TO THE OPPOSITION THREE YEARS
2 AGO. AND THE RECORD SHOULD BE VERY CLEAR THAT THIS
3 PROSECUTION TEAM HAS THE UNREDACTED NOTES, AND I KNOW
4 THE COURT IS INTERESTED AND HAS MADE REFERENCE, BOTH
5 LAST THURSDAY AND FRIDAY, TO WHAT OTHER EXPERTS MAY OR
6 MAY NOT HAVE HAD, AND I AM PREPARED TO ANSWER THOSE
7 QUESTIONS. BUT I AM NOT PREPARED TO ANSWER THOSE
8 QUESTIONS IN SUCH A WAY AS TO CREATE A CONFLICT BY
9 GIVING THE PROSECUTION INFORMATION THEY ARE NOT
10 OTHERWISE ENTITLED TO, OR MAKING MYSELF A WITNESS FOR
11 THE PROSECUTION.

12 BUT I DO THINK IT WOULD BE USEFUL FOR THE
13 COURT TO BE ABLE TO CONDUCT SUCH AN INQUIRY AND TO GET
14 ANSWERS TO ALL THOSE QUESTIONS, AND THE APPROPRIATE WAY

15 TO CONDUCT SUCH AN INQUIRY, AS ANY OTHER WORK PRODUCT
16 TYPE INQUIRY OR DISCOVERY INQUIRY, WOULD BE IN CAMERA.
17 AND I THINK, BEFORE WE PROCEED WITH A 402
18 IN WHICH THE COURT IS TO ASSESS WHETHER OR NOT
19 ADDITIONAL QUESTIONS MAY BE ASKED OF THE WITNESS
20 CONCERNING REDACTIONS OR THE REASONS FOR THEM, THAT I BE
21 PERMITTED TO MAKE SUCH A RECORD.
22 THE COURT: WELL, AS I INDICATED TO YOU
23 YESTERDAY, THE PURPOSE OF THE COURT'S INQUIRY IS TO
24 OBTAIN INFORMATION TO ASSIST IT IN MAKING DECISIONS ON
25 VARIOUS MOTIONS THAT KEEP BEING MADE HERE, ONE AFTER
26 ANOTHER. AND ONE LAWYER SITS DOWN, SOMEONE ELSE STANDS
27 UP TO MAKE ANOTHER MOTION.
28 AND I -- NOT JUST YESTERDAY. I INDICATED

-11303

1 THIS TO YOU FRIDAY -- THAT IN ORDER FOR THE COURT TO
2 EVALUATE THE MERITS OF SOME OF THESE MOTIONS, I NEED
3 MORE INFORMATION. HOWEVER, THESE ARE MOTIONS THAT DEAL
4 WITH EFFORTS TO TERMINATE THESE PROCEEDINGS. AND AS
5 SUCH, THE COURT HAS NO INTENTION OF OBTAINING THIS
6 INFORMATION IN CAMERA EX PARTE FROM YOU AND EXCLUDING --
7 WITH THE EXCLUSION OF THE PROSECUTION. THESE ARE
8 MATTERS THAT HAVE TO BE DEALT WITH WITH FULL
9 PARTICIPATION OF THE PROSECUTION, BECAUSE THEY ARE
10 MATTERS DEALING WITH MOTIONS TO TERMINATE. THIS IS A

11 VERY LENGTHY PROSECUTION. BY WAY OF MOTION FOR
12 MISTRIAL, AT LEAST ON BEHALF OF ONE DEFENDANT, IF NOT
13 BOTH, OR FOR REMOVAL OF COUNSEL AT THE REQUEST OF ONE
14 LAWYER OR ANOTHER, THESE ARE MATTERS THAT SHOULD BE DONE
15 IN OPEN COURT.

16 MS. ABRAMSON: I AM NOT ADDRESSING SPECIFICALLY
17 THOSE MOTIONS, THOUGH, YOUR HONOR. I THINK WITH RESPECT
18 TO THE IN LIMINE MOTION, SPECIFICALLY, AND WHETHER OR
19 NOT -- I AM NOT TALKING ABOUT TO INFORM THE COURT FOR
20 THE BASIS OF MISTRIAL MOTIONS. I AM TALKING SOLELY
21 ABOUT THE PURPOSE OF THE IN LIMINE MOTIONS FOR THE COURT
22 TO ASSESS WHETHER OR NOT THE PROSECUTION SHOULD BE
23 PERMITTED TO CONTINUE TO GO INTO THIS AREA FOR THAT
24 PURPOSE. THE COURT SHOULD BE IN A POSITION TO ASSESS
25 WHAT THE REAL NATURE OF THE CONDUCT OR MISCONDUCT, IF
26 THERE WAS ANY HERE, IS.

27 IT MAY ALL BE RESOLVABLE IN THE COURT'S
28 MIND AS A DISCOVERY VIOLATION AND THAT WOULD BE SO

-11302

1 INSTRUCTED TO THE JURY, AND THEIR ATTENTION WOULD BE
2 DIRECTED TOWARDS THE PROPER WAY TO EVALUATE AND WEIGH
3 THAT KIND OF ISSUE, BECAUSE WE ARE NOT TALKING ABOUT A
4 SITUATION WHERE ANY PERJURED TESTIMONY WAS PRESENTED.
5 WE ARE NOT TALKING ABOUT A SITUATION WHERE ANY DOCUMENT
6 WAS ADMITTED INTO EVIDENCE THAT WAS IN ANY WAY TAMPERED

7 WITH. WE'RE NOT TALKING ABOUT A SITUATION WHICH IS
8 BEFORE THIS JURY THAT ANYBODY TESTIFIED WHO WAS NOT IN
9 POSSESSION OF THE FULL AND COMPLETE RECORD IN THE GUILT
10 PHASE. THAT INCLUDES DR. WILSON AND DR. DIETZ.

11 SO I THINK IT HAS TO BE PUT IN CONTEXT.

12 AND FOR THE COURT TO MAKE THESE KIND OF RULINGS, IN
13 LIMINE RULINGS, WHICH DO NOT RESULT IN THE TERMINATION
14 OF THE CASE OR THE END OF ANYONE'S RIGHTS, THAT IT WOULD
15 BE APPROPRIATE TO GO IN CAMERA TO EXPLAIN THESE MATTERS.

16 THE COURT: WELL, YOU MADE ALL THESE STATEMENTS
17 AS CONCLUSIONS THAT THESE THINGS HAPPENED IN A CERTAIN
18 WAY. AND IF THAT'S THE SITUATION, THEN THAT SHOULD BE
19 PRESENTED TO THE PROSECUTION AND DEFENSE COUNSEL FOR THE
20 CO-DEFENDANT SO THEY ARE IN A POSITION TO EVALUATE THESE
21 MATTERS AS WELL.

22 I JUST DON'T SEE HOW ANY OF THIS IS SUBJECT
23 TO IN CAMERA PROCEEDINGS. THESE ARE ALL MATTERS THAT
24 CONCERN ISSUES THAT ARE SIGNIFICANT TO THE CO-DEFENDANT,
25 ARE SIGNIFICANT TO THE PROSECUTION, AND RELATE TO THE
26 MOTIONS THAT HAVE BEEN BROUGHT BY COUNSEL FOR THE
27 CO-DEFENDANT AND THE -- AND ACTUALLY BY MR. LEVIN AS
28 WELL, AT LEAST THE ONE HE'S INDICATED HE WOULD LIKE TO

-11301

1 MAKE.

2 AND THE RECORD SHOULD INDICATE THAT AT NO

3 TIME HAS THE COURT ENDEAVORED IN CAMERA TO OBTAIN MORE
4 INFORMATION FROM MS. ABRAMSON, OR ANYONE ELSE, ON THESE
5 PARTICULAR SUBJECTS, BUT THAT THESE ARE MATTERS THAT
6 SHOULD BE DEALT WITH IN OPEN COURT, AND THE COURT HAS
7 RESERVED THAT INQUIRY UNTIL OTHER MATTERS RELATING TO
8 ISSUES ARE BROUGHT TO THE ATTENTION OF THE COURT BY ERIK
9 MENENDEZ COULD BE DISCUSSED.

10 AND NOW WE'RE READY TO PROCEED WITH THIS.
11 SO GETTING BACK TO MR. CONN AND MY INQUIRY OF YOU AS TO
12 WHAT ELSE WAS IT THAT YOU WANTED TO ACCOMPLISH OTHER
13 THAN IMPEACH DR. VICARY.

14 MR. CONN: YES.

15 MS. ABRAMSON: EXCUSE ME, YOUR HONOR, BEFORE -- I
16 REALIZE -- I REALIZE I AM STEPPING ON THE COURT'S
17 PATIENCE, BUT BEFORE MR. CONN ANSWERS, WE HAVE AN
18 OBJECTION TO A DISCUSSION OF THE SPECIFICS.

19 MR. CONN HAS INDICATED TO CO-COUNSEL
20 YESTERDAY THAT HE INTENDED TO GO INTO, FOR WHICHEVER
21 PURPOSE, EVERYTHING THAT IS CIRCLED ON THE SET OF
22 ORIGINAL NOTES THAT MR. CONN FILED WITH THE COURT.

23 WE ARE CONCERNED THAT THE SUBJECT MATTER --
24 THE ACTUAL WORDS THAT ARE CIRCLED, MANY OF THEM IN MOST
25 OF THESE AREAS WE BELIEVE SHOULD NOT BE REVEALED ON THE
26 RECORD IN PUBLIC FOR THE RIGHTS OF VARIOUS INDIVIDUALS,
27 THIRD PARTIES AS WELL AS MY CLIENT.

28 AND SO WE WOULD ASK TO CONDUCT -- BECAUSE

1 THESE ARE VERY SENSITIVE MATTERS AND DO IMPLICATE
2 THIRD-PARTY PRIVACY RIGHTS. THERE ARE ALSO MATTERS THAT
3 IMPLICATE PRIVILEGE.

4 AND SO WE WOULD ASK THAT BEFORE COUNSEL FOR
5 THE PEOPLE BE PERMITTED TO GET INTO FACTS OR DETAILS OR
6 DESCRIPTIONS OF THESE MATTERS, THAT THE PUBLIC BE
7 EXCLUDED.

8 THE COURT: WELL, AS FAR AS ANY INQUIRIES
9 REGARDING REFERENCE TO SEXUAL ACTIVITY, WHAT I WOULD
10 SAY, MR. CONN, IS THAT YOU NOT IDENTIFY OTHER
11 INDIVIDUALS BY NAME AT THIS POINT TO PROTECT THEIR RIGHT
12 OF PRIVACY, BUT JUST REFER TO THE GENERAL SUBJECT MATTER
13 SO THAT WE CAN HAVE A BASIS FOR A DISCUSSION.

14 MR. CONN: YES.

15 PART OF THE PROBLEM AT THIS TIME IN
16 REPRESENTING TO THE COURT EXACTLY WHAT WE INTEND TO GO
17 INTO IS THAT THIS WITNESS IS, AFTER ALL, A DEFENSE
18 WITNESS, AND WE ARE IN THE PROCESS OF CROSS-EXAMINING
19 THIS DEFENSE WITNESS.

20 MOREOVER, WE HAVE NOTES HERE THAT WE HAVE
21 JUST OBTAINED FROM THE WITNESS, AND WE HAVE THE PROBLEM
22 OR THE HANDICAP OF TRYING TO INTERPRET THE NOTES, TRYING
23 TO UNDERSTAND WHAT THEY MEAN. AND SO WE'RE STILL
24 SOMEWHAT SHOOTING IN THE DARK HERE UNTIL WE HAVE AN
25 OPPORTUNITY TO CROSS-EXAMINE THE WITNESS CONCERNING THE
26 NOTES AND THE -- HIS RECOLLECTION CONCERNING THE VARIOUS
27 SUBJECTS THAT WERE DISCUSSED BY ERIK MENENDEZ. WE'RE

-11299

1 OF SOME OF THIS MATERIAL IS.

2 SO BEARING THAT IN MIND, I CAN REPRESENT TO
3 THE COURT AS BEST AS I CAN DETERMINE AT THIS TIME WHAT I
4 REGARD TO BE AREAS IN WHICH INQUIRY OF THE WITNESS IS
5 NECESSARY. BUT, OF COURSE, IT'S CONTINGENT TO WHAT HIS
6 ANSWERS WOULD BE IN REGARD TO EACH OF THESE MATTERS.

7 THE COURT: OKAY. WE'LL ASK THAT DR. VICARY STEP
8 OUTSIDE DURING THESE DISCUSSIONS.

9 (DR. VICARY EXITS THE COURTROOM.)

10

11 THE COURT: OKAY.

12 MR. CONN: IT'S MY UNDERSTANDING THAT DR. VICARY
13 REWROTE 10 PAGES OF HIS NOTES, AND WE INTEND TO GET INTO
14 EACH AND EVERY ONE OF THE 10 PAGES TO INQUIRE OF HIM THE
15 REASONS FOR REWRITING THOSE 10 PAGES. AND ON THOSE 10
16 PAGES I SEE APPROXIMATELY 24 AREAS OF INQUIRY THAT WOULD
17 BE NECESSARY TO QUESTION HIM IN REGARD TO.

18 WE START ON PAGE 7 OF THE NOTES. IT
19 APPEARS TO BE AT THE TOP OF THE PAGE.

20 MS. ABRAMSON: YOUR HONOR, WE WOULD OBJECT TO
21 THIS. THIS IS A MATTER THAT WE'RE ASSERTING A PRIVILEGE
22 ON.

23 MR. GESSLER: AND ALSO AS TO THE TOP LINE ON

24 BEHALF OF LYLE MENENDEZ, YOUR HONOR.
25 MS. ABRAMSON: IN FACT, I DON'T THINK THAT -- I
26 WOULD LIKE TO BE HEARD IN CAMERA ONLY ON THIS TO EXPLAIN
27 WHAT THIS MEANS TO THE COURT, SO THAT THE COURT CAN
28 UNDERSTAND WHY THERE IS A PROPER ASSERTION OF PRIVILEGE

-11298

1 AS TO THIS MATERIAL, AND I WOULD ASK LEAVE OF COURT. IT
2 WOULD TAKE TWO MINUTES TO DO THIS.

3 THE COURT: WELL, I CAN SEE THE REFERENCE, SO WHY
4 DON'T YOU GO ON TO SOMETHING ELSE, AND WE'LL DOUBLE BACK
5 ON THAT. IT'S SOMETHING WE CAN FOCUS ON IN A LITTLE
6 BIT.

7 MS. ABRAMSON: THANK YOU, YOUR HONOR.

8 MR. CONN: ALL RIGHT. THE TOP OF THE PAGE IS ONE
9 AREA IN WHICH WE WOULD NEED TO INQUIRE OF DR. VICARY, I
10 BELIEVE, THAT IS RELEVANT.

11 IN THE MIDDLE OF THE PAGE THERE IS A
12 REFERENCE TO MID-AUGUST -- WHAT APPEARS TO BE A
13 REFERENCE TO SOMETHING OCCURRING ON AUGUST THE 7TH, I
14 BELIEVE. I DON'T KNOW WHAT THAT WORD IS THAT APPEARS
15 BEFORE THAT. PERHAPS "ENDED." I'M NOT SURE.

16 AGAIN, THIS IS AN AREA IN WHICH WE WOULD
17 HAVE TO INQUIRE OF DR. VICARY. WHAT DOES THAT NOTATION
18 SAY, WHAT WAS THE MEANING OF THAT, WHAT WAS THE CONTEXT
19 AND WHAT WAS THE REASON WHY HE FELT IT NECESSARY --

20 EITHER HE OR MS. ABRAMSON FOUND IT NECESSARY TO DELETE
21 IT FROM HIS NOTES AND REWRITE HIS NOTES WITH THAT
22 DELETED?

23 AT THE BOTTOM OF THE PAGE THERE APPEARS TO
24 BE A REFERENCE TO ERIK MENENDEZ TELLING DR. VICARY THAT
25 HIS FATHER TOLD HIM THAT HE HAD PLAYED LIKE AN ASS.

26 PRESUMABLY THAT REFERS TO HIS PERFORMANCE
27 AT KALAMAZOO. THAT IS AN AREA THAT WE WANT TO INQUIRE.
28 IT IS IMMEDIATELY FOLLOWED BY A -- WHAT APPEARS TO BE A

-11297

1 STATEMENT THAT ERIK MENENDEZ WANTED TO GO ON A TOUR, AND
2 HIS FATHER TOLD HIM NO.

3 I THINK THAT THIS IS RELEVANT BECAUSE IT
4 DEMONSTRATES THE INTEREST OF ERIK MENENDEZ IN CONTINUING
5 TO PLAY TENNIS.

6 THE COURT: HADN'T YOU ALREADY GONE INTO THAT ON
7 THURSDAY?

8 MS. ABRAMSON: YES. YES, HE DID.

9 MR. CONN: I DON'T BELIEVE --

10 THE COURT: YOU HAD ASKED THAT QUESTION ON THAT
11 PARTICULAR MATTER. I DON'T KNOW IF YOU ASKED WHY THERE
12 WAS A DELETION, BUT YOU CERTAINLY ASKED THE QUESTION
13 ABOUT THE TOUR.

14 MR. CONN: YES, YES. THE COURT IS CORRECT. I
15 DID ESTABLISH THAT THIS WAS A STATEMENT MADE BY ERIK

16 MENENDEZ. I DID NOT ESTABLISH THAT THIS WAS AN AREA
17 THAT WAS DELETED.
18 SO I WILL -- IT WILL BE MY INTENTION TO
19 ESTABLISH THROUGH DR. VICARY THAT THIS WAS SOMETHING
20 THAT WAS DELETED FROM HIS NOTES. I THINK THAT'S
21 RELEVANT TO DEMONSTRATE THAT THIS APPARENTLY IS
22 SOMETHING WHICH IMPEACHES ERIK MENENDEZ, BECAUSE HE
23 MADE -- IT APPEARED AS IF HE WASN'T PARTICULARLY
24 CONCERNED THAT HE WOULD NOT BE PLAYING TENNIS. IN HIS
25 TESTIMONY HE MADE IT SOUND AS IF, WELL, NOW, HE JUST HAD
26 A LOAD OFF HIS MIND. HE DIDN'T HAVE TO PLEASE HIS
27 FATHER ANYMORE AS FAR AS TENNIS IS CONCERNED.
28 I THINK THAT ALL OF HIS STATEMENTS

-11296

1 CONCERNING TENNIS AND ALL OF THE DELETIONS IN HIS NOTES
2 REFERRING TO TENNIS IMPEACHES ERIK MENENDEZ, BECAUSE IT
3 DEMONSTRATES THAT HE WAS VERY MUCH CONCERNED ABOUT
4 PLAYING TENNIS, AND VERY MUCH WANTED TO CONTINUE PLAYING
5 TENNIS, CONTRARY --
6 THE COURT: OKAY, ALL RIGHT. THAT'S A SEPARATE
7 ISSUE FROM GOING INTO THE REASON FOR THE DELETION OR THE
8 FACT IT WAS DELETED.
9 MR. CONN: ONE --
10 THE COURT: BECAUSE WHAT YOU'RE SAYING IS, WELL,
11 DR. VICARY, YOU DELETED IT; THEREFORE, IN YOUR MIND IT

12 WAS A SIGNIFICANT THING AND YOU HAD A CERTAIN
13 INTERPRETATION ABOUT IT OR OF IT. AND THEN SO YOU'RE
14 ASKING THE JURY TO DRAW THE INFERENCE THAT THE WITNESS
15 THOUGHT IT WAS SIGNIFICANT; THEREFORE, IT IS
16 SIGNIFICANT, AND THE JURY SHOULD THINK IT SIGNIFICANT;
17 IN ADDITION TO YOUR OTHER ARGUMENT, THAT IT SHOWS THAT
18 THE WITNESS WAS TRYING TO PROTECT THE DEFENDANT OR DO
19 THINGS TO SHOW BIAS.

20 SO THERE ARE TWO WAYS THAT THOSE DELETIONS
21 AND THE REASONS FOR THOSE DELETIONS CAN BE USED BY THE
22 JURY, ONE OF WHICH COULD BE PERMISSIBLE, ONE WHICH WOULD
23 NOT.

24 MR. CONN: I'M SORRY. THE COURT IS REFERRING TO
25 WHICH AS BEING THE PERMISSIBLE, YOU SAID?

26 THE COURT: WELL, THE PERMISSIBLE SHOWING THE
27 WITNESS IS SHOWING BIAS. BUT IT'S IMPERMISSIBLE TO DRAW
28 THE CONCLUSION THAT THIS WITNESS THINKS SOMETHING IS

-11295

1 SIGNIFICANT; AND THEREFORE, THE JURY SHOULD THINK IT'S
2 SIGNIFICANT, BECAUSE THAT'S JUST THIS WITNESS' OPINION.

3 MR. CONN: I HAVE ONLY ASKED THE WITNESS WHETHER
4 HE REGARDED IT AS SIGNIFICANT. APPARENTLY HE DID REGARD
5 IT AS SUFFICIENTLY SIGNIFICANT THAT HE WOULD FIND IT
6 NECESSARY TO PUT IT DOWN IN HIS NOTES.

7 THE COURT: OKAY. THEN I HAVE TO BALANCE THAT

8 AGAINST THE POTENTIAL THAT THE WITNESS WILL SAY, "I DID
9 IT AT MS. ABRAMSON'S DIRECTION," AND THEN THE FALL-OFF,
10 OR THE IMPACT OF THAT AND THE PREJUDICE AFTER THAT
11 VERSUS ITS PROBATIVE VALUE.

12 SO LET'S MOVE ON. I THINK WE WILL HAVE THE
13 SAME DISCUSSION ON SOME OF THESE OTHERS, BUT LET'S MOVE
14 ON.

15 MR. CONN: ALL RIGHT. TURNING TO PAGE 18, I
16 BELIEVE THAT IS THE NEXT AREA IN WHICH THERE APPEARS TO
17 BE SOME DELETIONS FROM HIS NOTES.

18 THE FIRST REFERENCE IS THAT IN THE BOTTOM
19 HALF OF THE PAGE THAT HE DID HAVE DISCUSSIONS WITH HIS
20 BROTHER AS TO WHETHER OR NOT -- OR AS TO WHAT LIFE WOULD
21 BE LIKE WITHOUT HIS PARENTS. THAT'S AN AREA I THINK
22 THAT THE COURT HAS TAKEN UNDER SUBMISSION AS TO WHETHER
23 OR NOT THE PROSECUTION WILL BE ABLE TO ELICIT FROM THE
24 WITNESS THE FACT THAT HE HAD THOSE CONVERSATIONS WITH
25 HIS BROTHER.

26 THE ONLY THING THAT THE JURY HAS HEARD AT
27 THIS POINT IS THAT HE DID, IN FACT, HAVE CONVERSATIONS
28 CONCERNING WHAT IT WOULD BE LIKE WITHOUT HIS PARENTS.

-11294

1 SO WE WOULD WANT TO ESTABLISH FURTHER FROM
2 THIS JURY THAT HE HAD THOSE CONVERSATIONS WITH LYLE
3 MENENDEZ, THE FACT THAT THIS WAS, IN FACT, DELETED FROM

4 HIS NOTES, AND THE REASONS FOR THAT DELETION.

5 MR. GESSLER: WE RENEW OUR OBJECTION AS
6 PREVIOUSLY MADE, YOUR HONOR, CONCERNING LYLE MENENDEZ.

7 MR. CONN: THE NEXT REFERENCE IS TO LYLE MENENDEZ
8 HAVING A TOUPEE FOR HIS THIN HAIR, AND THAT HIS FATHER
9 WOULD NO LONGER PAY FOR THE COST.

10 THE COURT: YOU SAID ON FRIDAY THAT YOU WEREN'T
11 GOING TO GO INTO THAT.

12 MR. CONN: HOWEVER, I AM AWAITING THE COURT'S
13 RULING CONCERNING WHETHER OR NOT THE COURT IS GOING TO
14 ALLOW THE REFERENCES BY ERIK MENENDEZ TO HIS BROTHER,
15 LYLE MENENDEZ, BASED UPON OUR THEORY THAT SUCH
16 REFERENCES ARE ADMISSIBLE, BECAUSE THE DEFENSE WOULD
17 THEN BE ABLE TO RECALL ERIK MENENDEZ TO THE STAND AND --
18 FOR FURTHER CROSS-EXAMINATION.

19 SO I KNOW I INDICATED TO THE COURT I WAS
20 NOT INTENDING IT AT THAT TIME; HOWEVER, ONCE AGAIN, MY
21 CONCERN ABOUT THESE AREAS IS THAT DR. VICARY RE-EXPLAIN
22 TO THE JURY THE REASON FOR THE DELETIONS.

23 NOW, THE PROBLEM WITH GIVING AN OFFER OF
24 PROOF IN A VACUUM, AND HOW I THINK THIS WHOLE SCENARIO
25 IS GOING TO PLAY OUT, IS THAT I SIMPLY DON'T HAVE THE
26 INFORMATION AT THIS TIME. I DON'T KNOW WHAT HIS ANSWERS
27 ARE GOING TO BE FOR THESE VARIOUS AREAS.

28 NOW, IT CAN BE -- AND I THINK I GOT A HINT

1 OF IT YESTERDAY -- THAT HE IS SUGGESTING THAT HE DELETED
2 ALL REFERENCES TO LYLE MENENDEZ BECAUSE HE THOUGHT THAT
3 THAT WOULD BE UNFAIR.

4 WELL, THAT IS SIMPLY NOT THE CASE. THE
5 NOTES CONTAIN NUMEROUS REFERENCES TO LYLE MENENDEZ, SOME
6 WHICH PERHAPS HELP THE DEFENDANT, SOME OF WHICH HURT THE
7 DEFENDANT.

8 AND I THINK THAT THIS IS THE PERFECT
9 EXAMPLE OF SOMETHING -- OF THE INADEQUACY OF HIS ANSWER
10 IN THAT REGARD.

11 SO I THINK THAT IT MAY BE NECESSARY,
12 DEPENDING UPON HOW HE ANSWERS QUESTIONS CONCERNING THE
13 REASONS FOR THE DELETIONS, TO GET INTO THESE AREAS.

14 MR. GESSLER: WE RAISE THE SAME OBJECTION, YOUR
15 HONOR, UNDER PEOPLE VERSUS ANDERSON, AS ON THE EARLIER
16 ASPECTS OF THIS, AS MENTIONED TO THE COURT,
17 ARANDA-BRUTON ERROR AS TO HOW THIS CONVERSATION CAME
18 BACK AFFECTING LYLE MENENDEZ. AND IF YOU WANT TO, WE
19 CAN GET INTO THOSE CASES THE PEOPLE CITED AT THIS TIME.
20 OR IF YOU WANT, WE CAN DEFER THAT DISCUSSION.

21 THE COURT: NO. WE WILL HOLD OFF UNTIL WE GET A
22 LITTLE FURTHER ALONG IN THE OFFER HERE.

23 MR. CONN: THE NEXT AREA ON THE VERY SAME PAGE IS
24 THAT ERIK MENENDEZ SEEMED TO HAVE SAID TO DR. VICARY
25 THAT THERE WAS DRUG MONEY GOING THROUGH HIS FATHER'S
26 BUSINESS. I THINK THE REFERENCE THERE WAS THAT HIS
27 FATHER KNEW, WITHOUT ACTUALLY KNOWING. THAT'S MY
28 INTERPRETATION OF HIS NOTES. BUT AGAIN, I DON'T KNOW

1 WHAT THIS NOTE MEANS.

2 THE COURT: WHICH PAGE?

3 MR. LEVIN: WHICH PAGE, DAVID?

4 MR. CONN: EIGHTEEN, WHAT APPEARS TO BE THE THIRD
5 PARAGRAPH THAT WAS DELETED ON THE BOTTOM OF THE PAGE.

6 AND THIS IS SOMETHING I THINK IS RELEVANT
7 TO QUESTION DR. VICARY, NOT ONLY AS TO THE REASONS WHY
8 HE DECIDED IT WAS NECESSARY TO DELETE THIS, BUT ALSO I
9 THINK THAT IT DOES, IN FACT, IMPEACH ERIK MENENDEZ,
10 BECAUSE -- I DON'T KNOW THAT ERIK MENENDEZ WAS
11 SPECIFICALLY ASKED THAT QUESTION IN HIS
12 CROSS-EXAMINATION, BUT I THINK THAT THIS GOES TO HIS
13 KNOWLEDGE CONCERNING THE NATURE OF HIS FATHER'S BUSINESS
14 AND WHETHER OR NOT HIS FATHER WAS INVOLVED IN ANY
15 ILLEGAL ACTIVITIES.

16 MS. ABRAMSON: WELL, YOUR HONOR, I THINK THERE IS
17 NO -- THERE IS NO GROUNDS FOR INTRODUCING THIS AS
18 IMPEACHMENT OF ANYTHING ERIK MENENDEZ SAID OR DIDN'T SAY
19 AND --

20 THE COURT: ALL RIGHT. LET'S -- I AM JUST
21 HEARING THE PEOPLE'S OFFER AT THIS POINT.

22 WHAT ELSE, MR. CONN?

23 MR. CONN: YES. AND THE OTHER REASON IS THAT
24 ERIK MENENDEZ -- IT IS OUR THEORY, AND HAS BEEN OUR
25 THEORY RIGHT FROM THE START, THAT ERIK MENENDEZ AND LYLE

26 MENENDEZ SET THIS CRIME UP TO MAKE IT APPEAR AS IF THE
27 MAFIA WAS COMMITTING THIS CRIME. WELL, HERE THIS IS
28 PART OF HIS EFFORTS TO TRY TO PIN IT ON THE MAFIA BY

-11291

1 SAYING THAT THERE WAS DRUG MONEY GOING THROUGH HIS
2 FATHER'S BUSINESS, SOMETHING OF WHICH HE WOULD HAVE NO
3 KNOWLEDGE WHATSOEVER.
4 SO AGAIN, I THINK THIS IMPEACHES THE
5 CREDIBILITY OF ERIK MENENDEZ, TENDS TO SHOW HIS DESIRE
6 TO SET THIS UP AS A MAFIA KILLING. AND I SUBMIT THAT
7 THAT IS THE REASON WHY DR. VICARY AND/OR LESLIE ABRAMSON
8 DELETED THIS FROM THE NOTES, BECAUSE THEY WANTED TO
9 REMOVE ALL INDICATIONS THAT ERIK MENENDEZ WAS TRYING TO
10 PIN THIS ON THE MAFIA.

11 THE FOURTH PARAGRAPH --

12 MS. ABRAMSON: YOUR HONOR, JUST BRIEFLY, THAT'S
13 UTTERLY ABSURD.

14 THE COURT: I DON'T WANT TO HEAR ARGUMENT.

15 WHAT IS THE NEXT ONE?

16 MR. CONN: YES. THE FOURTH PARAGRAPH ON PAGE 18
17 ALSO GETS INTO THE SAME AREA. IT SAYS HERE THAT "BOUGHT
18 STRAWBERRY." PRESUMABLY THAT REFERS TO THE INVOLVEMENT
19 OF JOSE MENENDEZ IN THE PURCHASE OF THE COMPANY KNOWN AS
20 "STRAWBERRIES," AND THREW OUT MAFIA PEOPLE.

21 ONCE AGAIN, THIS TENDS TO SHOW ERIK

22 MENENDEZ' EFFORTS TO TRY TO CREATE DISPUTE BETWEEN
23 MEMBERS OF ORGANIZED CRIME AND HIS FATHER, AND THAT
24 DR. VICARY APPARENTLY, THROUGHOUT THESE NOTES, DESTROYED
25 THESE NOTES BECAUSE HE WANTS TO DESTROY ALL EVIDENCE OF
26 ERIK MENENDEZ SEEKING TO BLAME THIS CRIME ON THE MAFIA.
27 THE COURT: WELL, IN THE NOTES AREN'T THERE
28 REFERENCES TO ERIK MENENDEZ CLAIMING RESPONSIBILITY FOR

-11290

1 KILLING THE PARENTS? SO --
2 MR. CONN: YES, AT DIFFERENT TIMES.
3 THE COURT: WELL, AT TIMES BEFORE THESE
4 REFERENCES THAT YOU'RE TALKING ABOUT?
5 MR. CONN: YES. I THINK THAT THOSE REFERENCES
6 COME SOME TIME LATER.
7 BUT ALSO, ALTHOUGH ERIK MENENDEZ DOES, IN
8 FACT, MAKE THAT CLAIM, I THINK IT'LL BE NECESSARY TO
9 EXAMINE THE WITNESS CONCERNING PRECISELY WHEN THOSE
10 CLAIMS WERE MADE, AND THE CONTEXT IN WHICH ERIK MENENDEZ
11 WAS MAKING REFERENCES TO CONFLICTS BETWEEN HIS FATHER
12 AND THE MAFIA.
13 THE COURT: ALL RIGHT. LET ME STOP HERE, THEN.
14 I THINK WE'RE GOING TO HAVE TO TAKE SOME TESTIMONY FROM
15 THE WITNESS OUTSIDE THE PRESENCE OF THE JURY TO SEE
16 WHERE SOME OF THIS GOES.
17 MS. ABRAMSON, YOU SAID YOU WANTED TO

18 WITHDRAW YOUR CLAIM OF PRIVILEGE AND EXPLAIN YOUR
19 PERSPECTIVE AS TO HOW THESE THINGS OCCURRED AS FAR AS
20 MODIFICATIONS AND HOW NOTES CAME TO BE IN POSSESSION OF
21 THE PROSECUTION.

22 MS. ABRAMSON: IN CAMERA, YOUR HONOR, YES.

23 THE COURT: I'M NOT GOING TO HEAR ANYTHING IN
24 CAMERA.

25 MS. ABRAMSON: WELL, MY CONCERN IS THAT THAT
26 IMPLICATES, THEN, MY CLIENT'S PRIVILEGES AND THE
27 ATTORNEY/CLIENT RELATIONSHIP AND THE WORK PRODUCT
28 PRIVILEGE, AND I CAN'T -- I BELIEVE IT WOULD CREATE AN

-11289

1 IRRECONCILABLE CONFLICT IF I WERE TO ANSWER THOSE
2 QUESTIONS IN FRONT OF THE PROSECUTION.

3 THE COURT: AN IRRECONCILABLE CONFLICT WITH WHAT?

4 MS. ABRAMSON: WITH MY CLIENT'S INTERESTS FOR ME
5 TO BECOME A WITNESS THAT THE PROSECUTION MIGHT BE ABLE
6 TO CALL BY GIVING THEM THAT INFORMATION IN OPEN COURT.

7 THE COURT: I DON'T PERCEIVE THE PROSECUTION
8 CHOOSING TO CALL YOU AS A WITNESS, BUT I'M NOT GOING TO
9 HEAR ANY OF YOUR OFFERS OF PROOF WITHOUT THE PROSECUTION
10 PRESENT.

11 MS. ABRAMSON: I UNDERSTOOD THAT.

12 THE COURT: AND THESE ARE MATTERS, IF YOU DON'T
13 WANT TO DISCLOSE THEM --

14 MS. ABRAMSON: I FEEL I CAN'T DISCLOSE THEM, YOUR
15 HONOR, UNDER THESE CIRCUMSTANCES. I CAN DISCLOSE THEM
16 TO THE COURT, AS I WOULD IN ANY -- IF I WERE TO COME TO
17 THE COURT IN CAMERA ON DISCOVERY ISSUES. IT'S UNDER
18 THAT SAME CONCEPT THAT I WOULD DISCLOSE THESE MATTERS TO
19 THE COURT.

20 THE COURT: WELL, NORMALLY IF THERE IS A
21 REDACTION OF MATERIAL FROM ANY DOCUMENT USED IN
22 LITIGATION, THE REDACTION IS NOTED ON IT, THE DOCUMENT,
23 WHERE REDACTIONS OCCUR. AND IF THERE IS A PRIVILEGED
24 REASON FOR THE REDACTION, THEN THAT IS DOCUMENTED IN
25 WRITING OR ORALLY ON THE RECORD PRIOR TO THE REDACTIONS
26 AND PRIOR TO THE USE OF MATERIAL SO THAT THE MATTER IS
27 OF RECORD PRIOR TO THE MATERIAL BEING USED.

28 AND SINCE THIS ALL WAS DISCLOSED ON

-11288

1 THURSDAY OF LAST WEEK DURING THE TESTIMONY OF
2 DR. VICARY, WE'RE WELL BEYOND ANY PROFFERS OF
3 EXPLANATIONS IN CAMERA OR UNDER SEAL OR ANY OTHER
4 FASHION. THESE ARE MATTERS NOW THAT DEAL WITH
5 SUBSTANTIAL RIGHTS OF BOTH YOUR CLIENT AND THE
6 CODEFENDANT AND THE PROSECUTION. THEY'VE ALREADY BEEN
7 DISCUSSED TO SOME EXTENT BY THE WITNESS IN OPEN COURT,
8 AND ANYTHING FURTHER ON THAT SUBJECT AGAIN WILL BE DONE
9 IN OPEN COURT.

10 AND IF YOU FAIL TO MAKE SUCH REPRESENTATION
11 BECAUSE YOU FEEL THAT IT WOULD NOT BE IN THE BEST
12 INTERESTS OF YOUR CLIENT TO WAIVE ANY OF THOSE RIGHTS,
13 THEN THE RECORD WILL BE AS IT HAS --

14 MS. ABRAMSON: I UNDERSTAND, YOUR HONOR.

15 THE COURT: --- BEEN PRESENTED TO THE COURT.

16 MS. ABRAMSON: THIS IS -- I AM AWARE OF THAT,
17 YOUR HONOR, AND I AM CONSIDERING ALL POSSIBLE OPTIONS SO
18 THAT THE COURT IS IN A POSITION TO HAVE AS MUCH
19 INFORMATION AS I CAN ETHICALLY GIVE IT. AND THERE MAY
20 BE THINGS THAT I CAN SAY, AND THERE MAY BE OTHER THINGS
21 I CANNOT SAY.

22 BUT I DON'T KNOW THAT WOULD SATISFY THE
23 COURT, AND I WANT TO CONSULT FURTHER WITH MY CO-COUNSEL,
24 WHO DOESN'T WANT ME TO SAY ANYTHING WHATSOEVER ABOUT
25 THIS, SO THAT I MAY BE IN A POSITION TO SAY SOME THINGS
26 AFTER LUNCH. IT JUST DEPENDS, YOUR HONOR.

27 AS THE COURT KNOWS, THERE IS VERY SERIOUS
28 CONCERNS BY MY CO-COUNSEL ABOUT MY DOING ANYTHING AT

-11287

1 THIS POINT, SO I AM TRYING TO DO WHAT'S IN THE BEST
2 INTERESTS OF MY CLIENT AS WELL AS I CAN PERCEIVE IT.
3 BUT THESE ARE VERY DIFFICULT ISSUES TO RESOLVE. I MAY
4 BE ABLE TO ANSWER SOME INQUIRIES OF THE COURT AND I MAY
5 NOT, BUT I AM CONSIDERING WHAT THE OPTIONS ARE, AND I DO

6 WANT TO CONSULT WITH CO-COUNSEL WHEN WE HAVE THE NEXT
7 BREAK ABOUT THAT VERY ISSUE, YOUR HONOR.

8 THE COURT: WELL, THIS THING HAS DRAGGED ON FOR
9 QUITE A PERIOD OF TIME --

10 MS. ABRAMSON: I KNOW.

11 THE COURT: -- AS MR. GESSLER OBSERVED, AND I
12 DON'T PROPOSE IT JUST TO KEEP LINGERING HERE. IT'S
13 GOING TO BE RESOLVED. EVERYBODY HAS HAD QUITE A BIT OF
14 TIME TO THINK ABOUT THESE ISSUES, AND NOTHING MUCH IS
15 GOING TO CHANGE.

16 MS. ABRAMSON: I THOUGHT WE WERE ABOUT TO TAKE
17 FURTHER TESTIMONY FROM THE WITNESS THOUGH, SO --

18 THE COURT: THAT'S TRUE, BUT IT'S GOING TO BE
19 TRUNCATED. WE'RE NOT GOING TO GO INTO GREAT DETAIL THAT
20 MIGHT OCCUR IN FRONT OF THE JURY, BUT WE WILL TAKE SOME
21 TESTIMONY. BUT DON'T BE SURPRISED IF YOU SEE THE JURY
22 OVER HERE THIS AFTERNOON, BECAUSE THEY WILL BE.

23 ALL RIGHT. LET'S GET THE WITNESS IN.

24 MR. LEVIN: YOUR HONOR, I WOULD OBJECT TO THE
25 COURT PROCEEDING FURTHER WITH THIS WITNESS UNTIL I
26 INDEPENDENTLY HAVE HAD AN OPPORTUNITY TO INTERVIEW HIM.
27 I HAVE AN INVESTIGATOR THAT I HAVE ASKED TO BE APPOINTED
28 THAT I BROUGHT TO COURT. I WANT TO INDEPENDENTLY TALK

1 TO DR. VICARY. I WANT TO BE PREPARED TO CONDUCT THE

2 CROSS-EXAMINATION OF HIM. AT THIS TIME I AM NOT

3 PREPARED TO PROCEED.

4 THE COURT: THAT REQUEST IS DENIED.

5 MR. LEVIN: AND I ALSO WANT TO STATE THAT I HAVE

6 NEVER TALKED TO DR. VICARY. I HAVE NO IDEA TO WHAT

7 MATTERS HE WILL BE TESTIFYING, NOR THE ANSWERS THAT HE

8 WILL BE GIVING. AND I AM FULLY AND COMPLETELY

9 INCOMPETENT TO CONDUCT ANY CROSS-EXAMINATION ON BEHALF

10 OF ERIK MENENDEZ ON BEHALF OF THIS WITNESS, AND I AM

11 ASKING FOR TIME.

12 THE COURT: ALL RIGHT. THAT REQUEST IS DENIED AT

13 THIS POINT. WE WILL DISCUSS THOSE ISSUES FURTHER IN

14 CONJUNCTION WITH OUR CONVERSATION YESTERDAY IF THE

15 MATTER IS REQUIRED.

16 MR. LEVIN: YOUR HONOR, I DON'T EVEN KNOW WHAT

17 OBJECTIONS TO PROPERLY LODGE OR MOTIONS THAT I COULD

18 PROPERLY BRING TO PERHAPS BENEFIT OR DEFEND MY CLIENT

19 WITH RESPECT TO THESE PROCEEDINGS. HE IS, IN ESSENCE,

20 PROCEEDING WITHOUT COUNSEL.

21 AND I AM AGAIN ASKING THE COURT FOR A VERY

22 BRIEF OPPORTUNITY TO MEET WITH DR. VICARY. I KNOW

23 PRECISELY WHAT THE ISSUES ARE. I WOULD LIKE BETWEEN NOW

24 AND THE LUNCH HOUR.

25 THE COURT: YOU WILL HAVE THE LUNCH HOUR TO DO

26 THAT, IF YOU CHOOSE, BUT WE'RE GOING TO GO AHEAD RIGHT

27 NOW AND HEAR WHAT HE HAS TO SAY.

28 MR. LEVIN: WELL, I OBJECT TO DR. VICARY'S

1 ATTENDANCE IN THE COURT TO TESTIFY TO ANY MATTERS BEFORE
2 I'VE HAD AN OPPORTUNITY TO INTERVIEW HIM.

3 THE COURT: OKAY. WELL, MS. ABRAMSON IS STILL
4 COUNSEL FOR ERIK MENENDEZ AND REPRESENTS HIM IN
5 CONJUNCTION WITH YOU.

6 MR. GESSLER: YOUR HONOR, AS TO LYLE, I SHOULD
7 ADVISE THE COURT THAT I HAVE TOLD DR. VICARY THAT THERE
8 IS PRIVILEGE THAT SHOULD NEVER BE WAIVED, AND I WOULD
9 ASK THE COURT TO REMIND HIM OF THAT WHEN HE IS ON THE
10 STAND, THAT HE HAS NO RIGHT TO WAIVE ANY PRIVILEGES OF
11 LYLE MENENDEZ IN THIS MATTER.

12 THE COURT: ALL RIGHT.

13 MR. LEVIN: YOUR HONOR, FROM WHAT I PERCEIVE TO
14 BE POTENTIAL FUTURE CONFLICTS, I AM ASKING TO PROCEED
15 WITH RESPECT TO CONDUCTING ANY FURTHER EXAMINATION OR
16 THE MAKING OF OBJECTIONS WITH THIS WITNESS, BEGINNING
17 WITH THE OBJECTION THAT I JUST LODGED, AND DISAGREEING
18 WITH THE COURT THAT MS. ABRAMSON WILL BE CONDUCTING ANY
19 EXAMINATION WITH THIS WITNESS.

20 THE COURT: OKAY. HAVE YOU AND MS. ABRAMSON
21 CONFERRED ON THE SUBJECT AS TO WHO WOULD DO THE
22 EXAMINATION OF THE WITNESS?

23 MR. LEVIN: I HAVE -- WELL, I'VE INFORMED
24 MS. ABRAMSON THAT I SHOULD CONDUCT THE EXAMINATION. I
25 HAVE NOT BEEN --

26 THE COURT: I AM TALKING ABOUT IN THIS HEARING

27 RIGHT NOW, NOT BEFORE THE JURY.

28 MS. ABRAMSON: YOUR HONOR, IT WAS ANTICIPATED

-11284

1 THAT MR. LEVIN WOULD CONDUCT THE HEARING WITH THIS
2 WITNESS -- I MEAN, THE EXAMINATION OF THIS WITNESS IN
3 THIS HEARING, AND I WILL JOIN IN HIS REQUEST TO GIVE HIM
4 SOME TIME TO PREPARE TO DO THAT.

5 THE COURT: WELL, I AM NOT -- FIRST OF ALL, THE
6 PEOPLE ARE GOING TO TAKE SOME TIME TO QUESTION THE
7 WITNESS, AND THIS IS DELAY UPON DELAY UPON DELAY. AND
8 AT SOME POINT WE'RE JUST GOING TO START UP AGAIN AND
9 PROCEED, AND EVERY TIME A LAWYER POPS UP WITH ANOTHER
10 OBJECTION, IT JUST MEANS, IN MY MIND, ANOTHER REQUEST TO
11 DELAY. THAT'S ALL YOU'RE DOING.

12 MR. LEVIN: LET ME POP UP ONE MORE TIME, YOUR
13 HONOR.

14 THIS COURT TOLD ME LAST NIGHT THAT I SHOULD
15 BE READY TO PROCEED IN THESE MATTERS, WITH THE OBVIOUS
16 INDICATION THAT I WOULD BE PROCEEDING WITH RESPECT TO
17 ANY FUTURE MATTERS IN THIS CASE.

18 I CAME TO COURT BEFORE ANY MATTER BEGAN
19 THIS MORNING. THE VERY FIRST THING THAT I DID WAS
20 CONFER WITH INDEPENDENT -- AN INDEPENDENT INVESTIGATOR,
21 BECAUSE I PERCEIVED THAT THERE MIGHT BE PROBLEMS WITH
22 RESPECT TO ANY INTERVIEW CONDUCTED ON BEHALF OF

23 DR. VICARY BY MYSELF, IN THAT HE COULD POSSIBLY,
24 POTENTIALLY AND PROBABLY WOULD GIVE ME DIFFERENT ANSWERS
25 TO WHICH HE MIGHT TESTIFY IN FRONT OF THIS COURT OR IN
26 FRONT OF THE JURY.

27 I CONTACTED MY INVESTIGATOR. HE APPEARED
28 IN COURT THIS MORNING. I ASKED THIS COURT TO APPOINT MY

-11283

1 INVESTIGATOR SO THAT I COULD BEGIN THE PREPARATION OF
2 DR. VICARY. THE COURT TOLD ME NOT TO AGONIZE OVER THESE
3 PROBLEMS, AND TO BE PREPARED TODAY TO PROCEED. I HAVE
4 DONE SO. I SPENT A GREAT AMOUNT OF TIME LAST NIGHT
5 REVIEWING DOCUMENTS, GETTING PREPARED, TRYING TO COMPLY
6 WITH THE COURT'S WISHES.

7 I CAN DO NOTHING FURTHER BUT ASK THE COURT
8 FOR THE OPPORTUNITY TO CONDUCT AN INTERVIEW WITH THIS
9 WITNESS. I BELIEVE IT'S A CRITICAL STAGE IN THE
10 PROCEEDINGS. I NEED TO BE PREPARED. I NEED TO KNOW
11 WHAT OBJECTIONS MIGHT NEED TO BE LODGED. I NEED TO KNOW
12 WHAT THE WITNESS IS GOING TO SAY. THIS IS NOT A
13 DEPOSITION. THESE MATTERS ARE CRUCIAL TO THE DEFENSE OF
14 ERIK MENENDEZ.

15 AND GIVEN THE COURT'S PREVIOUS STATEMENTS
16 WITH RESPECT TO WHAT IT IS I AM TO DO, I THINK I HAVE
17 COMPLIED WITH ALL REQUESTS OF THIS COURT, AND THERE IS
18 VERY LITTLE THAT I CAN DO NOW TO PROTECT ERIK MENENDEZ'

19 RIGHTS EXCEPT ASK THE COURT FOR THIS TIME.
20 THE COURT: OKAY. AS FAR AS YOUR REMARKS JUST
21 NOW, YOU HAVE COMBINED REMARKS I MADE TO YOU YESTERDAY
22 WITH REMARKS I MADE TO YOU TODAY. THEY WERE MADE IN A
23 DIFFERENT CONTEXT. THE REMARKS YESTERDAY HAD TO DO WITH
24 THE POTENTIAL OF MS. ABRAMSON BEING REMOVED AS COUNSEL
25 FOR ERIK MENENDEZ AND YOU ASSUMING SOLE RESPONSIBILITY.
26 THAT HAS NOT RESULTED AS OF YET.

27 AND THIS MORNING YOUR REQUEST FOR THE
28 APPOINTMENT OF A PRIVATE INVESTIGATOR WAS DEEMED BY ME

-11282

1 PREMATURE, SINCE THAT ISSUE HAS NOT BEEN RESOLVED.
2 SO AT THIS POINT MS. ABRAMSON IS STILL
3 COUNSEL AND YOU ARE COUNSEL, AND YOUR REVIEW OF THE
4 MATERIALS AS FAR AS DR. VICARY'S NOTES AND TESTIMONY AND
5 THINGS OF THAT SORT THAT YOU DID WITH DILIGENCE IN
6 PREPARATION FOR TODAY'S PROCEEDINGS IN MY VIEW ARE
7 SUFFICIENT TO GET STARTED WITH THIS HEARING. AND AT
8 SOME POINT DURING THE LUNCH HOUR YOU CAN SEEK TO
9 INTERVIEW HIM.

10 MR. LEVIN: WELL, YOUR HONOR, I UNDERSTAND
11 THAT MS. ABRAMSON FEELS IT'S IN ERIK MENENDEZ' BEST
12 INTEREST THAT I PROCEED WITH THE EXAMINATION OF DR.
13 VICARY, AND THAT'S WHAT I UNDERSTAND HER TO BE SAYING.
14 AND IF THAT IS THE CASE, I AM UNPREPARED TO PROCEED WITH

15 ANY QUESTIONING OF DR. VICARY.

16 THE COURT: WELL, I UNDERSTAND THAT'S WHAT YOU'RE
17 SAYING, BUT I HAVE TO ASSUME THAT YOU'VE SPOKEN WITH
18 MS. ABRAMSON, YOU'VE SPOKEN WITH YOUR CLIENT, YOU'VE
19 READ THE MATERIALS. AND TO MY VIEW, THAT IS MORE THAN
20 SUFFICIENT PREPARATION FOR LISTENING TO THE PEOPLE'S
21 QUESTIONS AND BEGINNING YOUR CROSS-EXAMINATION, IF TIME
22 PERMITS, AND THEN INTERVIEWING HIM DURING THE LUNCH
23 HOUR. HE WAS AVAILABLE YESTERDAY. DR. VICARY WAS
24 AVAILABLE YESTERDAY, HE WAS AVAILABLE FRIDAY. AND
25 WHETHER YOU INTERVIEWED HIM BY YOURSELF OR WITH SOMEONE
26 ELSE PRESENT, HE CERTAINLY COULD HAVE BEEN INTERVIEWED
27 DURING THOSE TIMES AS WELL.
28 SO LET'S GET DR. VICARY IN HERE, PLEASE,

-11281

1 SOMEBODY.

2 MR. FITZGERALD: MAY I SEAT MYSELF IN THE JURY
3 BOX, YOUR HONOR?

4 THE COURT: YES.

5 OKAY. STATE YOUR NAME FOR THE RECORD,
6 PLEASE.

7 THE WITNESS: WILLIAM VICARY.

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

10

11 WILLIAM VICARY,
12 RECALLED AS A WITNESS UNDER EVIDENCE CODE SECTION 402,
13 RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:
14
15 CROSS-EXAMINATION
16 BY MR. CONN:
17 Q. DR. VICARY, SINCE LAST WEEK HAVE YOU HAD AN
18 OPPORTUNITY TO COMPARE YOUR ORIGINAL NOTES WITH THE
19 REVISED SET OF NOTES THAT YOU BROUGHT TO COURT THE OTHER
20 DAY?
21 A. YES.
22 Q. AND CAN YOU TELL US IF YOU MADE A
23 DETERMINATION AS TO THE NUMBER OF PAGES THAT YOU WROTE,
24 OR REWROTE, I SHOULD SAY, FROM YOUR ORIGINAL NOTES?
25 MR. LEVIN: YOUR HONOR, I OBJECT TO ANY FURTHER
26 QUESTIONING OF THIS WITNESS ON THE GROUNDS THAT I'VE
27 PREVIOUSLY STATED. IT'S A DENIAL OF MY CLIENT'S RIGHT
28 TO COUNSEL. I HAVE NO IDEA WHAT THIS WITNESSES IS GOING

-11280

1 TO SAY.
2 THE COURT: YOUR MOTION IS DENIED. YOU'VE
3 ALREADY SAID IT TWICE, SO HOW MANY TIMES DO YOU HAVE TO
4 SAY IT?
5 MR. LEVIN: WOULD YOU VIEW IT AS A CONTINUING
6 OBJECTION?

7 THE COURT: YOU'VE ALREADY STATED YOUR OBJECTION.

8 I DON'T HAVE TO VIEW IT AS A CONTINUING OBJECTION.

9 YOU'RE OBJECTING TO THE ENTIRETY OF THE WITNESS'

10 TESTIMONY UNTIL YOU HAVE A FURTHER OPPORTUNITY TO

11 PREPARE.

12 MR. LEVIN: I OBJECT. IT'S IRRELEVANT.

13 THE COURT: OVERRULED.

14 THE WITNESS: THE EXACT NUMBER OF PAGES?

15 Q. BY MR. CONN: YES. DO YOU KNOW -- OFFHAND,

16 DO YOU KNOW?

17 A. THE EXACT NUMBER?

18 Q. YES.

19 A. NO.

20 Q. ALL RIGHT. LET'S START ON PAGE 7 OF YOUR

21 NOTES.

22 DO YOU HAVE THAT IN FRONT OF YOU?

23 A. YES.

24 Q. AND I WOULD ASK YOU TO -- DO YOU ALSO HAVE

25 A COPY OF THE REVISED NOTES -- YOU HAVE THE REVISED

26 NOTES IN FRONT OF YOU NOW. THOSE ARE YOUR YELLOW COPY;

27 IS THAT CORRECT?

28 A. I HAVE BOTH IN FRONT OF ME.

-11279

1 Q. ALL RIGHT. LET'S START WITH PAGE NO. 7.

2 IS THAT A PAGE THAT --

3 MR. LEVIN: MAY I HAVE A MOMENT, YOUR HONOR?

4 THE COURT: SURE.

5 MS. ABRAMSON: YOUR HONOR, WITH RESPECT TO PAGE
6 7, WE DO HAVE THAT PRIVILEGED MATTER.

7 THE COURT: YES.

8 MR. LEVIN: PARTICULARLY AS TO THE FIRST PORTION,
9 YOUR HONOR.

10 THE COURT: THE TOP PORTION, YES.

11 MR. GESSLER: AND ALSO SEVEN LINES DOWN --
12 SEVENTH LINE, I BELIEVE.

13 THE COURT: THAT WAS NOT A REDACTED PORTION.

14 MR. LEVIN: ALL RIGHT.

15 MS. TOWERY: I THINK IT WAS, YOUR HONOR.

16 MR. GESSLER: IT'S IN THE CIRCLE.

17 MS. TOWERY: IT'S WITHIN THE CIRCLE.

18 SEVENTH LINE DOWN WITHIN THE CIRCLE.

19 THE COURT: YES.

20 MR. CONN: DOES THE COURT WISH ME TO SKIP OVER
21 THIS FIRST AREA OF REDACTION AT THIS TIME OR GO INTO IT
22 AT THIS TIME?

23 THE COURT: WELL, IF YOUR INQUIRY IS JUST IT WAS
24 REDACTED, YOU CAN DO THAT INQUIRY.

25 Q. MR. CONN: ALL RIGHT. I WOULD LIKE TO
26 DIRECT YOUR ATTENTION TO THE TOP OF PAGE 7.

27 DID YOU, IN FACT, REDACT THIS ENTIRE --
28 WHAT APPEARS TO BE APPROXIMATELY THE TOP ONE-THIRD OF

1 THE PAGE?

2 A. YES.

3 Q. OKAY. AND WHAT WAS YOUR REASON FOR DOING
4 THAT?

5 A. I WAS TOLD THAT THIS WAS PRIVILEGED
6 COMMUNICATION BETWEEN ERIK AND DR. OZIEL.

7 Q. AND WAS THAT TOLD TO YOU BY MS. ABRAMSON?
8 MR. LEVIN: OBJECTION. HEARSAY.

9 THE COURT: OVERRULED.

10 THE WITNESS: YES.

11 Q. BY MR. CONN: AND AFTER SHE MADE THAT
12 COMMENT TO YOU, DID YOU AGREE TO REWRITE THIS PAGE TO
13 ELIMINATE THAT FROM YOUR NOTES, OR DID YOU SUGGEST THAT
14 YOU SHOULD DO SO?

15 MR. GESSLER: OBJECTION. LEADING AND VAGUE,
16 REQUIRES HIM TO ADOPT ONE OR THE OTHER.

17 THE COURT: OVERRULED. OVERRULED.

18 THE WITNESS: NO, THAT WAS HER STATEMENT TO ME.

19 Q. BY MR. CONN: SO SHE ASKED YOU TO REWRITE
20 THE PAGE ELIMINATING THAT TOP ONE-THIRD OF THE PAGE?

21 MR. LEVIN: OBJECTION, HEARSAY.

22 THE COURT: OVERRULED.

23 THE WITNESS: YES.

24 Q. BY MR. CONN: DIRECTING YOUR ATTENTION TO
25 APPROXIMATELY THE MIDDLE OF THE PAGE, THERE APPEARS TO
26 BE REFERENCE TO MID-AUGUST. AM I READING THAT
27 CORRECTLY?

28 A. YES.

-11277

1 Q. AND CAN YOU READ THE REMAINDER OF THAT
2 LINE?

3 A. I THINK IT SAYS, "ENDED 8/7."

4 MR. LEVIN: OBJECTION, YOUR HONOR. THE WITNESS
5 IS ONLY ASKED TO READ IT, NOT RESPOND.

6 THE COURT: OVERRULED.

7 Q. BY MR. CONN: "ENDED 8/7"?

8 A. "ENDED 8/7."

9 Q. IS THAT SOMETHING THAT YOU DELETED WHEN YOU
10 WROTE THIS PAGE?

11 A. YES.

12 Q. DID MS. ABRAMSON ASK YOU TO DELETE THAT?

13 A. I DON'T THINK SO. I THINK I DELETED THAT
14 ON MY OWN BECAUSE WE COULDN'T FIGURE OUT WHAT IT MEANT.

15 Q. NOW, HAVE YOU EVER REWRITTEN PAGES FROM
16 YOUR NOTES AT THE REQUEST OF DEFENSE COUNSEL PRIOR TO
17 THIS OCCASION?

18 MR. LEVIN: OBJECTION. IRRELEVANT.

19 THE COURT: OVERRULED.

20 THE WITNESS: NO.

21 THE COURT: JUST CAN WE HAVE IT CLARIFIED AS TO
22 REWRITING OF THESE NOTES? DID YOU REWRITE THEM BECAUSE
23 THAT WAS YOUR DECISION OR WERE THEY ACTUALLY REWRITTEN

24 AT THE SUGGESTION OF SOMEONE ELSE?

25 THE WITNESS: AT THE SUGGESTION OF SOMEONE ELSE.

26 THE COURT: AND WHO WAS THAT?

27 THE WITNESS: MS. ABRAMSON.

28 THE COURT: SHE ACTUALLY ASKED YOU TO REWRITE,

-11276

1 RATHER THAN JUST TO BLOCK OUT OR BLACK OUT CERTAIN

2 MATERIALS?

3 THE WITNESS: THE INSTRUCTION WAS TO TAKE IT OUT.

4 I DON'T THINK IT WAS SPECIFICALLY HOW TO TAKE IT OUT.

5 BUT I MEAN, THERE'S ONLY SO MANY WAYS YOU COULD TAKE

6 ITEMS OUT.

7 THE COURT: WELL, WOULDN'T YOU AGREE THAT TO

8 REMOVE SOMETHING FROM YOUR NOTES SO THAT YOU COULDN'T

9 SEE IT, ONE WAY WOULD BE JUST TO BLACK IT OUT?

10 THE WITNESS: TO WHITE IT OUT? YES.

11 THE COURT: WHY DIDN'T YOU DO THAT?

12 THE WITNESS: IT NEVER OCCURRED TO ME.

13 THE COURT: WHY DIDN'T YOU BLACK IT OUT USING A

14 MARKER?

15 THE WITNESS: I SUPPOSE I COULD HAVE.

16 THE COURT: WHY DIDN'T YOU?

17 THE WITNESS: IT DIDN'T OCCUR TO ME TO DO IT THAT

18 WAY.

19 THE COURT: WHY DID IT OCCUR TO YOU TO REWRITE A

20 PAGE, RATHER THAN TO JUST REMOVE PORTIONS THAT YOU WERE
21 TOLD TO REMOVE?

22 THE WITNESS: WELL, I THINK ONE REASON WOULD BE
23 THAT IT WOULD LOOK SUSPICIOUS IF WE JUST WHITED OUT
24 LARGE SECTIONS.

25 MR. LEVIN: YOUR HONOR, I WOULD OBJECT TO ANY
26 FURTHER -- RESPECTFULLY OBJECT TO ANY FURTHER
27 QUESTIONING BY THIS COURT. I THINK THAT THE COURT IS
28 WELL BEYOND SEEKING CLARIFICATION OF AN ISSUE AND IS NOW

-11275

1 QUESTIONING THE WITNESS AS TO MATTERS THAT SHOULD BE
2 UNDERTAKEN BY THE PROSECUTION.

3 THE COURT: NO. THIS IS AN AREA OF APPROPRIATE
4 INQUIRY.

5 WHY WERE YOU CONCERNED ABOUT SOMETHING
6 LOOKING SUSPICIOUS IF IT WAS REMOVED?

7 THE WITNESS: WELL, THE WHOLE IDEA BEHIND THE
8 CHANGES THAT WERE DONE WAS THAT THIS INFORMATION WAS NOT
9 TO COME TO THE ATTENTION OF ANYBODY, AND THERE WERE
10 LEGAL REASONS FOR THIS; FOR EXAMPLE, WHAT WE'RE TALKING
11 ABOUT HERE. THIS WAS PRIVILEGED, ALL RIGHT, SO IF I
12 WHITED THIS OUT --

13 THE COURT: YOU'RE TALKING ABOUT THE TOP PAGE OF
14 PAGE 7?

15 THE WITNESS: YES, THIS PART ABOUT DR. OZIEL.

16 THIS WAS LEGALLY PRIVILEGED. NOBODY WAS TO KNOW ABOUT
17 THIS. SO IF I WHITE ALL THIS OUT AND EVERYBODY GETS A
18 COPY OF THIS, THEN THE QUESTION TO ME IS, "WHAT'S IN
19 HERE? WHY DID YOU WHITE THIS OUT?"

20 THEN I HAVE TO SAY, "WELL, IT'S PRIVILEGED
21 INFORMATION ABOUT DR. OZIEL."

22 "WELL, TELL US WHAT IT IS, THEN."

23 IT'S GOING TO COME OUT, YOU SEE. THE
24 PURPOSE HERE IS TO ACCOMPLISH LEAVING THIS OUT. IF YOU
25 JUST WHITE IT OVER, THEN THE QUESTION CAN BE ASKED AND
26 THE QUESTION AFTER THAT, AND THE QUESTION AFTER THAT,
27 UNTIL THE INFORMATION COMES OUT.

28 THE COURT: YOU DIDN'T DRAW A DISTINCTION BETWEEN

-11274

1 DELETING MATERIAL AND YOUR OBLIGATION TO REFUSE TO
2 DISCLOSE CONFIDENTIAL COMMUNICATIONS OR WHAT YOU
3 PERCEIVED TO BE PRIVILEGED INFORMATION?

4 THE WITNESS: NO. I KNOW THAT DISTINCTION, AND I
5 THINK IN PART OF MY DISCUSSION ABOUT THESE DELETIONS I
6 SAID, "WHY CAN'T WE JUST LEAVE THIS ALONE AND THEN WAIT
7 AND FIND OUT?" I MEAN, I DO THIS ALL THE TIME. I COME
8 TO COURT, AND BEFORE I TAKE THE WITNESS STAND, THE
9 DISTRICT ATTORNEY SAYS, "BY THE WAY, THE JUDGE HAS RULED
10 THAT YOU ARE NOT TO TALK ABOUT ANYTHING IN THIS MAN'S
11 CRIMINAL RECORD," EVEN THOUGH IT'S IN MY NOTES AND IT'S

12 IN MY REPORT. OKAY.

13 SO I AM CAPABLE OF DOING THAT. BUT THE
14 INSTRUCTION I RECEIVED IS THAT THIS HAD TO BE TAKEN OUT,
15 ALL RIGHT, AND THERE WAS LEGAL JUSTIFICATION FOR THIS.

16 AND I DIDN'T WANT TO DO THAT. AND I SAID,
17 "IT'S NOT NECESSARY." AND I WAS INSTRUCTED THAT THIS
18 HAD TO BE TAKEN OUT.

19 THE COURT: ACTUALLY PHYSICALLY REMOVED FROM YOUR
20 NOTES?

21 THE WITNESS: I THINK THAT'S THE MOST REASONABLE
22 INTERPRETATION OF THE INSTRUCTION, YES.

23 THE COURT: AND WAS THERE ANY DISCUSSION AS TO
24 YOUR PLAN TO REWRITE THE NOTES, OR WAS THAT SOMETHING
25 THAT WAS JUST YOUR DECISION?

26 THE WITNESS: NO. THAT WAS MY DECISION, WHICH I
27 THOUGHT WAS THE ONLY REASONABLE RESPONSE TO THE
28 INSTRUCTION. I COULD BE WRONG ABOUT THAT.

-11273

1 THE COURT: DID YOU EVER TELL ANYBODY THAT YOU
2 HAD REMOVED THESE THINGS FROM THE NOTES?

3 THE WITNESS: NO.

4 THE COURT: DID YOU EVER TELL MS. ABRAMSON THAT
5 YOU HAD, IN FACT, REMOVED THE MATERIAL FROM THE NOTES?

6 THE WITNESS: I SAID THAT I WOULD DO IT, AND THEN
7 I DID IT, AND THEN I GAVE HER BACK THE COPIES.

8 THE COURT: BOTH THE --

9 THE WITNESS: SO I DIDN'T SAY, "LOOK, I DID IT."

10 I MEAN, I ACTUALLY DID IT AND THEN GAVE IT BACK TO HER.

11 THE COURT: YOU GAVE HER BOTH THE REDACTED

12 VERSION AND THE UNREDACTED VERSION? IT'S NOT REALLY THE

13 REDACTED VERSION, THE MODIFIED VERSION AND THE

14 UNMODIFIED VERSION?

15 THE WITNESS: YES.

16 THE COURT: OKAY. AND YOUR PURPOSE WAS TO

17 PREVENT ANYBODY FROM KNOWING THAT THESE REDACTIONS HAD

18 EVEN -- OR THESE MODIFICATIONS HAD EVEN BEEN MADE; IS

19 THAT CORRECT?

20 MR. LEVIN: I WOULD RESPECTFULLY OBJECT AS

21 LEADING.

22 THE COURT: ALL RIGHT. I WILL FOLLOW LEGAL

23 COUNSEL, THEN.

24 WAS IT YOUR INTENTION, THEN, TO PREVENT

25 ANYONE FROM KNOWING THAT THESE MODIFICATIONS HAD BEEN

26 MADE?

27 THE WITNESS: YES.

28 THE COURT: OKAY. MR. CONN.

-11272

1 MR. CONN: YES.

2 Q. IS IT YOUR TESTIMONY, DR. VICARY, THAT

3 LESLIE ABRAMSON TOLD YOU TO TAKE SOMETHING OUT OF YOUR

4 NOTES; IS THAT CORRECT?

5 A. YES.

6 Q. DID SHE TELL YOU TO REWRITE YOUR NOTES?

7 A. I DON'T THINK SHE TOLD ME SPECIFICALLY

8 THAT. SHE JUST SAID, "THIS HAS TO COME OUT."

9 Q. ALL RIGHT. NOW, ON THIS OCCASION WHEN YOU

10 WERE IN MS. ABRAMSON'S OFFICE, I BELIEVE YOU

11 TESTIFIED --

12 MS. ABRAMSON: OBJECTION. ASSUMES FACTS NOT IN

13 EVIDENCE, YOUR HONOR.

14 THE COURT: SUSTAINED.

15 Q. BY MR. CONN: WERE YOU IN MS. ABRAMSON'S

16 OFFICE WHEN THIS CONVERSATION TOOK PLACE?

17 A. YES.

18 Q. AND YOU TESTIFIED, I BELIEVE, THAT THIS

19 OCCURRED SHORTLY BEFORE THE START OF THE FIRST TRIAL; IS

20 THAT CORRECT?

21 A. BEFORE MY TESTIMONY IN THE FIRST TRIAL,

22 YES.

23 Q. OKAY.

24 AND BY THAT TIME THE NOTES THAT ARE NOW IN

25 FRONT OF YOU WERE SUBSTANTIALLY THE SAME AS FAR AS THE

26 NUMBER OF PAGES IS CONCERNED; IS THAT CORRECT?

27 A. YES.

28 Q. OKAY. AND HOW DID THIS PROCESS GO ABOUT BY

1 WHICH YOU, FOR EXAMPLE, REWROTE PAGE 7?

2 DID YOU GO THROUGH YOUR NOTES PAGE BY PAGE

3 DISCUSSING IT WITH MS. ABRAMSON ON THAT OCCASION? OR

4 HOW WAS IT THAT YOUR ATTENTION CAME TO BE FOCUSED, FOR

5 EXAMPLE, ON PAGE 7 AND THE VARIOUS ENTRIES ON PAGE 7

6 THAT YOU DECIDED TO TAKE OUT OF THAT PAGE?

7 A. THE MEETING WAS TO PREPARE ME FOR MY

8 TESTIMONY AT THE FIRST TRIAL. AND AS PART OF OUR

9 PREPARATION, WE WENT OVER MY NOTES FROM PAGE 1 ALL THE

10 WAY TO -- I THINK AT THAT POINT THERE WERE 88 PAGES.

11 Q. OKAY.

12 SO IT WAS ON THAT OCCASION YOU STARTED WITH

13 PAGE 1 AND YOU WENT THROUGH IT PAGE BY PAGE,

14 ESSENTIALLY?

15 A. YES.

16 Q. AND YOU GOT TO PAGE 7, AND AT THAT POINT,

17 MS. ABRAMSON TOLD YOU TO TAKE OUT THAT TOP ONE-THIRD OF

18 THE PAGE; IS THAT CORRECT?

19 MR. LEVIN: OBJECTION. MISSTATES HIS TESTIMONY,

20 AND IS ALSO LEADING AND SUGGESTIVE.

21 THE COURT: OVERRULED.

22 THE WITNESS: SHE SAID THAT "THIS INFORMATION HAS

23 TO COME OUT."

24 Q. BY MR. CONN: OKAY.

25 A. AND I SAID, "WHY?" AND THEN SHE EXPLAINED.

26 Q. OKAY. NOW, AT THAT POINT DID YOU

27 DISCONTINUE THE MEETING AND BEGIN TO REWRITE THAT PAGE,

28 OR DID YOU MAKE A NOTE THAT THAT HAS TO BE TAKEN OUT AND

1 PROCEED TO THE NEXT PAGE? OR WHAT DID YOU DO?

2 A. NO. I JUST -- WE HAD A DISCUSSION --

3 ACTUALLY ARGUMENT, ALL RIGHT, ABOUT THAT.

4 AND THEN AT THE CONCLUSION OF THE ARGUMENT

5 I SAID, "ALL RIGHT. THAT MAKES SENSE TO ME."

6 Q. AND WHAT WAS THE CONTENTION IN DISPUTE IN
7 THAT ARGUMENT?

8 A. WE'VE ALREADY GONE OVER THIS. I SAID,
9 "WELL, JUST LEAVE IT IN. IF THIS IS THE RULING OF THE
10 COURT AND SO ON AND SO FORTH, THEN IT CAN'T COME OUT."
11 ALL RIGHT. "IF SOMEBODY TRIES TO ASK ABOUT THIS, THEN
12 THERE COULD BE AN OBJECTION."

13 SHE SAID, "THAT'S NOT GOOD ENOUGH. THAT'S
14 NOT GOING TO ACCOMPLISH THIS, BECAUSE THERE'S ALSO A
15 CHANCE THAT SOMEHOW OR OTHER THIS -- THIS WILL BE
16 DISCLOSED."

17 Q. AND WERE YOU CONCERNED ABOUT REMOVING IT
18 BECAUSE YOU KNEW THAT YOUR REVISED COPY WOULD THEN BE
19 TURNED OVER TO THE PROSECUTION AND WOULD THEN BE USED IN
20 COURT?

21 A. I WAS CONCERNED FOR A NUMBER OF REASONS,
22 THAT BEING ONE OF THEM, CORRECT.

23 Q. AND FOR WHAT OTHER REASONS WERE YOU
24 CONCERNED?

25 A. WELL, LIKE MOST DOCTORS, I THINK I'M --

26 MR. LEVIN: YOUR HONOR, I WOULD OBJECT, UNLESS
27 HE'S ANSWERING IT FROM HIS STATE OF MIND THEN OR NOW.
28 IT'S VAGUE.

-11269

1 THE COURT: ALL RIGHT. AS I INFER, HE IS
2 ANSWERING FROM HIS STATE OF MIND AT THE TIME, REFERRING
3 TO THAT.

4 IS THAT CORRECT?

5 THE WITNESS: YES.

6 THE COURT: OKAY.

7 THE WITNESS: LIKE MOST DOCTORS, ONCE WE MAKE
8 NOTES OR WE DO A REPORT, I MEAN, IF SOMEBODY ASKS US TO
9 CHANGE SOMETHING, WE TURN PURPLE. I MEAN, WE DON'T LIKE
10 THAT. WE'RE ARROGANT. WE'RE RIGID. WE BELIEVE IN OUR
11 WORK AND WE STAND BY IT. IT'S VERY EXTRAORDINARY, RARE,
12 ALMOST NEVER, THAT A DOCTOR WILL CHANGE HIS NOTES OR
13 CHANGE ANYTHING IN A REPORT. I MEAN, THERE IS NO 100
14 PERCENT ABSOLUTE RULE, OKAY. I HAD AN ETHICAL PROBLEM
15 WITH THIS. I DIDN'T THINK THAT --

16 MR. LEVIN: OBJECTION, YOUR HONOR, FOR THE
17 WITNESS TO STATE HIS STATE OF MIND. IT'S BEYOND THE
18 SCOPE OF THE QUESTION. ASK IT BE STRICKEN.

19 THE COURT: OVERRULED.

20 THE WITNESS: I HAD AN ETHICAL PROBLEM WITH THIS.
21 I DID NOT THINK THAT THIS WAS RIGHT, OKAY.

22 HOWEVER, YOU KNOW, I AM NOT A TRIAL LAWYER.

23 MR. LEVIN: YOUR HONOR, I WOULD OBJECT TO THE

24 WITNESS NARRATING.

25 THE COURT: IT'S A NARRATIVE AT THIS POINT.

26 YOUR NEXT QUESTION, PLEASE.

27 MR. CONN: YES.

28 Q. DID YOU INDICATE TO MS. ABRAMSON THAT YOU

-11268

1 DID, IN FACT, HAVE AN ETHICAL PROBLEM WITH THIS

2 PROCEDURE?

3 A. IN SO MANY WORDS, YES.

4 Q. AND DO YOU REMEMBER WHAT HER RESPONSE WAS?

5 A. SHE SAID, "LEGALLY, THIS IS JUSTIFIED. IT

6 HAS TO BE DONE."

7 Q. AND DID YOU TELL HER THAT THIS WAS

8 SOMETHING THAT YOU HAD NEVER DONE BEFORE IN YOUR CAREER?

9 A. I THINK I SAID, "I DON'T THINK THIS IS

10 RIGHT. I DON'T THINK THIS IS NECESSARY."

11 Q. AND WAS HER RESPONSE THE SAME?

12 A. YES. SHE STUCK BY HER ARGUMENT. SHE SAID,

13 "THIS IS ABSOLUTELY PRIVILEGED. THIS HAS TO COME OUT."

14 Q. ALL RIGHT. NOW, ONCE YOU WERE INSTRUCTED

15 TO TAKE THIS OUT, WHAT WAS THE PRIOR -- AT THAT POINT

16 DID YOU BEGIN TO REWRITE PAGE 7 BEFORE YOU WENT ON TO

17 PAGE 8, OR WHAT HAPPENED?

18 A. NO. WITH ALL THE CHANGES THAT WERE MADE, I
19 JUST NOTED THIS, AND THEN I WENT BACK TO MY OFFICE
20 SOMETIME LATER AND MADE THE CHANGES.
21 Q. OKAY. SO SOMEHOW IN YOUR NOTES, IN YOUR
22 ORIGINAL NOTES, YOU FLAGGED THAT TOP ONE-THIRD OF THE
23 PAGE?
24 A. RIGHT. YOU CAN SEE IT. THERE'S A LINE
25 DRAWN. YOU SEE THE LINE ACROSS THE PAGE?
26 Q. YES.
27 A. OKAY. THAT WAS MY WAY OF NOTING THAT THIS
28 HAD TO COME OUT.

-11267

1 Q. OKAY.
2 NOW, REFERRING TO YOUR SECOND ENTRY IN THE
3 MIDDLE OF THE PAGE, REFERRING TO MID-AUGUST, DID YOU
4 FLAG THAT IN SOME WAY AS WELL?
5 A. NO. THAT I THINK I TOOK OUT ON MY OWN. AS
6 LONG AS I WAS REWRITING THE PAGE, I SAID -- I THINK IN
7 OUR DISCUSSION SHE SAID, "WHAT DOES THIS MEAN?"
8 AND I SAID, "I DON'T KNOW WHAT --
9 WHY IT'S IN THERE, WHY IT SAYS 'ENDED
10 8/7.' I DON'T KNOW WHAT THAT MEANS. IT
11 DOESN'T MEAN ANYTHING TO ME. AS LONG AS I
12 AM REWRITING THE PAGE ON MY OWN
13 INITIATIVE," I SAID, "THE READER OF THIS

14 IS NOT GOING TO KNOW WHAT IT MEANS. I

15 DON'T KNOW WHAT IT MEANS, SO LEAVE IT

16 OUT."

17 Q. DOCTOR, IN YOUR CAREER HAD YOU EVER

18 REWRITTEN YOUR NOTES TO REMOVE THINGS THAT -- FOR WHICH

19 YOU DID NOT UNDERSTAND THE MEANING WHEN YOU LATER

20 REWROTE OR REREAD YOUR NOTES?

21 MR. LEVIN: OBJECTION. IT'S IRRELEVANT. HE'S

22 ALREADY TESTIFIED HE HAD NOT DONE IT BEFORE.

23 THE COURT: OVERRULED.

24 THE WITNESS: YES, I HAD NEVER DONE THAT BEFORE.

25 Q. BY MR. CONN: SO IS IT YOUR TESTIMONY

26 TODAY, DOCTOR, THAT YOU LEFT IN YOUR NOTES EVERYTHING

27 FOR WHICH YOU UNDERSTOOD THE MEANING AND THE CONTEXT,

28 AND YOU REMOVED FROM YOUR NOTES EVERYTHING FOR WHICH YOU

-11266

1 DID NOT UNDERSTAND THE MEANING OR THE CONTEXT?

2 A. NOT REALLY. I MEAN, OBVIOUSLY THERE'S

3 OTHER THINGS IN HERE THAT I'VE READ, AND I DON'T KNOW

4 WHAT IT MEANS, OR IS STILL CONFUSING TO ME AND I DIDN'T

5 TAKE OUT.

6 Q. NOW, ON THE OCCASION THAT YOU MET WITH

7 MS. ABRAMSON, DID YOU INDICATE TO MS. ABRAMSON THAT

8 THERE WERE A NUMBER OF THINGS IN YOUR NOTES FOR WHICH

9 YOU DID NOT UNDERSTAND THE MEANING?

10 MR. LEVIN: OBJECTION. IRRELEVANT.

11 THE COURT: OVERRULED.

12 THE WITNESS: AS WE WENT THROUGH THE NOTES, YOU
13 KNOW, TOPIC BY TOPIC HERE, THERE WERE THINGS, SAD TO
14 SAY, THAT CAME UP MORE TIMES THAN I WOULD LIKE TO ADMIT,
15 WHERE SHE SAID, "WHAT DOES THIS MEAN?" I MEAN, "WHY IS
16 THIS HERE?"

17 AND I SAID, "I DON'T KNOW." I'M A
18 REPORTER. I'M IN THE ROOM WITH ERIK, YOU KNOW, IT'S A
19 HUNDRED DEGREES IN HIS HIGH POWER SECTION AT THE JAIL.
20 IT'S STUFFY. IT'S NOISY. ERIK MENENDEZ' CRYING. HE'S
21 UPSET. HE'S AGITATED. I DON'T HAVE TIME TO BE
22 QUESTIONING HIM ON THIS, BECAUSE IT'LL KILL WHATEVER
23 INFORMATION I CAN GET. WHAT I'M DOING IS I'M WRITING IT
24 DOWN THE BEST I CAN.

25 LATER -- THIS IS A COUPLE OF YEARS AFTER
26 THIS HAPPENS -- WE'RE GOING BACK OVER HERE AND I'M
27 SAYING, "I DON'T KNOW."

28 Q. NOW, WHEN YOU WENT BACK TO YOUR OFFICE

-11265

1 FOLLOWING THAT MEETING WITH MS. ABRAMSON, DID YOU REMOVE
2 FROM YOUR NOTES OR REWRITE YOUR NOTES IN REGARD TO EACH
3 AND EVERY ONE OF THOSE ENTRIES FOR WHICH YOU DID NOT
4 UNDERSTAND THE MEANING?

5 A. NO. I LEFT LOTS OF THAT STUFF IN. IT

6 WOULD ONLY BE IF I WAS REWRITING A PAGE THAT I SAW
7 SOMETHING LIKE THAT OR WE'LL GET TO SOMETHING, THE NEXT
8 ITEM, WHERE HE SAID IT IN THE PREVIOUS PARAGRAPH, THEN
9 I'VE GOT IT WRITTEN NOT ONLY THERE, BUT AGAIN LATER,
10 WHAT'S THE POINT? IT MAKES THE READER THINK THAT THE
11 NOTE-TAKER IS DUMB. WHY SHOULD YOU REPEAT SOMETHING TWO
12 MINUTES LATER, YOU SEE?

13 Q. ALL RIGHT.

14 DIRECTING YOUR ATTENTION NOW TO THE BOTTOM
15 OF PAGE 7, YOU SEE A REFERENCE TO: "FATHER SAID PLAYED
16 LIKE AN ASS," AND ANOTHER LINE BENEATH THAT.

17 A. YES.

18 Q. AND COULD YOU READ THAT BOTTOM LINE?

19 A. IT SAYS, "DEFENDANT WANTED TO GO ON TOUR."
20 THAT'S MISWRITTEN. IT SAYS, "NO TOUR," BUT IT MEANS "ON
21 TOUR." THAT'S A MISTAKE BY THE WRITER.

22 THEN IT SAYS, "FATHER," SLASH OR ARROW,
23 "NO."

24 NOW, THOSE TWO LINES, "FATHER SAID PLAYED
25 LIKE AN ASS," AND "DEFENDANT WANTED TO GO ON TOUR.
26 FATHER SAID NO."

27 WERE THOSE TWO LINES ALSO DELETED FROM YOUR
28 REWRITTEN PAGE 7?

-11264

1 A. YES.

2 Q. AND CAN YOU TELL US WHY YOU DELETED THOSE
3 REFERENCES?

4 A. "THE FATHER SAID PLAYED LIKE AN ASS" IS
5 JUST LIKE I TESTIFIED. IF YOU GO UP FIVE LINES, IT SAYS
6 THE EXACT SAME THING. SO I MEAN, OBVIOUSLY WHEN HE'S
7 TALKING TO ME HE SAID THAT. THEN HE SAID IT AGAIN, AND
8 I WROTE IT DOWN BOTH TIMES. BUT THERE'S NO POINT IN
9 WRITING IT DOWN AGAIN. YOU SEE? IT'S STUPID.

10 Q. AND AS FAR AS THE FOLLOWING LINE IS
11 CONCERNED, IN REGARD TO THE TOUR, CAN YOU TELL US WHY
12 YOU DELETED THAT FROM YOUR REWRITTEN PAGE 7?

13 A. YOU KNOW, THIS IS YEARS AFTER THIS
14 HAPPENED. I THINK BECAUSE --

15 MR. LEVIN: OBJECTION, YOUR HONOR, UNLESS IT'S
16 BASED ON HIS PERSONAL KNOWLEDGE. HE'S GUESSING.

17 THE COURT: OVERRULED.

18 THE WITNESS: I THINK THAT THAT WAS A FACTUAL
19 ERROR OR A MISUNDERSTANDING ON MY PART. IT WASN'T THAT
20 THERE WAS SOME KIND OF AN ONGOING TOUR. IT WAS HE
21 WANTED TO GO TO THAT -- TO CONTINUE AT THIS
22 TENNIS-TEACHING THING IN FLORIDA, WHICH WAS AFTER OR
23 DURING THIS KALAMAZOO TOURNAMENT. AND THAT THE FATHER
24 TOLD HIM HE COULDN'T DO THAT AFTER HE LOST AT KALAMAZOO.
25 ALL RIGHT. BUT I'VE GOT THIS DOWN HERE, SOMETHING ABOUT
26 A TOUR. AND IT -- IT WASN'T A TOUR, YOU SEE, SO THAT'S
27 A MISTAKE ON MY PART. I THOUGHT THAT'S WHAT HE WAS
28 TELLING ME.

1 Q. NOW, WHEN DID IT COME TO YOUR ATTENTION
2 THAT IT WAS A MISTAKE ON YOUR PART?

3 A. IN MY DISCUSSION I THINK WITH
4 MS. ABRAMSON, SHE SAID, "THIS IS WRONG."

5 Q. SO SHE TOLD YOU IT WAS WRONG, AND AT THAT
6 POINT YOU DECIDED TO DELETE IT BECAUSE MS. ABRAMSON TOLD
7 YOU IT WAS WRONG?

8 A. CORRECT.

9 Q. BUT AT THE TIME THAT YOU WROTE IT, WASN'T
10 IT YOUR UNDERSTANDING THAT THIS WAS SOMETHING THAT ERIK
11 MENENDEZ WAS RELATING TO YOU?

12 A. THAT WAS MY CONCLUSION BASED UPON THE
13 STATEMENTS THAT HE WAS MAKING TO ME, OKAY. I THOUGHT
14 THAT THERE WAS SOME KIND OF A TOUR THAT WAS GOING TO GO
15 ON FOR MONTHS.

16 Q. WELL, WHEN MS. ABRAMSON SAID THAT THIS WAS
17 WRONG, DID YOU CONCLUDE FROM THAT STATEMENT THAT ERIK
18 MENENDEZ WAS WRONG WHEN HE RELATED THIS TO YOU, OR YOU
19 WERE WRONG WHEN YOU RECORDED IT?

20 A. NO. I THOUGHT THAT I HAD MADE THE MISTAKE.

21 Q. AND HOW DO YOU KNOW THAT YOU WERE WRONG
22 WHEN YOU RECORDED IT, AS OPPOSED TO ERIK MENENDEZ WAS
23 WRONG WHEN HE RELATED IT TO YOU?

24 A. I TRUSTED MS. ABRAMSON. I MEAN, SHE KNEW
25 THE CASE A HUNDRED TIMES BETTER THAN I DID, ALL THE
26 FACTS AND ALL THE DATES.

27 Q. WELL, GRANTED, THE INFORMATION WAS WRONG.
28 WHAT I AM ASKING YOU IS HOW DO YOU KNOW WHETHER WHEN YOU

-11262

1 RECORDED IT, YOU WERE WRONG IN RECORDING SOMETHING THAT
2 WAS NOT BEING SAID, OR ERIK MENENDEZ WAS WRONG IN
3 RELATING TO YOU SOMETHING WHICH DID NOT OCCUR?

4 A. WELL, I MEAN, THAT'S COMMON SENSE. WHY
5 WOULD ERIK TELL ME SOMETHING THAT HE KNEW WASN'T TRUE
6 ABOUT SOME TOUR, IMAGINARY TOUR? IT DOESN'T MAKE SENSE,
7 OKAY. IT'S MY MISTAKE, THAT'S WHY IT WAS TAKEN OUT.

8 Q. SO YOU RULED OUT THE POSSIBILITY OF LYING,
9 THAT ERIK MENENDEZ WAS LYING TO YOU; IS THAT CORRECT?

10 A. I --

11 MR. LEVIN: OBJECTION, YOUR HONOR, TO ASSUMING
12 THAT HE REMEMBERS WHAT ERIK MENENDEZ SAID, AND IT'S
13 VAGUE WITH RESPECT TO WHAT SPECIFIC ENTRY IS IN THE
14 NOTES.

15 THE COURT: IT'S ARGUMENTATIVE THE WAY IT'S
16 PHRASED.

17 Q. BY MR. CONN: LET'S GO ON TO -- LET'S GO ON
18 TO PAGE NO. 18.

19 NOW, I WOULD LIKE TO DIRECT YOUR ATTENTION
20 TO WHAT APPEARS TO BE THE LAST FOUR PARAGRAPHS ON THIS
21 PAGE. AND I SEE ON YOUR COPY YOU HAVE HIGHLIGHTED EACH
22 OF THOSE LAST FOUR PARAGRAPHS IN YELLOW; IS THAT

23 CORRECT?

24 A. YES.

25 Q. DIRECTING YOUR ATTENTION -- DIRECTING YOUR
26 ATTENTION TO THE FIRST OF THOSE FOUR PARAGRAPHS THAT YOU
27 HAVE HIGHLIGHTED IN YELLOW, DO YOU REMEMBER ERIK
28 MENENDEZ TELLING YOU THAT ONE WEEK PRIOR HE WAS TALKING

-11261

1 WITH HIS BROTHER ABOUT WHAT IT WOULD BE LIKE WITHOUT THE
2 PARENTS?

3 A. YES.

4 Q. AND IS THAT SOMETHING THAT YOU DELETED FROM
5 YOUR REWRITTEN PAGE 18?

6 A. YES.

7 Q. WHY DID YOU DO THAT?

8 A. MY MEMORY IS THAT I WAS TOLD THAT THIS WAS
9 SOMETHING THAT INVOLVED STATEMENTS BY LYLE; THEREFORE,
10 IT HAD TO COME OUT.

11 Q. WERE YOU TOLD BY MS. ABRAMSON THAT YOU MUST
12 DELETE FROM YOUR NOTES EVERY SINGLE REFERENCE TO A
13 STATEMENT MADE TO ERIK MENENDEZ BY LYLE MENENDEZ?

14 A. I DON'T THINK EVERY SINGLE STATEMENT. THE
15 GENERAL PRINCIPLE WAS THAT IT WAS NOT LEGALLY JUSTIFIED
16 FOR STATEMENTS BY LYLE TO BE BROUGHT INTO THE TRIAL IN
17 MY TESTIMONY THROUGH MY CONVERSATIONS WITH ERIK.

18 Q. DID YOU -- WHEN THIS WAS RELATED TO YOU,

19 DID YOU EXPRESS TO MS. ABRAMSON THAT MERELY BECAUSE A
20 REFERENCE TO A STATEMENT BY LYLE MENENDEZ APPEARS IN
21 YOUR NOTES DOESN'T MEAN THAT YOU WOULD NECESSARILY HAVE
22 TO TESTIFY TO THAT STATEMENT?

23 A. OF COURSE.

24 Q. AND WHAT WAS HER RESPONSE TO THAT?

25 A. SHE SAID THAT LEGALLY IT HAD TO COME OUT.

26 THERE WAS ADEQUATE JUSTIFICATION FOR THIS.

27 Q. AND DID YOU DISPUTE THAT CONTENTION?

28 A. IT SEEMED TO MAKE SENSE TO ME.

-11260

1 Q. NOW, DID YOU THEN DISCUSS WITH HER WHETHER
2 YOU WOULD HAVE TO DELETE FROM YOUR ENTIRE SET OF NOTES
3 ALL REFERENCES TO STATEMENTS BY LYLE MENENDEZ TO ERIK
4 MENENDEZ?

5 A. NO.

6 Q. WHY DID YOU NOT DISCUSS THAT WITH
7 MS. ABRAMSON?

8 A. BECAUSE WE WERE GOING THROUGH MY NOTES PAGE
9 BY PAGE, AND IF THERE WAS ANYTHING IN THAT THAT LYLE HAD
10 SAID, THEN WE'D COME ACROSS IT, YOU SEE.

11 Q. AND IS IT YOUR UNDERSTANDING THAT WHEN YOU
12 FINALLY DID REVISE YOUR NOTES, THAT YOU DID, IN FACT,
13 DELETE FROM YOUR NOTES ALL REFERENCES TO STATEMENTS MADE
14 BY LYLE MENENDEZ TO ERIK MENENDEZ?

15 A. I HAVE NO IDEA. I MEAN, THAT IS NOT A
16 PROCESS THAT I WAS DOING ON MY OWN. WHAT I DID WAS I --
17 BASED UPON THE CONVERSATIONS, WE WERE GOING THROUGH
18 THESE NOTES PARAGRAPH BY PARAGRAPH, ALL RIGHT. BUT IF
19 THERE WAS NOT A PROBLEM WITH SOMETHING, THEN IT WAS JUST
20 LEFT.

21 THE COURT: WHY DID YOU FEEL THAT THIS HAD TO BE
22 REMOVED RATHER THAN JUST BLACKED OUT OR WHITED OUT?

23 MR. LEVIN: OBJECTION. IT'S BEEN ASKED AND
24 ANSWERED BY THE COURT, I BELIEVE.

25 THE COURT: OVERRULED AS TO THIS PARTICULAR
26 REFERENCE.

27 THE WITNESS: I THINK MY RESPONSE WOULD BE THE
28 SAME AS I GAVE EARLIER, THAT IT WOULD LOOK SUSPICIOUS

-11259

1 AND THE READER WOULD SAY, "WELL, WHAT'S GOING ON HERE?
2 WHY IS THIS WHITED OUT?"

3 THE COURT: SO WHY WOULD YOU BE CONCERNED ABOUT
4 THAT?

5 THE WITNESS: WELL, THAT DEFEATS THE PURPOSE. I
6 MEAN, THEN--

7 THE COURT: WHAT WAS THE PURPOSE?

8 THE WITNESS: THEN IF IT'S WHITED OUT, I HAVE TO
9 SAY, "WELL, IT HAS TO DO" -- AND I WOULD DISCLOSE THE
10 INFORMATION, ALL RIGHT.

11 SO THE LEGALLY IMPERMISSIBLE INFORMATION

12 WOULD BE PRODUCED.

13 THE COURT: HOW DID YOU CONCLUDE THAT IT WAS

14 LEGALLY IMPERMISSIBLE INFORMATION?

15 THE WITNESS: BASED UPON WHAT MS. ABRAMSON TOLD

16 ME.

17 THE COURT: LEGALLY IMPERMISSIBLE IN WHAT

18 CONTEXT? WHAT DID SHE SAY? OR WAS IT DISCUSSED THAT

19 NOBODY IN THE WORLD SHOULD EVER KNOW THIS WAS IN YOUR

20 NOTES; IS THAT WHAT YOU UNDERSTOOD?

21 THE WITNESS: NO. LEGALLY IMPERMISSIBLE IN THE

22 SENSE THAT THIS WOULD NOT -- YOU CANNOT DISCLOSE THIS IN

23 COURT.

24 THE COURT: WELL, DID YOU UNDERSTAND THAT YOUR

25 NOTES WOULD BE TURNED OVER TO THE PROSECUTION?

26 THE WITNESS: OF COURSE.

27 THE COURT: DID YOU UNDERSTAND THAT IF YOU

28 REMOVED THIS MATERIAL FROM YOUR NOTES, THAT THE

-11258

1 PROSECUTION THEN WOULDN'T HAVE ACCESS TO THE FACT THAT

2 YOU HAD THIS CONVERSATION WITH ERIK MENENDEZ AND HE MADE

3 THIS STATEMENT TO YOU?

4 THE WITNESS: YES.

5 THE COURT: DID THAT CONCERN YOU AT ALL, THAT YOU

6 WOULD BE REMOVING THIS MATERIAL, THEN, NOT BE PROVIDING

7 IT TO THE PROSECUTION?

8 THE WITNESS: YES, IT DID.

9 THE COURT: DID YOU FEEL THAT IT WAS SOMEHOW
10 LEGALLY IMPERMISSIBLE FOR THIS MATERIAL TO COME INTO
11 POSSESSION OF THE PROSECUTION?

12 THE WITNESS: THAT'S A CLOSER QUESTION. IN MY
13 EXPERIENCE, I HAD NO PROBLEM OF GIVING A HUNDRED PERCENT
14 OF WHATEVER I'VE GOT TO THE PROSECUTION.

15 THE COURT: WELL, WHY DID YOU CONCLUDE THAT THIS
16 MATERIAL HAD TO BE REMOVED AND THAT YOU COULDN'T AFFORD
17 TO HAVE ANYBODY ASK YOU IF YOU WHITED SOMETHING OUT OR
18 BLACKED SOMETHING OUT, AND WHAT IT WAS, IF IT WAS ONLY,
19 FIRST OF ALL, GOING TO GO TO THE PROSECUTION?

20 THE WITNESS: I DON'T THINK I SPECIFICALLY
21 THOUGHT OF IT IN THOSE TERMS. I MEAN, YOU ASKED ME
22 EARLIER WHY I JUST TOOK IT OUT RATHER THAN WHITING IT
23 OVER; AND I MEAN, I COULD HAVE DONE THAT. ALL RIGHT.

24 BUT THEN WE GET BACK TO THE POINT OF THAT'S
25 SOMETHING IN THERE THAT'S WHITED OUT. AND IF THE GOAL
26 HERE IS TO MAKE SURE THAT THE INFORMATION THAT'S
27 CONFIDENTIAL, OR THE COURT HAS ALREADY RULED IS NOT
28 LEGALLY PERMISSIBLE, IS NOT GOING TO BE ALLOWED TO COME

-11257

1 OUT IS NOT TAKEN OUT, AND JUST MERELY WHITED OUT, THEN
2 THERE'S ALWAYS THE POSSIBILITY THAT IT CAN COME OUT.

3 THE COURT: DID MS. ABRAMSON OR ANYONE ELSE TELL
4 YOU THAT THIS -- THAT THE COURT HAD RULED THAT THIS
5 REFERENCE THAT HAS JUST BEEN REFERRED TO WAS
6 CONFIDENTIAL OR PRIVILEGED IN ANY WAY?

7 THE WITNESS: NO.

8 THE COURT: IT WAS JUST STATED THAT THIS WAS
9 SOMETHING THAT WAS SAID BY ERIK MENENDEZ REFERRING TO
10 HIS BROTHER, AND FOR THAT REASON ONLY IT SHOULD COME
11 OUT?

12 THE WITNESS: THAT IT WAS A CONVERSATION THAT THE
13 BROTHERS HAD HAD, YES.

14 THE COURT: OKAY. MR. CONN.

15 MR. CONN: YES.

16 Q. DID MS. ABRAMSON EVER INDICATE TO YOU THAT
17 THE COURT HAD MADE RULINGS REGARDING ANY OF THE MATTERS
18 FOR WHICH SHE WAS ASKING YOU TO DELETE FROM YOUR NOTES?

19 A. YES, SHE DID.

20 Q. AND WHAT DID SHE INDICATE IN THAT REGARD?

21 A. THAT THE JUDGE HAD ALREADY RULED ON SOME OF
22 THESE AREAS THAT THIS WAS NOT TO COME OUT. THAT NOBODY
23 WAS TO KNOW ABOUT THIS.

24 Q. LESLIE ABRAMSON INDICATED TO YOU THAT THE
25 JUDGE MADE A RULING THAT NOBODY WAS TO KNOW ABOUT
26 CERTAIN OF THESE ENTRIES IN YOUR NOTES?

27 MR. LEVIN: YOUR HONOR, I OBJECT. IT'S VAGUE AS
28 TO TIME, UNLESS THE PROSECUTION CAN PUT A CONTEXT TO THE

1 TIME FRAME HE'S TALKING ABOUT, AND THEN I CAN --

2 THE COURT: PERHAPS YOU CAN NARROW IT DOWN.

3 MR. CONN: YES.

4 Q. WAS IT IN THIS VERY SAME CONVERSATION THAT
5 YOU WERE DISCUSSING IN WHICH YOU WENT THROUGH YOUR NOTES
6 WITH MS. ABRAMSON THAT SHE INDICATED TO YOU THAT THE
7 COURT HAD ALREADY MADE RULINGS THAT THESE VARIOUS
8 ENTRIES IN YOUR NOTES SHOULD NOT COME OUT?

9 MR. LEVIN: I OBJECT, YOUR HONOR. IT'S STILL
10 VAGUE. I ONLY KNOW IT'S LIMITED TO SOME TIME,
11 APPARENTLY IN 1993, BUT THE TIME IS IMPORTANT.

12 THE COURT: OKAY. THIS WAS DURING THE MEETING
13 YOU HAD WITH MS. ABRAMSON WHEN DISCUSSIONS OF ALL THE
14 MATERIAL THAT WAS REMOVED OCCURRED?

15 THE WITNESS: YES.

16 MR. LEVIN: AND WHAT I'M ASKING FOR IS A
17 CLARIFICATION ON THE TIME SO THAT I CAN BE PREPARED TO
18 ASK QUESTIONS AND LOOK AT THE RECORD.

19 THE COURT: RIGHT. AS YOU INDICATED BEFORE, IT
20 WAS A WEEK OR SO, A WEEK OR 10 DAYS BEFORE YOU TESTIFIED
21 AT THE FIRST TRIAL?

22 THE WITNESS: YES.

23 THE COURT: THAT THIS CONVERSATION OCCURRED?

24 THE WITNESS: YES. IT MAY HAVE ACTUALLY BEEN A
25 SHORTER TIME SPAN THAN THAT.

26 THE COURT: ALL RIGHT.

27 THE WITNESS: THE TIME GOT MORE EXTENDED BECAUSE

-11255

1 GOT PUSHED BACK ONE DAY AND THEN ANOTHER DAY, AND A
2 THIRD DAY.

3 YOU SEE, ORIGINALLY I THINK THE MEETING WAS
4 ON A FRIDAY OR A SUNDAY, AND I WAS SUPPOSED TO TESTIFY
5 THAT WEEK, EARLIER IN THE WEEK, BUT IT GOT PUSHED BACK.

6 Q. BY MR. CONN: AND WAS YOUR UNDERSTANDING OF
7 MS. ABRAMSON'S REMARK TO YOU THAT THE JUDGE HAD RULED
8 THAT THIS MATERIAL WAS SIMPLY INADMISSIBLE IN EVIDENCE,
9 OR THIS MATERIAL WAS NOT DISCOVERABLE TO THE
10 PROSECUTION?

11 A. INADMISSIBLE IN EVIDENCE.

12 Q. OKAY. SHE NEVER REPRESENTED TO YOU THAT
13 THE COURT HAD RULED THAT THE PROSECUTION IS NOT ENTITLED
14 TO THE DISCOVERY OF THAT MATERIAL; IS THAT CORRECT?

15 A. NOT SPECIFICALLY, NO.

16 Q. AND DID YOU DISCUSS WITH MS. ABRAMSON THAT
17 WHETHER OR NOT THE COURT HAD MADE A RULING THAT THE
18 STATEMENTS WOULD BE INADMISSIBLE IN EVIDENCE DOES NOT
19 MEAN THAT THE MATERIAL SHOULD BE DELETED FROM YOUR NOTES
20 SO AS NOT TO BE DISCLOSED TO THE PROSECUTION?

21 A. I THINK THAT WAS PART OF OUR DISCUSSION. I
22 SAID, "WELL, LOOK" -- AS I DO TYPICALLY WHEN LAWYERS ARE
23 UNHAPPY WITH SOMETHING THAT'S IN MY REPORT. AND IT'S

24 NOT JUST DEFENSE LAWYERS, IT'S PROSECUTORS THAT ARE VERY
25 UNHAPPY SOMETIMES WITH THINGS THAT ARE IN MY REPORTS.
26 I SAID, "LOOK, IF IT'S NOT PERMISSIBLE, IF
27 THERE'S AN OBJECTION TO THIS AND SO FORTH, WELL THEN,
28 IT'LL NEVER COME OUT. BUT JUST BECAUSE IT'S IN MY

-11254

1 REPORT OR IT'S IN MY NOTES, NOBODY HAS TO KNOW, YOU SEE.
2 THE JUDGE WILL DECIDE THIS, AND WAIT AND SEE WHAT THE
3 INSTRUCTIONS ARE AND THE RULINGS."

4 Q. AND BY THAT YOU WERE SEEKING TO SUGGEST TO
5 MS. ABRAMSON THAT IT WAS YOUR UNDERSTANDING THAT THERE
6 WAS NO LEGAL REQUIREMENT FOR THE MATERIAL TO BE DELETED
7 FROM YOUR NOTES; IS THAT CORRECT?

8 MR. LEVIN: OBJECTION. IT'S ARGUMENTATIVE.

9 THE COURT: OVERRULED.

10 THE WITNESS: IN MY VIEW, I THOUGHT SHE WAS
11 OVER-REACTING. I UNDERSTOOD HER CONCERN, AND WE'RE
12 TALKING ABOUT THE DISCOVERY HERE, THAT EVEN THOUGH THE
13 COURT HAD MADE RULINGS OR WOULD MAKE RULINGS THAT THIS
14 STUFF WOULD NOT BE DISCLOSABLE TO ANYBODY IF MY NOTES
15 ARE TURNED OVER TO THE PROSECUTION, THIS INFORMATION IN
16 MY NOTES, THERE'S NO ABSOLUTE GUARANTEE, YOU SEE, THAT
17 THIS INFORMATION WOULD NOT BE EITHER ILLEGALLY BROUGHT
18 UP IN COURT OR DISCLOSED IMPROPERLY OUTSIDE OF COURT.

19 Q. SO WAS IT YOUR UNDERSTANDING THAT THE

20 PURPOSE OF YOUR REWRITING THE NOTES, THEN, WOULD BE
21 TWO-FOLD: NUMBER ONE, TO SEE TO IT THAT THE PROSECUTION
22 IS NOT PROVIDED WITH THE MATERIAL; AND SECONDLY, TO ALSO
23 CONCEAL FROM THE PROSECUTION THE FACT THAT ANYTHING HAD
24 BEEN DELETED FROM YOUR NOTES?

25 A. YES.

26 MR. LEVIN: YOUR HONOR, I WOULD OBJECT TO THE
27 PROSECUTOR LEADING THIS WITNESS, ESPECIALLY SINCE WE'RE
28 GETTING INTO AREAS THAT COULD IMPINGE UPON THIS WITNESS'

-11253

1 ANSWERS, WHETHER HE GETS PROSECUTED IN THE FUTURE FOR
2 SOME OBSTRUCTION OF JUSTICE OR SOME PARTICULAR CRIME BY
3 THE SAME OFFICE.

4 THE COURT: HE HAS HIS LAWYER HERE.

5 MR. LEVIN: WELL, HE HAS A LAWYER HERE, BUT THE
6 POINT IS THERE IS AN INFERENCE THAT WHEN MR. CONN ASKS A
7 LEADING QUESTION, HE IS SUGGESTING AN ANSWER THAT THIS
8 WITNESS BETTER ADOPT, OR MR. CONN IS GOING TO FILE
9 CHARGES AGAINST HIM.

10 AND I ASK THAT HE NOT BE LED. THAT'S ALL I
11 AM ASKING.

12 THE COURT: THAT'S HARDLY THE INFERENCE THAT ONE
13 WOULD DRAW.

14 MR. LEVIN: I WOULD JUST ASK IN THIS SITUATION
15 THE PROSECUTOR NOT BE ALLOWED TO LEAD THIS WITNESS.

16 THE COURT: OVERRULED.

17 MR. FITZGERALD: MAY I HAVE JUST A VERY BRIEF
18 MOMENT WITH MY CLIENT, YOUR HONOR?

19 THE COURT: CERTAINLY.

20 (DR. VICARY AND ATTORNEY FITZGERALD
21 CONFER SOTTO VOCE.)

22

23 MR. FITZGERALD: THANK YOU.

24 THE COURT: ALL RIGHT. YOUR NEXT QUESTION.

25 Q. BY MR. CONN: OKAY.

26 WAS IT YOUR UNDERSTANDING, THEN, THAT THE
27 PURPOSE OF YOUR REWRITING THE NOTES WAS TWO-FOLD:
28 NUMBER ONE, TO ACTUALLY DELETE MATERIAL SO THAT IT WOULD

-11252

1 NOT BE PROVIDED TO THE PROSECUTION, AND ALSO TO CONCEAL
2 FROM THE PROSECUTION THE FACT THAT MATERIAL HAD BEEN
3 DELETED?

4 A. YES.

5 THE COURT: JUST TO CLARIFY ONE THING HERE.

6 DID MS. ABRAMSON SAY THAT AS FAR AS ITEMS
7 THAT HAVE BEEN RULED INADMISSIBLE, THAT THE COURT HAD
8 ALREADY RULED ON THOSE MATTERS, OR THAT THE COURT WOULD
9 RULE ON THEM?

10 THE WITNESS: I THINK SHE SAID THAT THERE HAD
11 ALREADY BEEN RULINGS IN THESE AREAS, AND THERE WAS

12 VITUALLY NO QUESTION THAT THIS MATERIAL WAS OUT OF
13 BOUNDS; AND THEREFORE, THERE WAS A LEGAL JUSTIFICATION
14 FOR TAKING IT OUT.

15 MR. LEVIN: I WOULD OBJECT, YOUR HONOR, WITH A
16 MOTION TO STRIKE THE TESTIMONY. IT'S NOT BASED ON A
17 RECOLLECTION OF EVENTS. THE WITNESS APPEARS TO BE
18 GUESSING.

19 THE COURT: OVERRULED.

20 Q. BY MR. CONN: IS IT CORRECT THAT YOUR
21 TESTIMONY HERE TODAY IS THAT IT WAS YOUR UNDERSTANDING
22 THAT THE RULINGS BY THE COURT RELATED TO THE
23 ADMISSIBILITY OF THE MATERIAL AND NOT AS TO WHETHER OR
24 NOT THE PROSECUTION WAS ENTITLED TO DISCOVERY OF THAT
25 MATERIAL; IS THAT CORRECT?

26 A. WELL, THAT'S NOT CLEAR.

27 MR. LEVIN: OBJECTION, YOUR HONOR. FOR THE
28 WITNESS TO STATE ANY ANSWER TO A QUESTION TO WHICH HE

-11251

1 DOESN'T UNDERSTAND --

2 THE COURT: OVERRULED.

3 Q. BY MR. CONN: A FEW MOMENTS AGO IN MY
4 QUESTIONING OF YOU, DID YOU INDICATE THAT IT WAS YOUR
5 UNDERSTANDING THAT THE COURT HAD MADE RULINGS CONCERNING
6 THE ADMISSIBILITY OF THESE MATTERS, BUT THAT THE COURT
7 HAD NOT MADE ANY RULINGS CONCERNING WHETHER OR NOT THIS

8 MATERIAL WAS DISCOVERABLE TO THE PROSECUTION?

9 MR. LEVIN: OBJECTION. IT'S VAGUE AND IT'S

10 ARGUMENTATIVE.

11 THE COURT: OVERRULED.

12 THE WITNESS: WE'RE GETTING A LITTLE TECHNICAL

13 HERE. I UNDERSTAND THE DISTINCTION.

14 THE IMPRESSION I GOT, BASED UPON MY

15 CONVERSATION WITH MS. ABRAMSON, WAS THAT THE COURT HAD

16 SAID THAT THIS IS VERY SENSITIVE INFORMATION AND THAT

17 NOBODY WAS TO KNOW ABOUT THIS, THE PROSECUTION, THE

18 PUBLIC. NOBODY MEANS NOBODY.

19 Q. BY MR. CONN: SO YOU UNDERSTOOD

20 MS. ABRAMSON TO BE TELLING YOU THAT THERE WAS A COURT

21 ORDER OR A COURT RULING THAT YOU WERE NOT TO PROVIDE

22 THIS MATERIAL TO THE PROSECUTION?

23 A. NOT ABSOLUTELY SPECIFICALLY LIKE THAT. BUT

24 AS I STATED EARLIER, THE RULINGS WERE THAT THIS

25 INFORMATION, SOME OF IT, WAS PRIVILEGED -- PRIVILEGED,

26 CONFIDENTIAL, THAT NOBODY WAS TO HAVE ACCESS TO THIS

27 MATERIAL. AND THERE WERE SOLID REASONS FOR THAT, AND

28 THE COURT HAD MADE RULINGS IN THAT DIRECTION.

-11250

1 THERE WERE OTHER RULINGS THE COURT HAD

2 MADE. WE MENTIONED THE STATEMENTS BY THE CO-DEFENDANT,

3 ALL RIGHT, THE COURT HAD RULED WERE MORE I THINK WHAT

4 YOU'RE TALKING ABOUT, THE ADMISSIBLE IN COURT AS OPPOSED
5 TO DISCLOSING THEM TO THE PROSECUTION. ALL RIGHT. AND
6 THE DISCUSSION WE HAD IS I SAID, "WELL, WHY CAN'T WE
7 JUST LEAVE IT IN THE NOTES THEN, ALL RIGHT? IT WON'T
8 COME OUT."

9 BUT SHE INSISTED THAT IT WOULD HAVE TO COME
10 OUT, BECAUSE THERE WAS NO GUARANTEE IF IT WAS IN THE
11 NOTES THAT IT COULDN'T BE BROUGHT OUT ILLEGALLY, OR
12 ACCIDENTALLY OR SOME OTHER WAY, DESPITE THE LEGALITY.

13 Q. DID YOU EVER SUGGEST TO MS. ABRAMSON MAKING
14 A COPY OF THE NOTES AND BLACKING OUT THE MATERIAL IN ONE
15 COPY AND NOT THE OTHER?

16 A. I NEVER SUGGESTED THAT, NO.

17 Q. DID YOU INFORM MS. ABRAMSON, WHEN SHE
18 INSTRUCTED YOU THAT THIS MATERIAL WOULD HAVE TO BE TAKEN
19 OUT, THAT YOU WERE GOING TO GO BACK TO YOUR OFFICE AND
20 YOU WERE GOING TO REWRITE THE PAGE, AND YOU WERE GOING
21 TO DELETE FROM THE REWRITTEN PAGE ALL OF THE MATERIAL
22 THAT SHE INDICATED TO YOU SHOULD BE TAKEN OUT?

23 A. I DON'T THINK SPECIFICALLY. I MEAN, WE'RE
24 NOT DOTTING I'S AND CROSSING T'S HERE. I MEAN, THE
25 INSTRUCTION IS, "THIS HAS GOT TO COME OUT." ALL RIGHT.

26 Q. AND WHEN YOU -- EVENTUALLY YOU FINALLY
27 AGREED THAT YOU WOULD TAKE IT OUT; IS THAT CORRECT?

28 A. YES.

1 Q. AND YOU ARGUED OVER WHETHER OR NOT IT COULD
2 BE BLACKED OUT OR WHITED OUT; IS THAT CORRECT?

3 A. WE DIDN'T TALK ABOUT HOW IT HAD TO COME
4 OUT. BUT MY UNDERSTANDING WAS THAT THE ONLY WAY THAT
5 THIS COULD COME OUT, ALL RIGHT, AND NOBODY WOULD RAISE A
6 QUESTION ABOUT IT, OR POSSIBLY THAT THE INFORMATION
7 WOULD EVENTUALLY COME OUT, ALL RIGHT, AND WE HAD A COPY
8 OF THE ORIGINAL, WAS TO LITERALLY TAKE IT OUT.

9 Q. WHEN YOU WERE IN MS. ABRAMSON'S OFFICE, DID
10 YOU HAVE A COPY -- DID YOU HAVE A COPY OF YOUR NOTES
11 MADE, OR DID YOU JUST HAVE THE ORIGINAL WITH YOU?

12 A. NO. SHE HAD A COPY.

13 Q. AND DID YOU HAVE THE ORIGINAL?

14 A. YES.

15 Q. AND DID YOU HAVE ANY ADDITIONAL COPIES IN
16 YOUR OFFICE?

17 A. THAT'S A GOOD QUESTION. I MIGHT HAVE.
18 I -- YOU KNOW. WE MADE COPIES FOR OTHER DOCTORS.

19 Q. SO IS IT, TO THE BEST OF YOUR
20 RECOLLECTION -- WELL, LET ME ASK YOU THIS: YOU MADE
21 COPIES OF YOUR ORIGINAL NOTES FOR THE OTHER DOCTORS?

22 MR. LEVIN: OBJECTION WITH RESPECT TO THIS
23 WITNESS NOT HAVING ANY PERSONAL KNOWLEDGE, AND WHO HE'S
24 REFERRING TO AS "WE."

25 THE COURT: OVERRULED.

26 THE WITNESS: THAT'S MY UNDERSTANDING, YES.

27 MR. LEVIN: WELL, OBJECTION, YOUR HONOR. MOTION
28 TO STRIKE WITH RESPECT TO HIS UNDERSTANDING COULD BE

1 BASED ON HEARSAY, ALL KINDS OF SPECULATION AND
2 CONJECTURE.

3 THE COURT: SUSTAINED TO THE FORM OF THE
4 QUESTION.

5 THE ANSWER IS STRICKEN, DEPENDING ON
6 FURTHER FOUNDATION.

7 Q. BY MR. CONN: DID YOU PROVIDE COPIES OF
8 YOUR NOTES TO ANYONE OTHER THAN MS. ABRAMSON?

9 MR. LEVIN: OBJECTION. IT'S VAGUE WITH RESPECT
10 TO "COPY."

11 WHICH COPY IS HE REFERRING TO?

12 THE COURT: UNMODIFIED VERSION OF THE NOTES.

13 MR. CONN: YES, REFERRING TO THE UNMODIFIED
14 VERSION.

15 Q. UP UNTIL THE TIME YOU MET WITH MS. ABRAMSON
16 IN HER OFFICE, DID YOU PROVIDE ANYONE WITH COPIES OF
17 THAT UNMODIFIED VERSION?

18 A. I THINK THAT I HAD TWO OR THREE COPIES
19 MADE, AND I GAVE ONE COPY TO MS. ABRAMSON. I GAVE
20 ANOTHER TO HER CO-COUNSEL, AND --

21 MR. LEVIN: COULD WE CLARIFY WHO THAT WAS AT THE
22 TIME?

23 Q. BY MR. CONN: WHO WAS HER CO-COUNSEL?

24 A. THIS IS A MEMORY TEST. I AM PROBABLY GOING
25 TO FLUNK HERE.

26 I DON'T THINK I CAN REMEMBER HIS NAME. I
27 KNOW WHAT HE LOOKS LIKE.
28 MR. LEVIN: TAKE YOUR BEST SHOT.

-11247

1 THE COURT: WAS IT A MAN OR A WOMAN?

2 THE WITNESS: IT WAS A MAN. HE'S FROM THE PUBLIC
3 DEFENDER'S OFFICE FROM SAN FRANCISCO. I'VE WORKED WITH
4 HIM ON ONE OR TWO OTHER CASES.

5 Q. BY MR. CONN: WAS IT MICHAEL BURT?

6 A. MICHAEL BURT, YES.

7 Q. SO YOU PROVIDED AN UNMODIFIED COPY OF YOUR
8 NOTES TO MICHAEL BURT?

9 A. I THINK I DID. MY NORMAL PATTERN IS I MAKE
10 A FEW COPIES OF MY NOTES AND I GIVE THEM TO EVERYBODY.

11 IT'S ALSO USUAL THAT I GIVE THE ORIGINAL TO
12 THE ATTORNEY AND THE ATTORNEY MAKES COPIES FOR
13 EVERYBODY, THE OTHER LAWYERS AND THE OTHER DOCTORS.

14 Q. OKAY. BUT I AM JUST REFERRING TO IN THIS
15 SPECIFIC CASE.

16 PRIOR TO THE TIME THAT YOU MET WITH
17 MS. ABRAMSON IN HER OFFICE AND HAD THIS DISCUSSION WITH
18 HER CONCERNING WHAT SHOULD BE REMOVED FROM YOUR NOTES,
19 DID YOU MAKE COPIES OF YOUR NOTES?

20 A. I BELIEVE I DID.

21 Q. AND DO YOU ALSO BELIEVE THAT YOU GAVE

22 COPIES OF THE NOTES TO MICHAEL BURT?

23 A. YOU KNOW, I DO THESE CASES EVERY WEEK,

24 AND --

25 Q. I AM JUST ASKING YOU WHAT YOU RECALL.

26 A. I DON'T RECALL IF I SPECIFICALLY DID THAT.

27 I MEAN, THAT'S MY STANDARD PRACTICE. I MEAN, THE

28 LAWYERS COME TO MY OFFICE SOMETIMES. SOMETIMES I GO TO

-11246

1 THEIR OFFICE, AND I BRING COPIES OF THINGS. IT JUST

2 EXPEDITES MATTERS.

3 Q. DO YOU RECALL WHETHER YOU MIGHT HAVE GIVEN

4 THE COPY TO MR. BURT IN PERSON, OR WHETHER YOU MAILED IT

5 TO HIM?

6 MR. LEVIN: OBJECTION. ASSUMES FACTS NOT IN

7 EVIDENCE, THAT HE DID IT OR REMEMBERS DOING IT.

8 THE COURT: SUSTAINED.

9 THE WITNESS: I CAN'T REMEMBER.

10 MR. LEVIN: OBJECTION, YOUR HONOR.

11 THE COURT: HE'S ANSWERED THE QUESTION AS TO

12 WHETHER -- DO YOU HAVE ANY RECOLLECTION OF HAVING GIVEN

13 SOMETHING TO MR. BURT?

14 THE WITNESS: NOT SPECIFICALLY.

15 THE COURT: OKAY.

16 Q. BY MR. CONN: DO YOU KNOW WHETHER YOU GAVE

17 A COPY OF YOUR NOTES TO ANYONE PRIOR TO MEETING IN

18 MS. ABRAMSON'S OFFICE?

19 A. SPECIFICALLY ANY OTHER PERSON?

20 Q. YES.

21 A. NO, I DON'T HAVE A MEMORY OF THAT.

22 Q. AND SINCE THE MEETING IN MS. ABRAMSON'S

23 OFFICE, DID YOU GIVE A COPY OF YOUR NOTES TO ANYONE?

24 MR. LEVIN: OBJECTION. IT'S VAGUE WITH RESPECT

25 TO WHICH NOTES, IF IT'S SINCE THE MEETING.

26 THE COURT: SUSTAINED.

27 Q. BY MR. CONN: WELL, REFERRING TO YOUR

28 ORIGINAL UNMODIFIED NOTES, DID YOU EVER AT ANY TIME GIVE

-11245

1 A COPY OF THOSE NOTES TO ANYONE OTHER THAN MS. ABRAMSON?

2 A. I MAY HAVE GIVEN A COPY TO ONE OF THE

3 DOCTORS, BECAUSE I THINK ONE OR MORE OF THE DOCTORS

4 ACTUALLY CAME TO MY OFFICE.

5 Q. AND WHO WAS THAT?

6 A. DR. HART. PERHAPS DOCTOR TYLER.

7 MR. FITZGERALD: CAN I CONFER WITH MY CLIENT

8 BRIEFLY, YOUR HONOR?

9 THE COURT: YES.

10 (DR. VICARY AND ATTORNEY FITZGERALD

11 CONFER SOTTO VOCE.)

12

13 MR. FITZGERALD: I THINK THERE'S SOMETHING THAT

14 NEEDS TO BE CLARIFIED.

15 MR. LEVIN: WELL, I WOULD OBJECT.

16 THE COURT: DID THE WITNESS WANT TO CLARIFY HIS
17 ANSWER? IF NOT, SAY NO.

18 THE WITNESS: WELL, MY COUNSEL TOLD ME THAT I
19 GAVE HIM A COPY OF THE ORIGINAL, TOO. HE'S GOT A COPY.

20 Q. BY MR. CONN: YES.

21 OTHER THAN YOUR COUNSEL, IS IT YOUR
22 RECOLLECTION THAT YOU GAVE A COPY OF THE ORIGINAL
23 UNMODIFIED NOTES TO DR. HART?

24 A. I THINK THAT THERE WERE OTHER INDIVIDUALS
25 THAT CAME TO MY OFFICE, BUT THIS IS SUCH A LONG TIME AGO
26 THAT I CAN'T SPECIFICALLY REMEMBER IF THE COPIES WERE
27 PROVIDED VIA THE STAFF AT MS. ABRAMSON'S OFFICE OR BY
28 MYSELF, YOU SEE. COPIES WERE MADE, THOUGH, SEVERAL

-11244

1 COPIES.

2 Q. ARE YOU SAYING THAT IT IS YOUR
3 UNDERSTANDING THAT DR. HART ULTIMATELY RECEIVED A COPY
4 OF YOUR ORIGINAL, UNMODIFIED NOTES?

5 A. I THINK MY UNDERSTANDING IS THAT ALL THE
6 EXPERTS IN THE FIRST TRIAL GOT COPIES OF THE ORIGINAL
7 NOTES.

8 Q. AND IS THAT BASED UPON YOUR PROVIDING THOSE
9 NOTES TO THEM, OR BECAUSE OF INFORMATION THAT YOU

10 RECEIVED FROM SOMEONE ELSE THAT YOUR NOTES WERE, IN
11 FACT, PROVIDED TO THEM?

12 A. I DON'T HAVE A SPECIFIC MEMORY OF THAT. IT
13 HAD TO COME FROM EITHER ME OR MS. ABRAMSON.

14 MR. LEVIN: YOUR HONOR, I WOULD MOVE TO STRIKE
15 THE WITNESS' PREVIOUS ANSWER. HE DOESN'T HAVE PERSONAL
16 KNOWLEDGE OF THIS MATTER, AND I ASK THAT IT BE STRICKEN.

17 THE COURT: IT WOULD HELP IF YOU COULD MAKE AN
18 OBJECTION CONTEMPORANEOUS WITH THE QUESTION.

19 MS. ABRAMSON: I TRIED.

20 THE COURT: OBJECTION SUSTAINED. THIS ANSWER AND
21 THE PREVIOUS ANSWER IS STRICKEN, SINCE THERE IS NO
22 FOUNDATION THAT HE HAS KNOWLEDGE, OTHER THAN WHAT OTHER
23 PEOPLE MIGHT HAVE TOLD HIM, OR HIS CONCLUSIONS THAT
24 THESE MATERIALS WERE GIVEN TO OTHER PEOPLE.

25 Q. BY MR. CONN: DID YOU EVER PERSONALLY
26 PROVIDE NOTES -- THE ORIGINAL UNMODIFIED NOTES TO ANYONE
27 OTHER THAN MS. ABRAMSON?

28 A. I DON'T HAVE A SPECIFIC MEMORY OF DOING

-11243

1 THAT.

2 Q. DID YOU EVER DIRECT ANYONE IN YOUR STAFF TO
3 PROVIDE A COPY OF YOUR ORIGINAL UNMODIFIED NOTES TO
4 ANYONE OTHER THAN MS. ABRAMSON?

5 A. I TOLD MY STAFF THAT IF --

6 MR. LEVIN: I OBJECT, YOUR HONOR. WHATEVER HE
7 TOLD HIS STAFF IS HEARSAY.

8 THE COURT: WELL, UNLESS HE DIRECTED THEM TO DO
9 SOMETHING AND DISPUTE SOMETHING, SUSTAINED.

10 Q. BY MR. CONN: DID YOU EVER DIRECT ANY
11 MEMBER OF YOUR STAFF TO PROVIDE A COPY OF YOUR ORIGINAL
12 UNMODIFIED NOTES TO ANYONE?

13 A. THEY HAD THE GENERAL INSTRUCTION TO DO
14 THAT.

15 Q. TO DO WHAT?

16 A. IF ONE OF THE DOCTORS OR A LAWYER OR AN
17 INVESTIGATOR FOR THE DEFENSE CALLED, THAT WE HAD COPIES,
18 AND THEY WERE TO HAVE A COPY RIGHT AWAY.

19 Q. DID YOU EVER RECEIVE INFORMATION AS TO
20 WHETHER OR NOT COPIES HAD BEEN PROVIDED?

21 MR. LEVIN: OBJECTION, YOUR HONOR. IT WOULD BE
22 BASED ON HEARSAY. IT'S IRRELEVANT.

23 THE COURT: SUSTAINED. SUSTAINED.

24 Q. BY MR. CONN: NOW, WAS IT YOUR
25 UNDERSTANDING -- GIVEN THE FACT THAT IT WAS YOUR
26 UNDERSTANDING THAT IT WAS ONE OF THE PURPOSES TO REWRITE
27 THE NOTES SO AS TO CONCEAL FROM THE READER THE FACT THAT
28 THE NOTES HAD BEEN MODIFIED, WAS IT YOUR UNDERSTANDING

1 THAT YOUR MODIFIED NOTES WERE GOING TO BE PRESENTED TO

2 THE PROSECUTION AS IF THEY WERE THE ORIGINAL NOTES?

3 MR. LEVIN: OBJECTION. ASSUMES FACTS NOT IN

4 EVIDENCE. AND HE'S ASKING THE WITNESS TO ADOPT THE

5 REASON THE PROSECUTOR SUGGESTS FOR THE REDACTION OR THE

6 CHANGE IN THE NOTES AS OPPOSED TO WHAT HE SAID BEFORE.

7 THE COURT: OVERRULED.

8 THE WITNESS: YES.

9 Q. BY MR. CONN: AND WAS IT YOUR UNDERSTANDING

10 THAT THEY WERE TO BE USED IN COURT; THAT IS, YOUR

11 MODIFIED NOTES WERE TO BE USED IN COURT FOR PURPOSES OF

12 EXAMINATION AND CROSS-EXAMINATION AS IF THEY WERE THE

13 ORIGINAL NOTES?

14 A. YES.

15 Q. NOW, GOING BACK TO THE REFERENCES ON PAGE

16 18, I BELIEVE THAT YOU SAID THAT YOU WERE TOLD TO DELETE

17 THE FIRST ENTRY; THAT IS, THE FIRST PARAGRAPH THAT YOU

18 HAVE HIGHLIGHTED IN YELLOW CONCERNING CONVERSATIONS

19 BETWEEN LYLE MENENDEZ AND ERIK MENENDEZ BY MS. ABRAMSON;

20 IS THAT CORRECT?

21 A. CORRECT.

22 Q. DIRECTING YOUR ATTENTION NOW TO THE SECOND

23 PARAGRAPH, THE REFERENCE TO JOSE MENENDEZ NOT BEING

24 WILLING TO PAY FOR LYLE MENENDEZ' TOUPEE, WERE YOU ALSO

25 DIRECTED BY MS. ABRAMSON TO DELETE THAT PARAGRAPH FROM

26 YOUR REVISED NOTES?

27 A. YES.

28 Q. LET ME ASK YOU THIS: WHEN YOU TERMINATED

1 THIS CONVERSATION WITH MS. ABRAMSON ON THAT PARTICULAR
2 DAY, DID YOU ADVISE MS. ABRAMSON THAT WHAT YOU WERE
3 GOING TO DO WAS GO BACK TO YOUR OFFICE AND REWRITE THESE
4 PAGES, DELETING THE MATERIAL THAT SHE WANTED DELETED?

5 A. EVENTUALLY, YES.

6 Q. OKAY. WHEN YOU SAY EVENTUALLY, YOU MEAN
7 THAT DAY IT WAS DECIDED BEFORE YOU LEFT HER OFFICE THAT
8 THAT WAS, IN FACT, WHAT YOU WERE GOING TO DO; IS THAT
9 CORRECT?

10 A. CORRECT.

11 Q. AND DID YOU ADVISE MS. ABRAMSON AS TO WHAT
12 YOU WERE GOING TO DO WITH YOUR ORIGINAL NOTES AFTER YOU
13 HAD COMPLETED REWRITING THE PAGES THAT NEEDED TO BE
14 REWRITTEN?

15 A. NOT SPECIFICALLY.

16 Q. WAS THERE ANY DISCUSSION CONCERNING WHAT
17 YOU WOULD DO WITH YOUR ORIGINAL UNMODIFIED NOTES?

18 A. NO.

19 Q. DID MS. ABRAMSON REQUEST THAT SHE BE
20 PROVIDED WITH A COPY OF YOUR REVISED NOTES AS SOON AS
21 YOU HAD REWRITTEN THE PAGES THAT NEEDED TO BE REWRITTEN?

22 A. YES.

23 Q. AND DID YOU AGREE TO PROVIDE HER WITH
24 COPIES?

25 A. YES.

26 Q. WERE YOU GOING TO PROVIDE HER WITH AN

27 ENTIRE -- A REPRODUCTION OF YOUR ENTIRE NOTES AFTER THEY
28 HAD -- AFTER THE NECESSARY PAGES HAD BEEN REWRITTEN, OR

-11240

1 WERE YOU GOING TO SIMPLY PROVIDE HER WITH A COPY OF
2 THOSE PARTICULAR PAGES THAT YOU WERE REWRITING?

3 A. SHE ALREADY HAD A COPY OF THE ORIGINAL, SO
4 THERE WOULD BE NO REASON FOR ME TO SEND HER ANOTHER COPY
5 OF THAT.

6 Q. SO YOU TOLD HER THAT YOU WOULD THEN SEND
7 HER A COPY OF THOSE PAGES THAT YOU WERE REWRITING;
8 CORRECT?

9 MR. LEVIN: OBJECTION, YOUR HONOR. MISSTATES
10 HIS -- I DON'T BELIEVE THIS WITNESS EVER SAID --
11 THE COURT: SUSTAINED.

12 REPHRASE THE QUESTION, PLEASE.

13 Q. BY MR. CONN: DID YOU EVER INDICATE TO
14 MS. ABRAMSON THAT YOU WOULD BE PROVIDING HER WITH COPIES
15 OF THE PAGES YOU WERE GOING TO REWRITE?

16 MR. LEVIN: OBJECTION, YOUR HONOR. THE PREVIOUS
17 TESTIMONY INDICATED THAT MS. ABRAMSON DID NOT DIRECT HIM
18 TO REWRITE THE PAGES.

19 THE COURT: OVERRULED.

20 THE WITNESS: MAYBE I'M A LITTLE SLOW ON THE
21 UNDERSTANDING OF THIS MATTER, BUT THIS IS -- SHE HAS
22 ALREADY GOT A COPY OF THE ORIGINAL, OKAY. SO THERE IS

23 NO POINT IN MY GIVING HER THAT. THE ONLY THING SHE
24 WOULD NOT HAVE IS A COPY OF THE CORRECTIONS, ALL RIGHT.
25 SO I WOULD BRING OR SEND HER, EVENTUALLY, A COPY OF THE
26 NOW CORRECTED NOTES.

27 Q. BY MR. CONN: AND YOU TOLD HER THAT?
28 THAT'S MY POINT. YOU TOLD HER THAT, BEFORE LEAVING HER

-11239

1 OFFICE, THAT YOU WERE GOING TO GIVE HER A COPY OF THE
2 REWRITTEN PAGES AS SOON AS YOU REWROTE THOSE PAGES;
3 CORRECT?

4 MR. LEVIN: OBJECTION. IT'S LEADING AND
5 SUGGESTIVE.

6 THE COURT: OVERRULED.

7 THE WITNESS: IT WASN'T NECESSARY FOR ME TO TELL
8 HER THAT. I MEAN, SHE KNEW.

9 MR. LEVIN: OBJECTION.

10 THE COURT: ALL RIGHT. YOU DIDN'T TELL HER THAT,
11 IS THAT WHAT YOU'RE SAYING?

12 THE WITNESS: CORRECT.

13 MR. CONN: BUT IT'S MY UNDERSTANDING THAT YOU DID
14 TELL HER THAT YOU WERE GOING TO REWRITE THOSE PAGES IN
15 ACCORDANCE WITH HER DIRECTIONS; IS THAT RIGHT?

16 MR. LEVIN: OBJECTION. THE WITNESS PREVIOUSLY
17 STATED THAT MS. ABRAMSON DID NOT GIVE HIM DIRECTIONS TO
18 REWRITE THE NOTES.

19 THE COURT: REPHRASE THE QUESTION.

20 Q. BY MR. CONN: DID YOU INDICATE TO

21 MS. ABRAMSON BEFORE YOU LEFT THE OFFICE THAT YOU WERE

22 GOING TO REWRITE CERTAIN PAGES?

23 A. I AGREED THAT I WOULD MAKE THE CHANGES,

24 YES.

25 Q. OKAY.

26 AND DID YOU INDICATE TO MS. ABRAMSON THAT

27 YOU WERE GOING TO MAKE THE CHANGES BY REWRITING THOSE

28 PAGES, LEAVING OUT THE MATERIAL THAT SHE WAS OBJECTING

-11238

1 TO?

2 A. THAT WAS OUR UNDERSTANDING. I DON'T THINK

3 I SPECIFICALLY SAID THAT TO HER.

4 Q. AND THAT WAS YOUR UNDERSTANDING, BECAUSE

5 YOU DISCUSSED WHETHER OR NOT CERTAIN SECTIONS SHOULD BE

6 WHITED OUT OR BLACKED OUT; IS THAT CORRECT?

7 MR. LEVIN: OBJECTION. MISSTATES THE WITNESS'

8 TESTIMONY. THEY NEVER DISCUSSED IT.

9 THE COURT: REPHRASE THE QUESTION.

10 Q. BY MR. CONN: DID YOU HAVE A DISCUSSION

11 WITH MS. ABRAMSON CONCERNING WHETHER CERTAIN SECTIONS

12 SHOULD BE WHITED OUT OR BLACKED OUT?

13 A. NO.

14 Q. THEN WHY ARE YOU SAYING THAT IT WAS YOUR

15 UNDERSTANDING YOU WOULD REWRITE THE PAGES AS OPPOSED TO
16 WHITING OUT CERTAIN SECTIONS OR BLACKING OUT CERTAIN
17 SECTIONS?

18 A. IT JUST SEEMED COMMON SENSE TO ME, THAT
19 THERE WAS NO OTHER WAY TO DO IT.

20 Q. IF YOU WERE TO CONCEAL FROM THE READER THE
21 FACT THAT SOMETHING HAD BEEN DELETED; IS THAT CORRECT?

22 A. IF THERE WAS EXCLUSIVE INFORMATION THAT
23 NOBODY WAS SUPPOSED TO KNOW ABOUT, IT SEEMS TO ME TO BE
24 PRETTY STUPID JUST TO WHITE IT OUT.

25 I COULD BE WRONG ABOUT THAT, BUT THAT WAS
26 THE INFERENCE THAT I DRAW.

27 Q. OKAY. AND HOW SOON AFTER YOU LEFT
28 MS. ABRAMSON'S OFFICE THAT DAY DID YOU THEN PROVIDE

-11237

1 MS. ABRAMSON WITH A COPY OF THE REVISED PAGES?

2 A. OH, WITHIN THE NEXT FEW DAYS.

3 Q. AND DID YOU DO THAT BY MAILING IT TO HER OR
4 DELIVERING IT TO HER?

5 A. I THINK I HAD A MESSENGER TAKE IT TO HER.

6 MR. CONN: OKAY. DOES THE COURT WISH TO TAKE THE
7 NOON RECESS AT THIS TIME?

8 THE COURT: LET'S KEEP GOING.

9 Q. BY MR. CONN: ALL RIGHT.

10 MR. LEVIN: COULD WE HAVE A BREAK, YOUR HONOR?

11 IT'S NOON. I WOULD LIKE TO AVAIL MYSELF --

12 THE COURT: LET'S KEEP GOING A LITTLE FURTHER.

13 MR. LEVIN: I WOULD LIKE TO AVAIL MYSELF OF THE
14 COURT'S SUGGESTION.

15 THE COURT: LET'S KEEP GOING A LITTLE FURTHER IN
16 THE HEARING.

17 Q. BY MR. CONN: DIRECTING YOURSELF TO THE
18 SECOND PARAGRAPH ON THAT PAGE 18, DID MS. ABRAMSON
19 INDICATE TO YOU WHY THAT SECOND PARAGRAPH SHOULD BE
20 DELETED; THAT IS, THE REFERENCE TO JOSE MENENDEZ NOT
21 PAYING THE ONE OR TWO THOUSAND DOLLARS A YEAR FOR THE
22 HAIRPIECE?

23 A. YES.

24 Q. AND WHAT WAS THAT?

25 A. THAT THIS WAS A STATEMENT THAT LYLE HAD
26 MADE TO ERIK. THIS WAS NOT SOMETHING THAT ERIK KNEW ON
27 HIS OWN.

28 Q. DIRECTING YOUR ATTENTION TO THE THIRD

-11236

1 PARAGRAPH RELATING TO DRUG MONEY GOING THROUGH THE
2 FATHER'S BUSINESS, DO YOU SEE THE LINE THAT FOLLOWS THAT
3 REFERENCE?

4 A. CORRECT.

5 Q. CAN YOU TELL US WHAT THAT LINE SAYS?

6 A. IT SAYS, "FATHER KNEW WE KNEW."

7 Q. AND IT WAS YOUR UNDERSTANDING THAT ERIK
8 MENENDEZ WAS INDICATING TO YOU THAT HE KNEW THAT DRUG
9 MONEY WAS GOING THROUGH HIS FATHER'S BUSINESS?

10 A. THAT'S HIS STATEMENT TO ME, YES.

11 Q. AND DID YOU DELETE THAT FROM YOUR REWRITTEN
12 PAGE 8?

13 A. YES.

14 Q. I MEAN -- I'M SORRY.

15 A. YES.

16 Q. AND CAN YOU TELL US WHY YOU DELETED THAT?

17 A. MY UNDERSTANDING WAS THAT THIS WAS NOT
18 TRUE.

19 MR. LEVIN: OBJECTION, YOUR HONOR. IT -- THE
20 WITNESS HAS NO PERSONAL KNOWLEDGE OF THAT.

21 THE COURT: OVERRULED.

22 Q. BY MR. CONN: AND HOW DID YOU CONCLUDE THAT
23 THIS WAS NOT TRUE?

24 A. I BELIEVE BASED UPON WHAT MS. ABRAMSON TOLD
25 ME, AND OTHER INFORMATION THAT I HAD IN THE CASE.

26 Q. OKAY.

27 NOW, AT THE TIME -- WELL, ERIK MENENDEZ
28 SPECIFICALLY MADE THAT STATEMENT TO YOU; IS THAT

-11235

1 CORRECT?

2 A. HE DID.

3 Q. AND DID HE EVER TAKE THAT STATEMENT BACK

4 AND INDICATE TO YOU THAT THAT WAS NOT TRUE?

5 A. I DON'T THINK SPECIFICALLY, AND I DID NOT

6 ASK HIM.

7 Q. OKAY. AND THE REASON WHY YOU DELETED IT

8 WAS BECAUSE MS. ABRAMSON TOLD YOU THAT IT WAS NOT TRUE?

9 MR. LEVIN: OBJECTION. IT MISSTATES HIS

10 TESTIMONY.

11 THE COURT: OVERRULED.

12 THE WITNESS: THAT WAS MY UNDERSTANDING.

13 THE COURT: OKAY. ARE YOU SAYING THAT YOU ALSO

14 HAD OTHER INFORMATION INDICATING TO YOU THAT THAT WAS

15 NOT TRUE?

16 THE WITNESS: I HAD READ BOXES AND BOXES OF

17 DOCUMENTS, INCLUDING THE POLICE REPORTS IN THE CASE, AND

18 I HAD NEVER COME ACROSS ANY EVIDENCE THAT THIS WAS A

19 TRUE FACT. IT WAS JUST BULLSHIT, OKAY. AND SO I

20 THOUGHT IF IT'S NOT TRUE, ALL RIGHT, THEN WHY SHOULD IT

21 BE IN THERE?

22 THE COURT: WELL, WHY DID YOU -- WELL, DID YOU

23 EVER READ ANY INFORMATION ESTABLISHING THAT IT'S NOT

24 TRUE, OR ARE YOU SAYING THAT MERELY BECAUSE NO ONE ELSE

25 WAS ABLE TO CONFIRM THAT THIS WAS, IN FACT, A TRUE FACT,

26 THAT YOU CONCLUDED THAT IT WAS NOT A TRUE FACT?

27 THE WITNESS: I HAD NO DATA TO INDICATE THAT

28 THERE WAS ANY TRUTH AT ALL TO THIS.

1 THE COURT: WELL, YOU WERE ESSENTIALLY RELYING
2 UPON THE REPRESENTATION OF LESLIE ABRAMSON THAT IT WAS
3 NOT TRUE; IS THAT CORRECT?

4 THE WITNESS: TO A LARGE EXTENT, YES.

5 THE COURT: OKAY. WAS IT SIGNIFICANT TO YOU THAT
6 MR. MENENDEZ, ERIK MENENDEZ, HAD TOLD YOU THIS?

7 THE WITNESS: IT WAS.

8 THE COURT: THEN WHY DIDN'T YOU LEAVE IT IN?

9 THE WITNESS: WELL, IF IT'S JUST BULLSHIT -- I
10 MEAN, I KNOW THERE'S SIGNIFICANCE WHEN SOMEBODY TELLS
11 YOU SOMETHING THAT'S JUST COMPLETELY OFF THE WALL, BUT
12 HER REPRESENTATION WAS THAT THIS WAS JUST IRRELEVANT AND
13 THERE WAS NO SUPPORT WHATEVER FOR THIS.

14 MR. LEVIN: YOUR HONOR, BASED UPON WHAT I'VE
15 HEARD AT THIS TIME, I WOULD INTERPOSE THE -- REINTERPOSE
16 THE PSYCHIATRIC-PATIENT PRIVILEGE ON BEHALF OF ERIK
17 MENENDEZ, IN THAT THIS WITNESS HAS EFFECTIVELY DONE
18 SOMETHING ON HIS OWN TO DESTROY THE CREDIBILITY OF ERIK
19 MENENDEZ IN A TRIAL WHERE HIS LIFE IS AT STAKE; AND
20 WITHOUT TELLING ERIK MENENDEZ THAT HE WAS GOING TO
21 REMOVE SIGNIFICANT INFORMATION FROM THE REPORT, THERE IS
22 NO WAY THAT ERIK MENENDEZ COULD HAVE MADE A KNOWING AND
23 CONSCIOUS WAIVER OF THE PSYCHOTHERAPIST-PATIENT
24 PRIVILEGE.

25 WHAT I HAVE HEARD AT THIS POINT, UP TO THIS
26 POINT, AND BASED UPON WHAT THIS DOCTOR DECIDED TO DO ON
27 HIS OWN, TO CALL ERIK MENENDEZ A LIAR -- HAD ERIK

-11233

1 NOTWITHSTANDING MS. ABRAMSON'S INVOKING IT AT THIS TIME,
2 AND IT'S A SEPARATE INVOCATION OF THE PRIVILEGE.

3 THE COURT: OKAY. WHAT YOU'RE SAYING IS
4 PREMATURE TO THE EXTREME, BECAUSE WE HAVEN'T HEARD THE
5 ENTIRETY OF THE ANSWER HERE. AND YOU CAN JUST BE QUIET
6 AND LET ME GET SOME MORE INFORMATION.

7 MR. LEVIN: I DON'T THINK I CAN BE QUIET, YOUR
8 HONOR.

9 THE COURT: YES, YOU CAN, BECAUSE I AM TELLING
10 YOU TO AT THIS POINT YOU HAVE AN OBJECTION. YOU CAN
11 MAKE IT A LITTLE LATER ON. WE HAVE TO HAVE MORE
12 INFORMATION.

13 MR. LEVIN: IT IS NOT AN OBJECTION. HE IS
14 INVOKING THE PATIENT-DOCTOR PRIVILEGE AND ASKING
15 DR. VICARY TO PROVIDE NO OTHER TESTIMONY, NO FURTHER
16 TESTIMONY CONCERNING ANY STATEMENTS HE MADE, AND IF HE
17 DOES SO, HE IS DOING IT ON HIS OWN AND HE IS DOING IT AT
18 HIS OWN PERIL. AND THAT'S INDEPENDENT OF ANY RIGHT TO
19 COUNSEL THAT HE HAS. I AM INVOKING IT ON HIS BEHALF.

20 THE COURT: OKAY. ALL RIGHT. THAT IS NOTED.

21 GETTING BACK TO THE INQUIRY HERE, YOU SAID
22 THAT YOU DISCOUNTED THIS INFORMATION BASED UPON OTHER
23 INFORMATION YOU RECEIVED FROM MS. ABRAMSON AND FROM

24 OTHER SOURCES.

25 MY QUESTION OF YOU IS: FIRST OF ALL, DID

26 YOU THINK IT WAS SIGNIFICANT THAT THE DEFENDANT HAD TOLD

27 YOU THIS?

28 THE WITNESS: YES.

-11232

1 THE COURT: AND REGARDLESS OF WHAT OTHER PEOPLE

2 TOLD YOU ABOUT THE MATERIAL OR THE RELIABILITY OF THE

3 MATERIAL, DID YOU STILL THINK IT WAS SIGNIFICANT THAT HE

4 HAD TOLD YOU THIS?

5 THE WITNESS: TO SOME EXTENT, YES.

6 THE COURT: AND ITS SIGNIFICANCE THEN -- WELL,

7 FIRST OF ALL, DID YOU CONCLUDE THAT -- YOU USED YOUR

8 PHRASE AS TO HOW YOU CHARACTERIZED THIS INFORMATION.

9 DID YOU CONCLUDE THAT THAT WAS THE STATE OF

10 MIND OF THE DEFENDANT WHEN HE TOLD YOU THIS, OR THAT HE

11 ACTUALLY BELIEVED IT, AND THAT LATER ON YOU DETERMINED

12 THIS INFORMATION WAS INCORRECT?

13 IT'S UNCLEAR WHAT YOU MEAN WHEN YOU

14 CHARACTERIZE THIS INFORMATION.

15 THE WITNESS: YES. AND I DON'T KNOW THE ANSWER

16 TO THAT. I DON'T KNOW WHETHER ERIK REALLY BELIEVED

17 THIS, OR SOMEBODY HAD TOLD HIM THIS, OR HE WAS JUST

18 TELLING ME A TALL TALE. I DON'T KNOW.

19 THE COURT: AND REGARDLESS OF THE VARIOUS

20 POSSIBILITIES, YOU CONCLUDED THAT THIS MATERIAL SHOULD
21 BE DELETED?

22 THE WITNESS: RIGHT. BECAUSE IT WAS -- IT WAS
23 NOT TRUE.

24 THE COURT: OKAY. AND DID YOU DELETE OTHER
25 MATERIAL IN YOUR NOTES JUST BECAUSE YOU INDEPENDENTLY
26 DETERMINED THAT IT WAS NOT TRUE?

27 THE WITNESS: THERE MAY HAVE BEEN ANOTHER
28 OCCASION OR TWO WHERE THAT WAS DONE.

-11231

1 THE COURT: OKAY. AND DO YOU HAVE A SPECIFIC
2 RECOLLECTION OF THOSE?

3 THE WITNESS: I'M SURE THEY WILL COME OUT. I
4 DON'T HAVE A SPECIFIC RECOLLECTION RIGHT NOW, BUT IF
5 WE'RE GOING TO GO THROUGH ALL THIS, IT WILL COME OUT.

6 THE COURT: ALL RIGHT. LET'S FINISH THIS PAGE.

7 DO YOU HAVE ANY MORE INQUIRY ON THIS PAGE,
8 MR. CONN?

9 MR. CONN: YES.

10 Q. DID YOU SUGGEST TO MS. ABRAMSON THAT
11 PERHAPS YOU SHOULD HAVE FURTHER INTERVIEWS WITH ERIK
12 MENENDEZ TO DETERMINE WHETHER OR NOT HE BELIEVED IT TO
13 BE TRUE, WHETHER OR NOT HE WAS LYING, BEFORE YOU DELETED
14 IT FROM YOUR NOTES?

15 A. THAT WAS A POSSIBILITY. IT WASN'T VERY

16 PRACTICAL, SINCE THERE WAS ONLY A COUPLE OF DAYS BEFORE
17 MY TESTIMONY.

18 Q. SO YOU DID NOT SUGGEST THAT TO HER?

19 A. IT DIDN'T OCCUR TO ME. IT DIDN'T OCCUR TO
20 ME.

21 Q. DID IT MAKE ANY DIFFERENCE TO YOU, AS FAR
22 AS YOUR DECISION AS TO WHETHER OR NOT IT SHOULD BE
23 DELETED FROM YOUR NOTES, AS TO WHETHER OR NOT ERIK
24 MENENDEZ BELIEVED IT TO BE TRUE, OR WHETHER OR NOT HE
25 WAS LYING ABOUT THIS?

26 A. NO. I THINK THAT WOULD BE SIGNIFICANT, ALL
27 RIGHT.

28 Q. SIGNIFICANT TO YOUR DECISION AS TO WHETHER

-11230

1 OR NOT TO DELETE IT?

2 A. YES.

3 Q. AND WHY WOULD THAT BE SIGNIFICANT?

4 A. WELL, I THINK IT'S IMPORTANT IF THIS IS A
5 LIE THAT HE TOLD ME AS OPPOSED TO SOMETHING HE HONESTLY
6 BELIEVED. I DON'T KNOW. ALL I KNOW IS THAT BASED UPON
7 THE INFORMATION I HAD, THIS IS SIMPLY NOT TRUE, OKAY.

8 IT'S -- SO I WASN'T GETTING PRECISE AT THAT
9 POINT. I WAS JUST SAYING, "WELL, IF THIS IS REALLY NOT
10 TRUE, IT'S JUST A BUNCH OF BALONEY, THEN ALL RIGHT, IT
11 CAN COME OUT."

12 Q. WHAT I'M ASKING YOU IS, IN WHAT WAY DO
13 THOSE TWO POSSIBILITIES, THAT IS, THAT HE WAS LYING OR
14 THAT HE WAS HONESTLY MISTAKEN, AFFECT YOUR DECISION TO
15 DELETE?

16 A. OH, I THINK IT'S MORE SIGNIFICANT IF HE
17 ACTUALLY CONSCIOUSLY WAS LYING TO ME ABOUT THIS.

18 Q. BUT YOU DIDN'T KNOW ONE WAY OR THE OTHER
19 ABOUT WHETHER HE WAS LYING OR NOT?

20 A. THIS WAS SUCH A LONG TIME AGO. IT MAY BE
21 THAT COUNSEL TOLD ME THAT HE --

22 MR. LEVIN: OBJECTION, YOUR HONOR, TO WHAT
23 COUNSEL MAY HAVE SAID. THE WITNESS IS SPECULATING AND
24 HAS NO PERSONAL RECALL.

25 THE COURT: IT APPEARS THAT HE DOESN'T HAVE A
26 RECOLLECTION OF THIS.

27 IF HE'S ANSWERING IN THAT FASHION,
28 SUSTAINED.

-11229

1 MR. LEVIN: CAN WE BREAK NOW, YOUR HONOR?

2 THE COURT: I JUST WANT TO FINISH THIS PAGE, IF
3 THERE'S ANYTHING FURTHER ON THIS PAGE.

4 Q. BY MR. CONN: DIRECTING YOUR ATTENTION NOW
5 TO THE FINAL PARAGRAPH ON THIS PAGE, THERE IS A
6 REFERENCE TO "BOUGHT STRAWBERRIES" WHICH IS FOLLOWED BY
7 THE WORDS "THREW OUT MAFIA PEOPLE," CORRECT?

8 A. RIGHT.

9 Q. AND WHAT WAS IT THAT ERIK MENENDEZ TOLD YOU
10 THAT CAUSED YOU TO MAKE THAT ENTRY ON THOSE TWO LINES?

11 A. THAT HE MADE A STATEMENT LIKE THAT, ALL
12 RIGHT, AND EVERYTHING WE HAVE JUST TALKED ABOUT OVER THE
13 PAST FIVE MINUTES IS THE SAME FOR THIS STATEMENT.

14 Q. WHO BOUGHT STRAWBERRIES?

15 A. HIS FATHER.

16 Q. AND HIS FATHER THREW OUT MAFIA PEOPLE?

17 A. YES.

18 Q. AND WAS THAT THE LAST PARAGRAPH THAT YOU
19 DELETED FROM YOUR REVISED PAGE 18?

20 A. YES.

21 Q. WHAT WAS YOUR REASON FOR DELETING THAT?

22 A. EXACTLY THE SAME AS THE PREVIOUS SENTENCE.

23 Q. AND THAT IS THAT MS. ABRAMSON TOLD YOU THAT
24 THAT WAS UNTRUE; IS THAT CORRECT?

25 MR. LEVIN: OBJECTION. ASSUMES FACTS NOT IN
26 EVIDENCE.

27 THE COURT: OVERRULED.

28 THE WITNESS: YES.

-11228

1 Q. BY MR. CONN: AND DID YOU HAVE ANY
2 INDEPENDENT INFORMATION AS TO WHETHER OR NOT THAT WAS
3 TRUE, OTHER THAN THE REPRESENTATION OF MS. ABRAMSON,

4 THAT THAT WAS NOT TRUE?

5 A. NO.

6 Q. AND DID SHE ASK YOU TO DELETE BOTH OF THOSE
7 TWO LAST PARAGRAPHS FROM PAGE 18 RELATING TO THE DRUG
8 MONEY AND BUYING STRAWBERRIES?

9 A. THAT'S MY MEMORY.

10 Q. AND IN REGARD TO THE PURCHASE OF
11 STRAWBERRIES, YOU DID NOT KNOW WHETHER ERIK MENENDEZ WAS
12 LYING ABOUT THAT, OR WHETHER HE WAS HONESTLY MISTAKEN
13 ABOUT THAT; IS THAT CORRECT?

14 A. CORRECT.

15 MR. CONN: THANK YOU.

16 I HAVE NO FURTHER QUESTIONS, IF THE COURT
17 WISHES TO BREAK AT THIS POINT.

18 THE COURT: ALL RIGHT. WE WILL TAKE A RECESS
19 UNTIL 1:30.

20 MY SUGGESTION TO THE PROSECUTION IS THAT
21 IT'S TAKING QUITE AWHILE HERE TO JUST GO THROUGH TWO
22 PAGES, AND THIS IS A VERY TIME-CONSUMING EFFORT. AND
23 ALL THE WHILE THROUGHOUT THESE PROCEEDINGS THE JURY WAS
24 KEPT WAITING. AND IT'S VERY DISRUPTIVE TO THESE
25 PROCEEDINGS AND DISRUPTIVE TO THE COMPLETION OF THESE
26 PROCEEDINGS IF WE GET BOGGED DOWN TO THE EXTENT THAT WE
27 ARE NOW IN THESE MATTERS.

28 IF THE PROSECUTION CAN LIMIT ITS

1 CROSS-EXAMINATION OF THIS WITNESS TO THE AREAS OF
2 SIGNIFICANCE RATHER THAN EVERY MODIFICATION, IT WOULD
3 CERTAINLY BE APPROPRIATE, SO THAT WE CAN RESUME THE
4 TRIAL WITH THE JURY.

5 MR. CONN: YES. I WILL DO THAT, YOUR HONOR.

6 THE COURT: ALL RIGHT. WE WILL RESUME AT 1:30.

7 (AT 12:15 P.M. PROCEEDINGS WERE

8 ADJOURNED UNTIL 1:30 P.M. OF

9 THE SAME DAY.)

-11227

1 VAN NUYS, CALIFORNIA; TUESDAY, APRIL 9, 1996

2 1:40 P.M.

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

4 (APPEARANCES AS HERETOFORE NOTED)

5 (MARY LU MURPHY, OFFICIAL REPORTER)

6

7 THE COURT: OKAY. WE HAVE EVERYBODY PRESENT.

8 THE WITNESS IS ON THE WITNESS STAND.

9

10 CROSS-EXAMINATION (CONTINUED)

11 BY MR. CONN:

12 Q. DOCTOR, AFTER YOU MODIFIED YOUR NOTES AND
13 MADE THE CHANGES THAT YOU'VE INDICATED THAT YOU MADE,
14 WHAT DID YOU DO WITH YOUR ORIGINAL NOTES?

15 A. THE PAGES THAT WERE CHANGED WERE DISCARDED.
16 THE OTHER ORIGINAL PAGES WERE KEPT JUST AS THEY WERE.

17 MR. LEVIN: I WOULD OBJECT, UNLESS THE WITNESS

18 HAS PERSONAL KNOWLEDGE.

19 THE COURT: OVERRULED.

20 Q. BY MR. CONN: DID YOU PERSONALLY THROW AWAY
21 THE ORIGINAL NOTES?

22 A. THE ORIGINAL PAGE, YES.

23 Q. DO YOU REMEMBER THAT LAST THURSDAY YOU CAME
24 UP TO THE DISTRICT ATTORNEY'S OFFICE WITH MYSELF AND
25 DETECTIVE ZOELLER AND YOU WERE MAKING -- WE WERE MAKING
26 COPIES OF YOUR MODIFIED NOTES IN THE DISTRICT ATTORNEY'S
27 OFFICE?

28 MR. LEVIN: I WOULD OBJECT, UNLESS THE

-11226

1 PROSECUTION IS GOING TO PROVIDE DISCOVERY WITH RESPECT
2 TO A MEETING THAT TOOK PLACE OR EVENTS UPON WHICH HE'S
3 GOING TO QUESTION THIS WITNESS. I HAVE NO NOTICE. THIS
4 JUST OCCURRED. I HAVE NO IDEA.

5 THE COURT: THIS IS CROSS-EXAMINATION.

6 OVERRULED.

7 MR. LEVIN: WELL, IT'S IRRELEVANT TO ANY ISSUE
8 THAT WAS BROUGHT UP BY MS. ABRAMSON.

9 THE COURT: I HAVEN'T HEARD IT YET.

10 THE WITNESS: YES.

11 Q. BY MR. CONN: AND DO YOU REMEMBER THAT
12 WHILE COPIES WERE BEING MADE, MYSELF AND DETECTIVE
13 ZOELLER SPOKE TO YOU NEAR THE XEROX MACHINE?

14 MR. LEVIN: OBJECTION. THE ANSWER, I BELIEVE,

15 COULD BE GIVEN, BUT IT MIGHT CALL FOR HEARSAY.

16 THE COURT: OVERRULED.

17 THE WITNESS: YES.

18 Q. BY MR. CONN: DID YOU TELL US AT THAT TIME

19 THAT MS. ABRAMSON GOT RID OF THE NOTES?

20 MR. LEVIN: OBJECTION. HEARSAY.

21 THE COURT: OVERRULED.

22 THE WITNESS: YES, I MADE A STATEMENT LIKE THAT.

23 YOU ASKED ME WHAT HAPPENED TO THE ORIGINAL NOTES. AND

24 AT THAT TIME THAT'S WHAT I SAID, BUT THAT'S NOT

25 ACCURATE.

26 MY MEMORY IS, HAVING THOUGHT ABOUT IT, THAT

27 I WENT BACK TO MY OFFICE AND I HAD ALL THE ORIGINALS

28 WITH ME. SO IT WAS ME THAT MADE THE CHANGES, AND THEN I

-11225

1 HAD THE ORIGINAL YELLOW SHEET, AND I JUST THREW IT IN

2 THE TRASH. IT WASN'T MS. ABRAMSON.

3 Q. BY MR. CONN: SO ORIGINALLY YOU DID TELL US

4 THAT IT WAS MS. ABRAMSON THAT DISCARDED OR DESTROYED THE

5 ORIGINAL NOTES?

6 A. THAT WAS MY RECOLLECTION AT THE TIME.

7 Q. WAS IT ALSO YOUR RECOLLECTION AT THE TIME

8 THAT YOU MADE THE CHANGES IN MS. ABRAMSON'S OFFICE?

9 A. NO.

10 Q. SO LATER YOU REALIZED THAT IT WAS YOU WHO
11 HAD ACTUALLY MODIFIED -- YOU WHO HAD ACTUALLY DESTROYED
12 THE NOTES?

13 A. YES.

14 Q. NOW, I'D LIKE TO DIRECT YOUR ATTENTION TO
15 PAGE 20 OF YOUR NOTES.

16 IS PAGE 20 A PAGE THAT WAS ALSO -- THAT YOU
17 ALSO MODIFIED AND DESTROYED THE ORIGINAL?

18 A. YES.

19 Q. DIRECTING YOUR ATTENTION TO THE AREA IN THE
20 UPPER RIGHT-HAND CORNER, I BELIEVE THAT YOU
21 HIGHLIGHTED --

22 MR. LEVIN: MAY I HAVE A MOMENT?

23 THE COURT: YES.

24 (BRIEF PAUSE)

25

26 Q. BY MR. CONN: IN THE UPPER RIGHT-HAND
27 CORNER THERE IS A HIGHLIGHTED AREA WHICH WOULD ACTUALLY
28 BE THE THIRD HANDWRITTEN LINE ON THE PAGE.

-11224

1 CAN YOU TELL US WHAT ERIK MENENDEZ SAID TO
2 YOU THAT CAUSED YOU TO MAKE THAT ENTRY?

3 A. IT'S WRITTEN THERE. IT SAYS, "FATHER CUT
4 BROTHER'S HAIR PRESCRIPTION OFF."

5 MR. LEVIN: YOUR HONOR, I WOULD OBJECT AS NOT

6 RESPONSIVE. HE WAS ASKED IF HE RECALLS WHAT ERIK

7 MENENDEZ SAID. HE IS JUST READING FROM THE NOTES.

8 THE COURT: OVERRULED.

9 Q. BY MR. CONN: THAT SAYS, "BROTHER CUT --

10 FATHER CUT BROTHER'S HAIR PRESCRIPTION OFF"?

11 A. YES.

12 Q. AND CAN YOU TELL US WHY YOU DELETED THAT

13 FROM THE MODIFIED PAGE?

14 A. BECAUSE AGAIN, THAT WAS SOMETHING THAT ERIK

15 DID NOT KNOW. THAT WAS SOMETHING THAT LYLE TOLD HIM.

16 Q. DID YOU DELETE THAT ON YOUR OWN, OR DID

17 MS. ABRAMSON REQUEST THAT YOU DELETE THAT?

18 A. SHE REQUESTED THAT.

19 Q. DIRECTING YOUR ATTENTION TO THE SECOND

20 AREA, WHICH I BELIEVE WAS DELETED FROM THAT PAGE

21 BEGINNING WITH THE REFERENCE, "BROTHER SAID WAIT A

22 WEEK." DEFENDANT SAID, "I CAN'T TAKE ANOTHER WEEK."

23 WAS THAT ALSO DELETED FROM THE MODIFIED

24 PAGE?

25 A. YES.

26 Q. WHY WAS THAT DELETED?

27 A. BECAUSE IT WAS UNCLEAR WHAT WAS MEANT BY

28 THAT NOTE. I ASSUMED THAT WHEN I MADE THAT NOTE THAT HE

1 WAS TALKING ABOUT SOMETHING DRASTIC HAPPENING TO HIS

2 PARENTS, BECAUSE AT THIS POINT I DID NOT KNOW THAT HE
3 HAD BEEN MOLESTED.

4 LATER IT CAME OUT THAT THERE WAS THE
5 MOLESTATION AND THE IDEA THAT THERE WOULD BE A
6 CONFRONTATION BY LYLE WITH FATHER TO TRY AND GET FATHER
7 TO RELENT, ALL RIGHT.

8 "SO WHAT DOES THIS MEAN?"

9 AND I SAID, "I DON'T KNOW WHAT IT MEANS. I
10 THOUGHT IT MEANT ONE THING, BUT NOW THAT I KNOW ABOUT
11 THE MOLESTATION, IT'S MORE LIKELY THAT IT HAS TO DO WITH
12 THE MOLESTATION."

13 AND SHE SAID TO ME, "WELL, IF YOU DON'T
14 KNOW, DON'T YOU SEE THAT THIS COULD BE VERY PREJUDICIAL
15 AND MISLEADING?"

16 AND I SAID, "YES, I CAN SEE THAT."

17 AND SHE SAID, "WELL, THEN IT HAS TO COME
18 OUT."

19 Q. DIRECTING YOUR ATTENTION TO AN AREA ON THE
20 PAGE THAT BEGINS -- THAT SEEMS TO SAY "THREE TIMES
21 DURING MY LIFE."

22 DO YOU SEE THAT REFERENCE THERE?

23 A. YES.

24 Q. CAN YOU TELL US WHAT ERIK MENENDEZ SAID
25 THAT CAUSED YOU TO MAKE THAT NOTE?

26 A. THIS IS REGARDING THE SUBJECT OF BEING
27 DISOWNED.

28 Q. AND WHAT WAS IT THAT ERIK MENENDEZ SAID

1 CONCERNING BEING DISOWNED?

2 A. THAT HE LEARNED THAT IT HAD HAPPENED THREE
3 TIMES DURING HIS LIFE.

4 Q. HE LEARNED THAT WHAT HAD HAPPENED THREE
5 TIMES DURING HIS LIFE?

6 A. THAT HE HAD BEEN THREATENED OR ACTUALLY
7 DISOWNED BY FATHER.

8 Q. AND WHAT ELSE DID YOU NOTE THERE THAT YOU
9 LATER TOOK OUT OF THE REVISED PAGE?

10 A. THAT THE FIRST TIME THAT HAPPENED WAS AFTER
11 THE -- AFTER ERIK WAS CHARGED WITH BURGLARY. HIS FATHER
12 WAS VERY ANGRY ABOUT THAT.

13 Q. CAN YOU READ THE REST OF YOUR NOTATIONS
14 THERE?

15 A. "AND THE SECOND OCCURRED AFTER HE HAD BEEN
16 PRACTICING TENNIS AND HE HAD A BIG ARGUMENT WITH HIS
17 FATHER," AND THEN IT SAYS, "HE DID NOT TELL ME."

18 IN OTHER WORDS, APPARENTLY FATHER TOLD
19 MOTHER AND TOLD LYLE THAT HE WAS GOING TO DISOWN ERIK,
20 BUT HE DIDN'T SAY THAT TO ERIK'S FACE. SO THIS IS
21 SOMETHING HE LEARNED FROM LYLE.

22 Q. AND DID THAT REFERENCE ALSO INDICATE
23 "BROTHER AND I BOTH"?

24 A. THAT'S THE SECOND SENTENCE, MEANING THAT
25 BOTH ERIK AND LYLE HAD BEEN THREATENED WITH BEING
26 DISOWNED.

27 Q. AND DID YOU DELETE ALL OF THOSE REFERENCES
28 FROM THE EDITED PAGE?

-11221

1 A. YES.

2 Q. AND WHY DID YOU DO SO?

3 A. BECAUSE IT WAS MY UNDERSTANDING THAT THIS
4 INFORMATION ALMOST ENTIRELY CAME FROM LYLE; AND AGAIN,
5 THAT STATEMENTS BY LYLE TO ERIK WERE TO BE EXCLUDED.

6 Q. WAS IT YOUR INFORMATION THAT ALL THIS
7 INFORMATION CAME FROM LYLE, OR THAT SOME OF IT CAME FROM
8 PERSONS OTHER THAN LYLE AS WELL?

9 A. NO, I THINK IT WAS FROM LYLE.

10 Q. THAT EACH AND EVERY TIME ERIK MENENDEZ
11 LEARNED THAT HE WAS DISOWNED, HE LEARNED THAT FACT FROM
12 LYLE MENENDEZ?

13 A. IT DOESN'T SPECIFICALLY SAY THAT, BUT
14 THAT'S MY UNDERSTANDING, THAT THIS INFORMATION IN LARGE
15 PART CAME FROM LYLE.

16 Q. SO AS YOU WENT THROUGH YOUR NOTES BACK IN
17 YOUR OFFICE, DID YOU DELETE NOT ONLY ALL INFORMATION
18 CONCERNING LYLE, BUT ALSO ANYTHING THAT ERIK MENENDEZ
19 WAS EVER TOLD BY HIS BROTHER, LYLE MENENDEZ?

20 A. THE ANSWER TO THAT IS THE SAME AS I
21 TESTIFIED EARLIER, THAT WE WERE GOING THROUGH MY NOTES
22 PAGE BY PAGE. AND IF THERE WAS SOMETHING IN THERE THAT

23 SEEMED TO COME ALMOST ENTIRELY FROM LYLE, STATEMENTS BY
24 LYLE TO ERIK, THAT THAT WAS JUSTIFICATION FOR TAKING IT
25 OUT.

26 Q. AND WERE YOU SATISFIED AT THE TIME THAT YOU
27 COMPLETED REVISING YOUR NOTES AND SENT A COPY OF THEM
28 BACK TO LESLIE ABRAMSON; THAT YOU HAD, IN FACT, REMOVED

-11220

1 ALL INFORMATION THAT ERIK MENENDEZ HAD RECEIVED FROM
2 LYLE MENENDEZ?

3 A. I DON'T THINK I COULD MAKE THAT STATEMENT.

4 Q. WELL, ISN'T THAT WHAT YOU WERE ATTEMPTING
5 TO DO, REMOVE FROM YOUR NOTES ALL INFORMATION THAT LYLE
6 MENENDEZ PROVIDED TO ERIK MENENDEZ AT ANY TIME DURING
7 HIS LIFE?

8 A. I THINK IN GENERAL THAT WAS THE PRINCIPLE.

9 Q. AND SO YOU WERE ATTEMPTING TO DO THAT; IS
10 THAT CORRECT?

11 A. I BELIEVE SO.

12 Q. AND WERE YOU SATISFIED WHEN YOU SENT THE
13 NOTES BACK TO MS. ABRAMSON, THE REVISED NOTES, THAT YOU
14 HAD COMPLETED THAT TASK?

15 A. WELL, THAT WAS NOT MY TASK. THE TASK WAS
16 TO TAKE OUT THE SECTIONS THAT WE AGREED WERE GOING TO BE
17 TAKEN OUT. IT WAS NOT MY ASSIGNMENT TO GO BACK AND ON
18 MY OWN INITIATIVE TO TAKE OUT A WHOLE BUNCH OF OTHER

19 STUFF THAT I THOUGHT ARROGANTLY THAT I HAD SOME KIND OF
20 LEGAL JUSTIFICATION TO DO.

21 Q. I'D LIKE TO JUMP FORWARD FOR A MOMENT, IF
22 WE CAN TURN TO PAGE 74.

23 DO YOU HAVE THAT IN FRONT OF YOU?

24 A. I DO.

25 Q. AND DO YOU SEE THAT EVEN IN YOUR REVISED
26 PAGE 74 YOU HAVE AN ENTRY WHICH SAYS, "LYLE FOUGHT BACK
27 AT THE AGE OF NINE"?

28 A. YES.

-11219

1 Q. WAS IT YOUR UNDERSTANDING THAT ERIK
2 MENENDEZ WAS A WITNESS TO THAT?

3 A. NO.

4 Q. WELL, THEN, CAN YOU TELL US, DOCTOR, ISN'T
5 74 -- PAGE NO. 74 ONE OF THE PAGES THAT YOU REVISED BACK
6 IN YOUR OFFICE?

7 A. THERE WAS A SECTION THAT WAS TAKEN OUT
8 ABOUT THE ALLEGED HOMOSEXUAL LOVER OF THE FATHER.

9 Q. OKAY. WELL, IF YOU WERE REVISING THAT
10 PAGE, DR. VICARY, CAN YOU TELL US WHY YOU DECIDED TO
11 LEAVE ON PAGE 74 HEARSAY INFORMATION THAT ERIK MENENDEZ
12 APPARENTLY RECEIVED FROM HIS BROTHER, LYLE MENENDEZ?

13 A. YEAH. I DON'T HAVE AN EXPLANATION FOR
14 THAT.

15 Q. ISN'T IT TRUE, DOCTOR, THAT THE REASON WHY
16 THE DELETIONS TO LYLE MENENDEZ WERE MADE AT CERTAIN
17 POINTS IS NOT BECAUSE IT WAS HEARSAY INFORMATION, BUT
18 BECAUSE IT HURT ERIK MENENDEZ' CASE IN SOME WAY?

19 A. I CLEARLY COULD SEE THAT AS A DEFINITE
20 ELEMENT TO VIRTUALLY ALL OF THESE THINGS THAT WERE BEING
21 TAKEN OUT. THAT'S WHY I WAS SO UNCOMFORTABLE WITH IT.

22 Q. LET ME DIRECT YOUR ATTENTION NOW TO A
23 FOURTH AREA THAT APPEARS TO HAVE BEEN REMOVED FROM PAGE
24 20.

25 DID YOU REMOVE A REFERENCE TO ERIK MENENDEZ
26 SAYING THAT SOMEONE KNEW THAT HE HATED HIS MOTHER?

27 A. YES.

28 Q. AND WHAT DID ERIK MENENDEZ SAY IN THAT

-11218

1 REGARD?

2 A. THIS IS IN A PARAGRAPH WHERE IT SAYS, "IN
3 MAY THERE WAS A HUGE ARGUMENT. FATHER WOULDN'T LISTEN.
4 MOTHER TOOK FATHER'S SIDE," AND THEN THE THING IN MY
5 NOTES SAYS, "KNEW I HATED MOTHER."

6 Q. YES.

7 A. ALL RIGHT. NOW, I THINK THE REASON THAT
8 THAT WAS TAKEN OUT WAS THAT IT'S NOT CLEAR WHAT THAT
9 REFERS TO. DOES THAT MEAN THAT THE FATHER KNEW THAT
10 ERIK HATED HIS MOTHER BECAUSE OF HER TAKING THE FATHER'S

11 SIDE? OR DOES THIS MEAN THAT AT THAT POINT ERIK KNOWS

12 THAT HE HATES HIS MOTHER? OKAY.

13 AND MS. ABRAMSON ASKED ME, SHE SAYS, "WELL,

14 WHAT IS IT?"

15 AND I SAID, "I DON'T KNOW. I THINK IT'S IN

16 THE PARAGRAPH ABOUT THE ARGUMENT WITH THE FATHER."

17 SHE SAYS, "WELL, THIS IS MISLEADING AND

18 IT'S PREJUDICIAL; SO THEREFORE, IT HAS TO COME OUT."

19 Q. AND SHE ASKED YOU TO REMOVE IT?

20 A. YES.

21 Q. AND YOU DID?

22 A. YES.

23 Q. DIRECTING YOUR ATTENTION TO PAGE 22 -- IS

24 THERE A PASSAGE THERE THAT YOU REMOVED FROM YOUR

25 ORIGINAL NOTES WHICH SAID, "HATE THIS MAN AND THIS

26 WOMAN. NOT MY PARENTS. WANT THEM OUT OF MY LIFE."

27 A. YES.

28 Q. AND CAN YOU TELL ME WHAT ERIK MENENDEZ SAID

-11217

1 IN THAT REGARD?

2 A. THIS IS BEGINNING WITH THE NOTE THAT SAYS

3 "A WEEK PRIOR." THIS IS A WEEK PRIOR TO THE HOMICIDES.

4 SO THIS IS THE TIME FRAME WE'RE TALKING ABOUT, AND THESE

5 ARE THE STATEMENTS THAT HE IS MAKING TO ME.

6 Q. SO ERIK MENENDEZ TOLD YOU THAT ONE WEEK

7 PRIOR TO KILLING HIS PARENTS HE HATED THEM AND HE WANTED
8 THEM OUT OF HIS LIFE; IS THAT CORRECT?

9 A. YES.

10 Q. AND YOU REMOVED THAT ENTRY FROM YOUR
11 ORIGINAL NOTES; IS THAT CORRECT?

12 A. YES.

13 Q. WHY DID YOU DO SO?

14 A. BECAUSE IN MY DISCUSSION WITH MS. ABRAMSON,
15 SHE ASKED ME WHAT THIS WAS REFERRING TO, AND I SAID THAT
16 THIS WAS REFERRING TO ALL OF THE TROUBLE THAT WAS GOING
17 ON IN THE FAMILY, AND SHE SAID, "WHEN HE TOLD YOU THIS,
18 DID YOU KNOW ABOUT THE MOLESTATION?"

19 AND I SAID, "I DID NOT."

20 SHE SAID, "IS THAT REALLY WHAT'S GOING ON
21 HERE? IS THAT THE ESSENCE OF THIS CONVERSATION?"

22 I SAID, "IN HINDSIGHT, YES, IT IS. WHEN HE
23 FIRST TOLD ME THIS, I JUST LITERALLY WROTE DOWN WHAT HE
24 SAID." ALL RIGHT.

25 BUT SHE SAID, "BUT NOW YOU UNDERSTAND THIS
26 IS THE MOLESTATION THAT'S GOING ON. THIS IS WHY HE'S
27 HAVING THESE FEELINGS. THIS IS WHY HE'S MAKING THESE
28 STATEMENTS TO YOU."

-11216

1 AND I SAID, "YES, IT IS."

2 AND SHE SAYS, "DON'T YOU SEE HOW MISLEADING

3 THIS IS AND HOW PREJUDICIAL THIS IS, THAT STANDING HERE
4 BY ITSELF WITHOUT A SPECIFIC LINK TO THE MOLESTATION,
5 THERE ARE MANY PEOPLE WHO WOULD LOOK AT THIS AND DRAW AN
6 EXTREMELY PREJUDICIAL INFERENCE?"

7 AND I SAID, "OF COURSE."

8 AND SHE SAID, "IT HAS TO COME OUT."

9 Q. ERIK MENENDEZ SAID HE WANTED HIS PARENTS
10 OUT OF HIS LIFE AND HATED THEM ONE WEEK BEFORE HE KILLED
11 THEM; IS THAT CORRECT?

12 A. THIS IS HIS STATEMENT TO ME WHEN I'M
13 TALKING TO HIM AT THE JAIL ABOUT HIS THOUGHTS AND
14 FEELINGS ONE WEEK PRIOR -- IN THE ONE WEEK PRIOR TO THE
15 HOMICIDES, YES.

16 Q. WELL, DOCTOR, REGARDLESS OF THE REASON WHY
17 HE HATED THEM, DIDN'T YOU THINK IT WAS IMPORTANT TO
18 LEAVE IN YOUR NOTES THE FACT THAT ONE WEEK BEFORE HE
19 KILLED HIS PARENTS HE DID, IN FACT, HATE THEM AND HE
20 DID, IN FACT, WANT THEM OUT OF HIS LIFE?

21 A. YOU BET.

22 Q. AND DID YOU THINK THAT THAT WAS PERHAPS
23 SUGGESTIVE OF PREMEDITATION IN THIS CASE?

24 A. YES, I DID.

25 Q. AND DID YOU TELL MS. ABRAMSON THAT YOU
26 WOULD NOT DO IT?

27 A. THIS WAS PROBABLY THE BITTEREST ARGUMENT
28 THAT WE HAD.

1 Q. AND HOW DID THAT ARGUMENT FINALLY RESOLVE
2 ITSELF?

3 A. WITH THE CONCLUSION THAT IF I DIDN'T TAKE
4 THIS OUT, THAT I WAS OFF THE CASE.

5 Q. AND WHAT DID YOU DECIDE?

6 A. I THOUGHT ABOUT IT VERY HARD.

7 Q. ARE YOU SAYING THAT YOU LEFT IT IN BECAUSE
8 YOU WERE AFRAID OF BEING TAKEN OFF THE CASE?
9 THE COURT: LEFT IT IN OR TOOK IT OUT?

10 Q. BY MR. CONN: THAT YOU LEFT IT IN -- I'M
11 SORRY. THAT YOU TOOK IT OUT BECAUSE YOU WERE AFRAID OF
12 BEING TAKEN OFF THE CASE?

13 A. I WASN'T AFRAID OF BEING TAKEN OFF THE
14 CASE. I WAS AFRAID OF WHAT BEING OFF THE CASE WOULD
15 MEAN TO THE DEFENDANT. I THOUGHT I HAD IMPORTANT,
16 VALUABLE INFORMATION, AND THAT IF I WAS TAKEN OFF THE
17 CASE, THAT IT WOULD BE IRRESPONSIBLE. IT WOULD BE
18 DAMAGING TO HIM. IT WOULD BE AN ABANDONMENT OF THE
19 PATIENT.

20 SO I THOUGHT THAT EVEN THOUGH THIS WAS
21 WRONG, AND I DISAGREED WITH IT, THAT IN ORDER TO
22 CONTINUE TO OFFER SOMETHING THAT I THOUGHT WAS
23 IMPORTANT, THAT I WOULD HAVE TO TAKE THIS OUT.

24 Q. LET'S GO DOWN THE PAGE. SKIPPING OVER SOME
25 OF THE ENTRIES, I AM GOING TO DIRECT YOUR ATTENTION TO A
26 LINE THAT BEGINS "WANT TO KILL THEM."

27 DO YOU SEE THAT REFERENCE?

-11214

1 Q. CAN YOU TELL US WHAT ERIK MENENDEZ SAID TO
2 YOU THAT CAUSED YOU TO MAKE THAT ENTRY, "WANTS TO KILL
3 THEM"?

4 A. YES. THAT'S UNDER THE CATEGORY OF "IN THE
5 FIVE-DAY PERIOD PRIOR TO THE HOMICIDES WAS HAVING
6 NIGHTMARES."

7 AND THE NOTES READ: "IN THE NIGHTMARES,
8 MOTHER AND FATHER ARE CHASING US. I'M RUNNING AWAY FROM
9 MY PARENTS. I WAKE UP SHAKING, WANT TO KILL THEM, RAGE
10 ABOUT THINGS THAT HAPPENED AND WERE ABOUT TO HAPPEN."

11 Q. AND ON THAT SAME LINE IS: "WANT TO KILL
12 THEM."

13 IS THERE A REFERENCE TO "I COULDN'T WAIT"?

14 A. YES. WE'RE ON THE LEFT-HAND SIDE.

15 Q. WHAT WAS THAT REFERENCE TO, "I COULDN'T
16 WAIT" IN CONTEXT?

17 A. IT'S NOT CLEAR.

18 Q. AND IS "WANT TO KILL THEM," WHAT WAS THAT
19 IN REFERENCE TO?

20 A. THE NIGHTMARES.

21 Q. WHAT ABOUT THE NIGHTMARES?

22 A. AGAIN, IT'S NOT CLEAR. I MEAN, IS THIS
23 SOMETHING THAT'S OCCURRING WHEN HE'S AWAKE, OR IS THIS

24 SOMETHING THAT'S OCCURRING IN HIS NIGHTMARES? I WAS
25 SPECIFICALLY ASKED BY MS. ABRAMSON, "WHAT IS IT?"
26 AND I SAID, "I DON'T KNOW. I'M WRITING AS
27 FAST AS I CAN, YOU KNOW. THESE ARE VERY ADVERSE
28 CONDITIONS AT THIS JAIL IN THIS LITTLE ROOM, ALL THE

-11213

1 NOISE, AND HOW AGITATED ERIK IS, AND I AM DOING THE BEST
2 I CAN."

3 BUT NOW SHE ASKS ME THREE YEARS LATER, SHE
4 SAYS, "WELL, WHY? WHAT IS GOING ON HERE?"

5 AND I SAY, "I DON'T KNOW. I THINK THIS HAS
6 TO DO WITH THE DREAMS."

7 Q. ARE YOU SAYING, DOCTOR, THAT WHEN ERIK
8 MENENDEZ SAID TO YOU, WHEN YOU INITIALLY INTERVIEWED
9 HIM: "I COULDN'T WAIT, AND I WANT TO KILL THEM," YOU
10 DIDN'T ASK HIM TO CLARIFY WHAT HE MEANT BY THAT?

11 A. NOT AT THAT POINT, BECAUSE HE'S TALKING,
12 AND HE'S SO FRAGILE THAT IF I INTERRUPT HIM AND START TO
13 PRESS HIM, HE WITHDRAWS. SO I CAN'T GET ANYMORE
14 INFORMATION, YOU SEE.

15 Q. LET'S GO ON TO PAGE 28.

16 DID ERIK MENENDEZ INDICATE TO YOU, WITHOUT
17 GETTING INTO ANY NAMES HERE, THAT AT THE AGE OF FIVE HE
18 WAS RAPED BY A BABYSITTER?

19 A. YES.

20 Q. HE INDICATED TO YOU THAT HE WAS NOT
21 SODOMIZED, BUT HE WAS, IN FACT, MOLESTED AT THE AGE OF
22 FIVE?

23 A. YES.

24 Q. BY THE BABYSITTER?

25 A. YES.

26 Q. AND DID YOU DELETE THAT FROM YOUR REVISED
27 NOTES?

28 A. YES.

-11212

1 Q. AND CAN YOU TELL US WHY YOU DELETED THAT?

2 A. BECAUSE THE BABYSITTER WAS A MALE, AND THAT
3 I WAS TOLD THAT ANY HOMOSEXUAL EXPERIENCES IN THE PAST
4 THAT THE DEFENDANT HAD WITH ANYBODY, OTHER THAN HIS
5 FATHER, WERE RULED BY THE COURT TO BE OUT OF BOUNDS, AND
6 THAT THIS INFORMATION WAS NOT TO BE DISCLOSED OR
7 ADMITTED IN COURT.

8 Q. SO IT WAS YOUR UNDERSTANDING THAT THE COURT
9 HAD NOT ONLY RULED SUCH EVIDENCE INADMISSIBLE, BUT THAT
10 THE COURT ALSO RULED THAT YOU WERE NOT TO INCLUDE OR
11 RETAIN SUCH MATERIAL IN YOUR NOTES?

12 A. NO, I DON'T THINK THE COURT RULED THAT.

13 Q. SO WHAT WAS YOUR UNDERSTANDING CONCERNING
14 THE PRECISE NATURE OF THE COURT'S RULING?

15 A. THAT THIS INFORMATION WAS NOT TO COME OUT,

16 ALL RIGHT, PERIOD, IN MY ARGUMENT WITH MS. ABRAMSON
17 WHERE I SAID: "ALL RIGHT. WELL, IT'LL NEVER COME OUT."
18 THIS IS THE RECURRENT ARGUMENT WE ARE
19 HAVING ABOUT THESE CHANGES, AND I SAID: "IT WILL JUST
20 STAY HERE AND NOBODY WILL KNOW ABOUT IT. THEY WILL
21 NEVER SEE IT."

22 AND SHE SAID, "NO. THE JUDGE HAS RULED
23 NOBODY IS TO KNOW ABOUT THIS. YOU HAVE TO TAKE THIS
24 OUT. IT'S A RULING BY THE COURT. YOU HAVE TO TAKE THIS
25 OUT."

26 Q. DID YOU TELL HER THAT PERHAPS THERE IS A
27 PROBLEM, BECAUSE YOU MAY HAVE ALREADY PROVIDED A COPY OF
28 YOUR NOTES TO THE EXPERTS IN THIS CASE?

-11211

1 A. IT NEVER OCCURRED TO ME. I KNEW THAT
2 EVERYBODY IN THE CASE HAD MY ORIGINAL NOTES.

3 Q. HOW DID YOU KNOW THAT?

4 A. I WAS TOLD THAT, AND --

5 Q. BY WHO?

6 A. BY MS. ABRAMSON. AND WE HAD A MEETING OF
7 ALL THE EXPERTS, AND I THINK I ASKED OR CHECKED, AND
8 EVERYBODY BROUGHT THEIR -- SOME OF THEIR MATERIALS WITH
9 THEM. AND IT WAS IMPORTANT FOR ME TO KNOW -- BECAUSE I
10 THINK MY NOTES ARE IMPORTANT, THEY HAVE IMPORTANT
11 INFORMATION -- THAT THE OTHER EXPERTS HAD MY NOTES, JUST

12 LIKE IF THEY DID A REPORT WHERE THEY HAD NOTES, I WOULD

13 WANT TO SEE THAT, YOU SEE.

14 Q. IN YOUR NOTES YOU REFER TO SEVERAL

15 HOMOSEXUAL EXPERIENCES THAT ERIK MENENDEZ REPORTED TO

16 YOU; IS THAT CORRECT?

17 A. YES.

18 Q. AND DID YOU DISCUSS THOSE HOMOSEXUAL

19 EXPERIENCES WITH THOSE OTHER EXPERTS WHO YOU BELIEVE

20 RECEIVED COPIES OF YOUR NOTES?

21 A. I DON'T THINK SPECIFICALLY, NO.

22 Q. OKAY. LET ME SKIP FORWARD A LITTLE BIT TO

23 PAGE 96.

24 AND SPECIFICALLY, DID ERIK MENENDEZ RELATE

25 TO YOU THAT AFTER HE WAS MOLESTED AT THE AGE OF FIVE

26 THAT HE HAD A HOMOSEXUAL EXPERIENCE AT THE AGE OF 11?

27 A. YES.

28 Q. DID HE ALSO INDICATE TO YOU THAT HE HAD

-11210

1 ANOTHER HOMOSEXUAL EXPERIENCE WITH SOMEONE ELSE AT THE

2 AGE OF 12?

3 A. YES.

4 Q. DID HE ALSO INDICATE TO YOU THAT HE HAD A

5 HOMOSEXUAL EXPERIENCE WITH SOMEONE ELSE AT THE AGE OF

6 16?

7 A. YES.

8 Q. NOW, IN REGARD TO THAT LAST HOMOSEXUAL
9 EXPERIENCE AT THE AGE OF 16, DID HE IDENTIFY WHO THAT
10 PERSON WAS?

11 A. HE DID.

12 Q. NOW LET'S GO BACK TO PAGE 28.

13 ON PAGE 28 AT THE BOTTOM LINE, DID HE
14 INDICATE THAT "MOTHER FOUND OUT ABOUT" AND THEN HE
15 IDENTIFIES THAT PERSON WITH WHOM HE HAD THE HOMOSEXUAL
16 EXPERIENCE?

17 A. YES.

18 Q. AND DID YOU DELETE THAT REFERENCE TO HIS
19 MOTHER FINDING OUT ABOUT THAT PERSON?

20 A. YES.

21 Q. AND WAS THAT AT THE REQUEST OF
22 MS. ABRAMSON?

23 A. YES.

24 Q. DIRECTING YOUR ATTENTION TO PAGE 29, DID
25 YOU DELETE A STATEMENT OF ERIK MENENDEZ TO THE EFFECT
26 THAT "HE LOVED MY BODY"?

27 A. YES.

28 Q. WAS HE -- WITHOUT IDENTIFYING THE PERSON,

-11209

1 WAS HE REFERRING TO JOSE MENENDEZ AT THAT POINT OR SOME
2 OTHER PERSON?

3 A. NO. THAT WAS IN REFERENCE TO HIS FATHER.

4 Q. DIRECTING YOUR ATTENTION TO THE MIDDLE OF
5 THAT PAGE, DID HE ALSO INDICATE THAT HIS FATHER FOUND
6 OUT ABOUT THAT PERSON WITH WHOM HE HAD THAT HOMOSEXUAL
7 RELATIONSHIP WITH AT THE AGE OF 16?

8 A. YES.

9 Q. AND HIS FATHER WAS FURIOUS?

10 A. YES.

11 THE COURT: WHAT PAGE WAS THAT AGAIN?

12 MR. CONN: THAT WAS PAGE 29.

13 MR. LEVIN: 29.

14 MR. CONN: MIDDLE OF THE PAGE.

15 Q. AND DIRECTING YOUR ATTENTION TO PAGE 62, ON
16 PAGE 62 DID HE DETAIL OR GIVE SOME ADDITIONAL DETAILS
17 CONCERNING THE HOMOSEXUAL EXPERIENCE HE HAD AT THE AGE
18 OF 11 AND 12?

19 A. YES.

20 Q. AND DID HE INDICATE THAT HE HAD SOME
21 TOUCHING CONTACT WITH THAT PERSON APPROXIMATELY FOUR OR
22 FIVE TIMES?

23 A. YES.

24 Q. AND DID HE ALSO INDICATE THAT FOLLOWING HIS
25 BREAKUP WITH KIRSTEN, HE HAD A HOMOSEXUAL RELATIONSHIP
26 WITH THAT PERSON WHOM HE IDENTIFIED AS HAVING HAD A
27 RELATIONSHIP WITH AT THE AGE OF 16?

28 A. YES.

1 Q. AND DID HE INDICATE THAT THAT HOMOSEXUAL
2 RELATIONSHIP INCLUDED ORAL SEX AND SODOMY?

3 A. YES.

4 Q. AND YOU DELETED ALL OF THOSE REFERENCES TO
5 A HOMOSEXUAL RELATIONSHIP THAT YOU NOTED ON THAT PAGE?

6 A. YES, I DID.

7 Q. AND WAS THAT ALL DONE AT THE REQUEST OF
8 MS. ABRAMSON?

9 A. YES.

10 Q. AND FOR THE REASONS THAT YOU'VE ALREADY
11 SPECIFIED?

12 A. YES.

13 Q. DIRECTING YOUR ATTENTION TO PAGE 74, THE
14 REFERENCE TO THE -- TO HIS FATHER HAVING A HOMOSEXUAL
15 LOVER WHO TIPPED OFF HIM AND HIS BROTHER THAT THEIR
16 PARENTS WERE GOING TO KILL THEM, THAT IS ALSO AN AREA
17 THAT YOU -- OR A REFERENCE THAT YOU DELETED FROM YOUR
18 REVISED NOTES?

19 A. YES.

20 Q. AND WHY DID YOU DELETE THAT ENTIRE EPISODE?

21 MR. GESSLER: TO WHICH I OBJECT ON THE GROUNDS OF
22 PRIVILEGE, YOUR HONOR.

23 MR. LEVIN: SAME GROUNDS, YOUR HONOR.

24 THE COURT: ALL RIGHT. WHY DON'T YOU REPHRASE
25 THE QUESTION IN REGARD TO HIS CONVERSATION -- THE
26 WITNESS' CONVERSATION WITH THE DEFENDANT.

27 Q. BY MR. CONN: OKAY.

28 JUST DIRECTING YOUR ATTENTION TO THE

1 CONVERSATION WITH ERIK MENENDEZ, I BELIEVE THAT YOU
2 INDICATED THAT SOMETIME AFTER ERIK MENENDEZ MADE THAT
3 CLAIM TO YOU, HE WITHDREW THAT CLAIM?

4 A. HE SAID IT WAS NOT TRUE.

5 Q. OKAY. AND THAT WAS SEVERAL WEEKS AFTER HE
6 OFFICIALLY REPORTED THAT TO YOU?

7 A. ONE TO TWO WEEKS LATER, YES.

8 Q. AND DID YOU ASK HIM WHY HE HAD LIED TO YOU
9 ABOUT THAT?

10 A. YES.

11 Q. AND WHAT DID HE SAY?

12 MR. GESSLER: TO WHICH I OBJECT ON PRIVILEGE,
13 YOUR HONOR.

14 MR. LEVIN: SAME.

15 THE COURT: ALL RIGHT, I WILL HEAR THIS ANSWER IN
16 A CLOSED SETTING. BUT WE WILL GO ON TO OTHER THINGS AND
17 COME BACK TO IT. MY FEELING IS IT WILL TURN OUT NOT TO
18 BE PRIVILEGED, FROM WHAT THE DEFENDANT TOLD THE WITNESS,
19 BUT OTHER ASPECTS OF COMMUNICATION MIGHT BE.

20 MR. CONN: OKAY.

21 Q. DIRECTING YOUR ATTENTION TO PAGE 95, DID
22 THE DEFENDANT INDICATE TO YOU THAT HE WAS DEPRESSED WHEN
23 TONY LEFT IN DECEMBER OR JANUARY, "NO TIME TO GET
24 DEPRESSED WHEN HE WAS AROUND"?

25 A. YES.

26 Q. DID HE INDICATE WHO TONY WAS?

27 A. I BELIEVE SO.

28 Q. AND DO YOU KNOW WHO THAT IS?

-11206

1 A. IT WOULD BE ANOTHER PRISONER.

2 Q. AND FROM THAT PAGE -- DID YOU REWRITE THAT

3 PAGE, LEAVING OUT EVERYTHING EXCEPT THE WORD

4 "DEPRESSED"?

5 A. YES.

6 Q. AND CAN YOU TELL US WHY YOU LEFT OUT

7 EVERYTHING FROM THE REVISED PAGE EXCEPT THE WORD

8 "DEPRESSED"?

9 A. YES.

10 Q. WHY?

11 A. BECAUSE AGAIN, THE CONVERSATION I HAD WITH

12 MS. ABRAMSON WAS THAT THERE WERE PEOPLE WITH DIRTY MINDS

13 THAT WERE GOING TO READ THIS AS SOME KIND OF A

14 HOMOSEXUAL RELATIONSHIP, WHEN THERE WAS NO DATA OR

15 STATEMENTS BY THE DEFENDANT OR ANYBODY ELSE THAT THERE

16 WAS A HOMOSEXUAL RELATIONSHIP HERE.

17 BUT IT WAS IN THIS AREA IN HOMOSEXUALITY,

18 AND THAT'S WHY IT HAD TO COME OUT.

19 Q. SO PART OF THE REASON WHY -- OR THE REASON

20 WHY SHE TOLD YOU TO DELETE THIS WAS BECAUSE IT MIGHT BE

21 SUBJECT TO MISINTERPRETATION; IS THAT CORRECT?

22 A. BECAUSE IT WAS ON THE SUBJECT OF
23 HOMOSEXUALITY, YES.
24 Q. AND DID YOU TELL MS. ABRAMSON THAT ERIK
25 MENENDEZ HAD NOT INDICATED TO YOU THAT THIS ENTAILED A
26 HOMOSEXUAL RELATIONSHIP?
27 A. YES, I DID.
28 Q. AND SHE NEVERTHELESS INSISTED THAT YOU

-11205

1 REMOVE IT?
2 A. YES.
3 Q. DIRECTING YOUR ATTENTION TO THE BOTTOM OF
4 PAGE 95, DID YOU MAKE REFERENCE TO ERIK MENENDEZ STATING
5 THAT LYLE'S INCESTUOUS RELATIONSHIP WITH MOTHER WAS IN
6 HIS HEAD?
7 A. YES, I DID.
8 Q. AND IN YOUR REVISED NOTES, DID YOU INCLUDE
9 "LYLE'S INCESTUOUS RELATIONSHIP WITH MOTHER," BUT
10 DELETED THE WORDS "IN HIS HEAD"?
11 A. YES, I DID.
12 Q. NOW, CAN YOU TELL US WHY YOU CUT THAT
13 SENTENCE IN HALF, AND YOU RETAINED THE FIRST HALF OF
14 THAT PASSAGE, YET YOU DELETED THE WORDS "IN HIS HEAD"?
15 A. YES.
16 Q. WHY.
17 A. BECAUSE ARROGANTLY I KNEW THAT LYLE, IN

18 FACT, HAD AN INCESTUOUS RELATIONSHIP WITH HIS MOTHER.

19 IT WASN'T JUST IN HIS HEAD. THAT'S WHAT ERIK THOUGHT,

20 BUT I KNEW MORE.

21 MR. GESSLER: YOUR HONOR, I WILL OBJECT AND ASK

22 TO APPROACH THE BENCH.

23 THE COURT: OKAY.

24 (PAGE 54332 WAS HELD IN CAMERA

25 AND SEALED BY ORDER OF THE

26 COURT.)

27

28

-11203

1 (THE FOLLOWING PROCEEDINGS

2 WERE HELD IN OPEN COURT:)

3

4 THE COURT: OKAY. THAT'S IT THEN, MR. CONN?

5 MR. CONN: YES. SUBJECT TO SOME ADDITIONAL

6 INQUIRY IN CAMERA, I HAVE NO FURTHER QUESTIONS AT THIS

7 TIME.

8 THE COURT: OKAY. ON THE THEORY THAT SOME

9 MATTERS MIGHT RELATE TO PRIVILEGES OF THIRD PARTIES,

10 WE'LL GO INTO THOSE AT A LATER TIME.

11 YOU MAY CROSS-EXAMINE.

12 MR. LEVIN: THANK YOU.

13 THE COURT: UNLESS YOU WANT TO GO FIRST,

14 MR. GESSLER.

15 MR. GESSLER: NO, YOUR HONOR.

16 THE COURT: OKAY.

17

18 CROSS-EXAMINATION

19 BY MR. LEVIN:

20 Q. DR. VICARY, WHEN WAS THE VERY LAST TIME

21 THAT YOU SAW ERIK MENENDEZ?

22 A. LAST SATURDAY. SATURDAY NOON.

23 Q. AND WHERE WAS IT THAT YOU SAW ERIK

24 MENENDEZ?

25 A. AT THE CENTRAL JAIL.

26 Q. AND WHEN -- WAS THIS A VISIT THAT YOU

27 YOURSELF DETERMINED WAS SOMETHING YOU WANTED TO OCCUR?

28 A. YES.

-11202

1 Q. ERIK MENENDEZ DIDN'T CALL YOU TO COME TO

2 THE JAIL, DID HE?

3 A. NO.

4 Q. AND YOUR PURPOSE OF SEEING HIM AT THE JAIL

5 WAS FOR WHAT?

6 A. TO CHECK ON HIM AND SEE HOW HE WAS DOING.

7 Q. AND DID YOU CALL ME AND ASK ME FOR

8 PERMISSION TO SEE ERIK MENENDEZ?

9 A. NO, I DID NOT.

10 Q. DID YOU TELL MS. ABRAMSON THAT YOU WERE
11 GOING TO SEE ERIK MENENDEZ?

12 A. NO.

13 Q. DID YOU BRING YOUR NOTES WITH YOU WHEN YOU
14 WENT TO SEE ERIK MENENDEZ ON SATURDAY?

15 A. YES, I THINK I BROUGHT THE ORIGINAL NOTES.

16 Q. WHEN YOU SAY "THE ORIGINAL NOTES," YOU'RE
17 TALKING ABOUT THE NOTES THAT YOU DID NOT ALTER?

18 A. CORRECT.

19 Q. AND DID YOU BRING A COPY OF THE ALTERED
20 NOTES WITH YOU?

21 A. NO.

22 Q. WHY DID YOU BRING A COPY OF YOUR NOTES TO
23 TO THE JAIL LAST SATURDAY? WHY WAS IT NECESSARY TO
24 BRING YOUR NOTES TO CHECK ON ERIK MENENDEZ?

25 A. IT'S NOT NECESSARY. JUST TO CHECK ON HIS
26 MENTAL CONDITION.

27 Q. WHAT YOU REALLY WANTED TO DO WAS TALK TO
28 ERIK MENENDEZ ABOUT YOUR NOTES, CORRECT?

-11201

1 A. AS LONG AS I WAS SEEING HIM, YES. YOU'RE
2 RIGHT.

3 Q. AND YOUR PURPOSE OF BRINGING YOUR NOTES WAS
4 BECAUSE THESE NOTES WERE GENERATED OVER THE COURSE OF
5 SIX YEARS, BEGINNING IN 1990, ALMOST ALL THE WAY TO

6 1996; CORRECT?

7 A. INCLUDING 1996.

8 Q. AND ON EACH OF THESE PAGES THERE IS NO
9 INDICATION OF THE DATE THAT YOU WOULD RECORD THESE NOTES
10 OR THE VISIT THAT YOU HAD TO CORRESPOND TO THE
11 INFORMATION IN THOSE NOTES, IS THERE?

12 A. I THINK THAT IN MOST CASES THERE IS NO
13 DATE. I THINK THERE IS A DATE ON A COUPLE OF THE PAGES.

14 Q. AND YOU KNEW YOU WERE GOING TO BE A
15 WITNESS, WERE YOU NOT -- OR YOU KNEW THAT YOU WERE GOING
16 TO BE A WITNESS TO TESTIFY TO MATTERS CONCERNING WHAT
17 ERIK MENENDEZ TOLD YOU BACK IN 1990 TO 1996, BASED ON
18 WHAT WAS CONTAINED IN YOUR NOTES, CORRECT?

19 A. YES.

20 Q. AND THE REASON THAT YOU BROUGHT YOUR NOTES,
21 AND THE REAL REASON YOU SAW ERIK MENENDEZ WAS TO --
22 BECAUSE YOU DIDN'T HAVE A RECOLLECTION OF WHAT ERIK
23 MENENDEZ TOLD YOU BACK DURING THE TIME THAT YOU RECORDED
24 THE NOTES THAT YOU DELETED, CORRECT?

25 A. TO SOME EXTENT, YES.

26 Q. AND YOU THEN TALKED TO ERIK MENENDEZ
27 WITHOUT COUNSEL TO GET ERIK MENENDEZ TO TRY TO EXPLAIN
28 TO YOU WHAT HE MEANT, WHICH CAUSED YOU TO WRITE IN YOUR

1 NOTES THINGS BACK IN 1990 TO 1996; ISN'T THAT CORRECT?

2 A. YES.

3 Q. SO THE MATTERS UPON WHICH YOU WERE
4 TESTIFYING TODAY ARE MATTERS THAT YOU HAVE NO
5 INDEPENDENT RECOLLECTION OF WHAT ERIK MENENDEZ ACTUALLY
6 TOLD YOU -- THE WORDS THAT HE ACTUALLY USED AT THE TIME
7 THAT HE SPOKE THEM; ISN'T THAT CORRECT?

8 MR. CONN: OBJECTION. LEADING.

9 THE COURT: OVERRULED.

10 THE WITNESS: THERE ARE SOME AREAS IN MY NOTES
11 WHERE IT'S NOT CLEAR, THAT THEY'RE KIND OF -- AS NOTES
12 ARE -- IT'S CRYPTIC, AND IT'S NOT CLEAR EXACTLY WHAT IT
13 IS THAT HE SAID, OR IF HE SAID IT, WHAT WAS THE CONTEXT
14 OR WHAT IS THE MEANING OF IT.

15 AND THERE WERE A COUPLE OF AREAS THAT I
16 THOUGHT I WOULD ASK HIM ABOUT.

17 Q. WHY DO YOU TAKE NOTES?

18 A. TO REFRESH MY MEMORY SO THAT I CAN PREPARE
19 WRITTEN REPORTS AND TO TESTIFY.

20 Q. AND THE PURPOSE -- AND THE INFORMATION THAT
21 YOU PUT IN NOTES IS INFORMATION YOU CONSIDER TO BE
22 SUBSTANTIVE AND IMPORTANT, CORRECT?

23 A. YES.

24 Q. AND IT'S WHAT A PERSON TELLS YOU, CORRECT?

25 A. IN MOST INSTANCES, YES. IT'S OFTENTIMES
26 VERBATIM, SOMETIMES IT'S NOT. IT'S MORE LIKE BEING AT A
27 HISTORY LECTURE AND THE PROFESSOR IS MAKING ALL KINDS OF
28 SPECIFIC STATEMENTS, AND WHAT YOU'RE DOING IS YOU'RE

1 KIND OF ABSTRACTING.

2 Q. AND NOTES ARE IMPORTANT FOR YOU TO REFRESH
3 YOUR MEMORY ABOUT WHAT THE WITNESS SAID TO YOU SO THAT
4 YOU CAN LATER TESTIFY ACCURATELY IN A COURT OF LAW,
5 CORRECT?

6 A. YES.

7 Q. NOW, CAN YOU THINK OF ANYTHING MORE SERIOUS
8 THAN TESTIFYING IN A CAPITAL CASE IN A PENALTY PHASE,
9 WHERE THE PERSON WHO IS YOUR PATIENT IS ON -- IS FACING
10 THE POSSIBLE DEATH PENALTY?

11 A. NO, I CANNOT.

12 Q. DID YOU TAKE NOTES OF WHAT YOU TALKED ABOUT
13 WITH ERIK MENENDEZ LAST SATURDAY?

14 A. NO.

15 Q. DID YOU TAPE RECORD YOUR CONVERSATION WITH
16 ERIK MENENDEZ?

17 A. NO.

18 Q. DID YOU HAVE A WITNESS WITH YOU WHEN YOU
19 TALKED TO ERIK MENENDEZ?

20 A. NO.

21 Q. WHY DIDN'T YOU TAKE ANY NOTES?

22 A. I DIDN'T THINK THAT ANYTHING THAT HE TOLD
23 ME WAS OF THAT GRAVITY THAT IT REQUIRED ME TO MAKE A
24 NOTE.

25 Q. YOU WERE ASKING HIM TO CLARIFY THINGS THAT
26 WERE CONTAINED IN YOUR NOTES THAT YOU KNEW MR. CONN WAS

27 GOING TO BE QUESTIONING YOU ABOUT IN THIS COURT, DID YOU
28 NOT?

-11198

1 A. YES.

2 Q. AND YOU KNEW THAT THE VERY BEST EVIDENCE OF
3 WHAT ERIK MENENDEZ TOLD YOU WOULD BE YOUR RECALL OF WHAT
4 HE ACTUALLY SAID WHICH CAUSED YOU TO WRITE THAT
5 PARTICULAR PORTION OF INFORMATION IN YOUR NOTES,
6 CORRECT?

7 A. WELL, I THINK THE VERY BEST EVIDENCE IS
8 ACTUALLY WHAT IS ON THE WRITTEN PAGE, ALL RIGHT.

9 Q. HAVE YOU EVER BEEN ASKED A QUESTION ABOUT
10 WHAT YOU RECALL SOMEONE SAID AND SAID THEN, "I DON'T
11 RECALL"?

12 A. OF COURSE.

13 Q. IS THAT IN YOUR LEXION?

14 A. OF COURSE.

15 Q. WELL, WHAT WAS YOUR PURPOSE OF HAVING ERIK
16 MENENDEZ EXPLAIN TO YOU WHAT HE MEANT BY NOTES THAT YOU
17 TOOK OF CONVERSATIONS THAT OCCURRED UP TO SIX YEARS AGO
18 IF YOU, IN FACT, DON'T REMEMBER THEM?

19 A. I WAS LOOKING TO HIM TO HELP ME.

20 Q. HELP YOU WHAT?

21 A. HELP ME UNDERSTAND.

22 Q. SO YOU WOULD BE A BETTER WITNESS FOR THE

23 PROSECUTION AT THIS TIME?

24 A. WELL, I WANTED MORE INFORMATION SO THAT I
25 COULD HOPEFULLY BE HONEST AND ACCURATE.

26 Q. AND YOU KNOW THAT YOU CAN BE PROSECUTED FOR
27 A CRIME, SUCH AS OBSTRUCTION OF JUSTICE, PERJURY,
28 CONSPIRACY, CRIMES OF THAT ILK; DO YOU NOT?

-11197

1 A. I DO.

2 Q. AND YOU KNOW THAT THE PROSECUTOR IN THIS
3 CASE IS LOOKING UPON YOU TO PROVIDE HIM WITH TRUTHFUL
4 ANSWERS SO THAT IT CAN ASSIST HIM IN OBTAINING A DEATH
5 JUDGMENT AGAINST YOUR PATIENT, ERIK MENENDEZ, CORRECT?

6 A. THAT'S HIS JOB.

7 Q. AND YOU KNOW THAT YOU HAVE AN ATTORNEY
8 SITTING HERE IN COURT TO PROTECT YOUR INTERESTS AND
9 TELL -- GIVE YOU ADVICE, LEGAL ADVICE, CONCERNING YOUR
10 STANDING AS A WITNESS AND THE POTENTIAL FOR YOU BEING
11 PROSECUTED AT A LATER TIME, CORRECT?

12 A. YES.

13 Q. AND SO DID YOU TELL THE PROSECUTOR -- FIRST
14 OF ALL, DID THE PROSECUTION ASK YOU TO GO DOWN TO THE
15 JAIL?

16 A. NO.

17 Q. HAD YOU HAD ANY CONVERSATIONS WITH THE
18 PROSECUTION BETWEEN THE TIME THAT YOU TESTIFIED ON APRIL

19 4TH AND TODAY?

20 A. NO.

21 Q. HAD YOU HAD ANY CASUAL CONVERSATIONS WHERE
22 YOU BUMPED INTO THEM IN THE HALL?

23 A. ONLY TO NOD AT THEM AND ASK THEM, YOU KNOW,
24 WHAT'S HAPPENING. I MEAN, I'M SITTING IN THE CAFETERIA
25 HOUR AFTER HOUR AFTER HOUR, DAY AFTER DAY. I'D LIKE TO
26 BE INFORMED. SOMEBODY TELL ME.

27 Q. YOU'RE A LAWYER, ARE YOU NOT?

28 A. I AM NOT A MEMBER OF THE BAR. I'M A LAW

-11196

1 SCHOOL GRADUATE, YES.

2 Q. WHERE DID YOU GRADUATE FROM LAW SCHOOL?

3 A. HARVARD LAW SCHOOL.

4 Q. AND WHEN WAS THAT?

5 A. 1969.

6 Q. AND YOU HAVE NOT TAKEN THE BAR EXAM IN ANY
7 STATE?

8 A. I NEVER TOOK THE BAR IN ANY STATE.

9 Q. YOU HAVE NEVER PRACTICED LAW?

10 A. NEVER.

11 Q. BUT NONETHELESS, YOU'VE SUCCESSFULLY
12 COMPLETED LAW SCHOOL?

13 A. YES.

14 Q. AND MEDICAL SCHOOL?

15 A. YES.

16 Q. AND YOUR CHOSEN PROFESSION IS A
17 PSYCHIATRIST?

18 A. CORRECT.

19 Q. AND YOU WERE ERIK MENENDEZ' TREATING
20 PHYSICIAN, WERE YOU NOT?

21 A. YES, I WAS.

22 Q. WHEN YOU WENT TO SEE ERIK MENENDEZ, THAT
23 WAS BACK IN 1990, CORRECT?

24 A. YES.

25 Q. AND WHEN YOU WENT TO SEE HIM, DID YOU MAKE
26 IT CLEAR TO HIM THAT YOU WERE HIS TREATING DOCTOR?

27 A. NO. I THINK I EXPLAINED THAT I WAS THERE
28 ON BEHALF OF HIS ATTORNEY.

-11195

1 Q. WELL, DID YOU PRESCRIBE TO HIM MEDICATION
2 AND SET UP A COURSE OF TREATMENT?

3 THE COURT: OKAY, WE KNOW ALL ABOUT THIS,
4 MR. LEVIN, AND THIS ISN'T THE PURPOSE, TO PERMIT YOU TO
5 PRACTICE YOUR CROSS-EXAMINATION.

6 MR. LEVIN: I AM NOT PRACTICING ANYTHING, YOUR
7 HONOR.

8 THE COURT: THAT YOU CAN DO BEFORE THE JURY.
9 I'VE HEARD ALL OF THIS MATERIAL, AND WE WANT TO GET TO
10 THE SPECIFICS OF THIS HEARING, TO ASCERTAIN THE BASES OF

11 THE VARIOUS MOTIONS MADE BY YOU, BY MR. GESSLER,
12 REGARDING EXCUSING OR RELIEVING MS. ABRAMSON, MOTIONS
13 FOR MISTRIAL, THINGS OF THAT NATURE. GOING BACK THROUGH
14 THIS HISTORY, WHICH WE ALL KNOW ABOUT, WON'T HELP US.
15 LET'S FOCUS ON THIS.

16 MR. LEVIN: WHAT I WANTED TO DO, AS AN OFFER OF
17 PROOF, YOUR HONOR, IS GET INTO AREAS OF PRIVILEGE WITH
18 RESPECT TO ATTEMPTING TO SHOW THAT THIS PARTICULAR
19 WITNESS NEVER, EVER, TOLD ERIK MENENDEZ ANYTHING OTHER
20 THAN EVERY CONVERSATION HE HAD WITH HIM WOULD BE
21 PRIVILEGED AND CONFIDENTIAL.

22 THE COURT: IT DOESN'T MATTER. YOUR OBJECTION
23 REGARDING PRIVILEGE IS A LITTLE LATE, SINCE THIS WITNESS
24 TESTIFIED IN THE FIRST TRIAL, HE TESTIFIED IN THIS
25 TRIAL, HIS NOTES WERE PROVIDED TO OTHER WITNESSES WHO
26 TESTIFIED IN THIS TRIAL AND IN THE FIRST TRIAL.

27 MS. ABRAMSON: OBJECTION, YOUR HONOR. THAT
28 MISSTATES, IN FACT, WHAT HAPPENED.

-11194

1 THE COURT: WELL, I'VE BEEN TOLD THAT, FROM THE
2 OFFER OF PROOF HERE, WHAT'S BEEN PRESENTED SO FAR, THAT
3 NOTES WERE GIVEN TO OTHER EXPERTS. I HEARD
4 DR. WILSON TESTIFY THAT NOTES WERE GIVEN TO HIM.

5 MS. ABRAMSON: IN THIS TRIAL, CORRECT.

6 THE COURT: AND THE WITNESS TESTIFIED THAT IT WAS

7 HIS UNDERSTANDING THE EXPERTS IN THE FIRST TRIAL HAD
8 THESE NOTES.

9 SO THERE IS CLEARLY A WAIVER OF PRIVILEGE
10 WITH RESPECT TO THIS WITNESS' RELATIONSHIP WITH ERIK
11 MENENDEZ.

12 MR. LEVIN: I RESPECTFULLY DISAGREE, BUT I WILL
13 MOVE ON.

14 THE COURT: I COULDN'T SEE HOW WE WOULD HAVE A
15 BROADER WAIVER THAN WHAT HAS OCCURRED HERE. THIS
16 WITNESS WAS CALLED BY THE DEFENSE.

17 MR. LEVIN: I WILL MOVE ON TO ANOTHER AREA.

18 Q. DR. VICARY, HAVE I EVER DISCUSSED WITH YOU
19 OTHER THAN IN PREPARATION OF TODAY'S PROCEEDINGS THIS
20 CASE?

21 A. NO.

22 Q. AND WAS I PRESENT DURING ANY OF THE
23 CONVERSATIONS THAT YOU HAD WITH MS. ABRAMSON BACK IN
24 1993?

25 A. NO.

26 Q. CONCERNING THE ALTERATION OR CHANGING OF
27 THESE DOCUMENTS?

28 A. NO.

-11193

1 Q. AND DID I HAVE ANY CONVERSATIONS WITH YOU
2 PRIOR TO YOUR TESTIMONY IN THE TRIAL?

3 A. NO.

4 Q. DID I HAVE ANY CONVERSATIONS OR DEALINGS
5 WITH YOU PRIOR TO YOUR TESTIMONY IN THE PENALTY PHASE?

6 A. NO.

7 Q. NOW, IS THERE ANY WAY THAT YOU KNOW AT THIS
8 MOMENT EXACTLY WHAT PASSAGES, WORDS, PAGES, PARAGRAPHS,
9 THAT YOU SHOWED ERIK MENENDEZ ON SATURDAY TO QUESTION
10 HIM OR ASK HIM FOR A RESPONSE?

11 DO YOU HAVE ANY RECORDING OR NOTATIONS OR
12 ANYTHING UPON WHICH I COULD REFER TO KNOW WHAT IT WAS
13 YOU SHOWED ERIK MENENDEZ ON SATURDAY?

14 A. NO.

15 Q. HOW LONG DID YOU SEE ERIK MENENDEZ
16 SATURDAY?

17 A. OH, ROUGHLY 30 MINUTES.

18 Q. AND WOULD YOU SAY THAT SOME OF THE
19 TESTIMONY THAT YOU PROVIDED HERE TODAY CONCERNING
20 ANSWERS TO QUESTIONS POSED TO YOU BY THE PROSECUTION
21 WHICH ELICITED ANSWERS FROM YOU CONCERNING YOUR
22 UNDERSTANDING OF WHAT ERIK MENENDEZ TOLD YOU CAME FROM
23 SATURDAY'S CONVERSATION WITH ERIK MENENDEZ?

24 A. I REMEMBER TWO PARTICULAR AREAS. I THINK
25 WHAT HE TOLD ME REFRESHED MY MEMORY.

26 Q. YOU THINK IT REFRESHED YOUR MEMORY THAT YOU
27 DIDN'T HAVE BEFORE YOU TALKED TO HIM?

28 A. YES.

1 Q. DO YOU HAVE A NOTATION OR ANY WAY THAT
2 THOSE TWO AREAS WERE SEGREGATED BY ERIK MENENDEZ?

3 DEFENDANT ERIK MENENDEZ: BARRY, MAY I TALK TO
4 YOU?

5 MR. LEVIN: WAIT A SECOND.

6 Q. DO YOU HAVE ANY?

7 A. NO, I DON'T.

8 MS. ABRAMSON: EXCUSE ME. COULD WE HAVE A
9 MOMENT, YOUR HONOR?

10 (ATTORNEYS ABRAMSON AND LEVIN CONFER
11 SOTTO VOCE.)

12

13 Q. BY MR. LEVIN: DR. VICARY, YOU TESTIFIED
14 THAT THERE WERE THINGS THAT YOU TOOK OUT OF YOUR NOTES
15 ON YOUR OWN INITIATIVE; IS THAT CORRECT?

16 A. YES.

17 Q. AND THOSE THINGS THAT YOU TOOK OUT OF YOUR
18 NOTES ON YOUR OWN INITIATIVE ARE THINGS THAT
19 MS. ABRAMSON DID NOT REQUEST FOR YOU TO TAKE OUT,
20 CORRECT?

21 A. CORRECT.

22 Q. IS THERE ANY WAY THAT WE CAN DETERMINE WITH
23 ANY DEGREE OF RELIABILITY OR CERTAINTY THE DIFFERENCE
24 BETWEEN THOSE THINGS THAT YOU TOOK OUT OF YOUR NOTES AT
25 THE REQUEST OF MS. ABRAMSON AND THOSE THINGS THAT YOU
26 TOOK OUT ON YOUR OWN INITIATIVE?

27 A. THE GENERAL RULE WOULD BE, THE THINGS THAT

28 I TOOK OUT ON MY OWN INITIATIVE WERE LIKE ONE OR TWO,

-11191

1 THREE WORDS, SOMETHING LIKE THAT; WHEREAS, THE SECTIONS
2 I DELETED AT HER INSTRUCTIONS WERE LIKE SEVERAL
3 SENTENCES OR AN ENTIRE PARAGRAPH.

4 Q. OTHER THAN YOUR SAYING IT, IS THERE
5 ANYTHING OR ANY WAY THAT WE CAN DETERMINE -- THAT I CAN
6 DETERMINE WHAT THINGS WERE REMOVED FROM YOUR NOTES AT
7 THE BEHEST OR REQUEST OF MS. ABRAMSON, OR WHAT WAS TAKEN
8 OUT OF YOUR NOTES PURSUANT TO YOUR OWN INITIATIVE?

9 A. THERE IS NO OBJECTIVE WAY OF DETERMINING
10 THAT.

11 Q. YOU'RE DOING IT NOW BASED ON YOUR OWN
12 RECALL NOW, THE EVENTS THAT TOOK PLACE, THE MEETING YOU
13 HAD WITH MS. ABRAMSON, CORRECT?

14 A. THAT'S CORRECT, AND I MAY BE WRONG.

15 Q. WHEN YOU SAY YOU MAY BE WRONG, YOU MAY BE
16 WRONG ABOUT WHETHER OR NOT MS. ABRAMSON DIRECTED YOU TO
17 REMOVE ALL THE DELETIONS TO WHICH YOU ATTRIBUTED TO HER
18 TODAY, CORRECT?

19 A. NO. I THINK THAT MY MEMORY ABOUT THAT
20 WOULD BE VERY ACCURATE. MY MEMORY AS TO THE
21 JUSTIFICATIONS FOR EACH AND EVERY ONE OF THE DELETIONS,
22 I THINK, WOULD BE SOMETHING THAT MS. ABRAMSON AND I
23 COULD HONESTLY DISAGREE ABOUT.

24 Q. WELL, MY QUESTION TO YOU IS -- WELL, FIRST
25 OF ALL, WHAT GIVES YOU THE RIGHT TO REMOVE A NOTE, A
26 WORD, A REFERENCE, IN YOUR -- FROM YOUR NOTES THAT YOUR
27 PATIENT HAS STATED TO YOU? WHAT RIGHT DO YOU HAVE TO
28 REMOVE THOSE WORDS FROM YOUR NOTES? UPON WHAT

-11190

1 JUSTIFICATION DO YOU RELY?

2 A. THERE HAS TO BE A JUSTIFICATION, BECAUSE IN
3 GENERAL YOU SHOULD NEVER TAKE ANY NOTES OUT.

4 Q. WELL, WHAT IS YOUR JUSTIFICATION?

5 A. IN REDOING THE PAGES HERE, THERE WERE SOME
6 THINGS THAT I LEFT OUT BECAUSE I SIMPLY KNEW THAT THEY
7 WERE NOT TRUE, AND IT WAS IRRELEVANT AND DIDN'T MATTER,
8 OR THERE WAS A SENTENCE THAT WAS WRITTEN, AND THEN IT
9 WAS REWRITTEN TWO INCHES LATER, AND IT MAKES THE WRITER
10 LOOK STUPID. SO I TOOK IT OUT.

11 THERE IS ALSO SOME -- WHEN HE HAD AN
12 EPISODE OF HIGH BLOOD PRESSURE AT THE JAIL, I HAVE THE
13 WORD "TUMOR" THERE, BECAUSE THEY THOUGHT HE MIGHT HAVE A
14 TUMOR, CAUSING HIS BLOOD PRESSURE TO GO UP. I KNOW
15 THAT'S NOT TRUE. THEY DID A WORKUP ON HIM AT USC, AND I
16 KNEW THAT HE DIDN'T HAVE A TUMOR.

17 WHY CONFUSE PEOPLE BY HAVING THE WORD
18 "TUMOR" IN HERE, WHEN IT'S STUPID? TAKE IT OUT.

19 MAYBE FOUR OR FIVE TIMES IN GOING THROUGH

20 THE NOTES THAT I DID SOMETHING LIKE THAT. I DON'T HAVE
21 THE RIGHT TO DO THAT, BUT IT DOESN'T MATTER.

22 Q. IT DOESN'T MATTER TO WHO, DR. VICARY? DOES
23 IT MATTER TO YOUR CREDIBILITY IN A DEATH PENALTY CASE,
24 WHERE THE LIFE OF YOUR CLIENT IS ON THE LINE, AND YOUR
25 CREDIBILITY FOR PROVIDING ACCURATE AND TRUTHFUL
26 INFORMATION TO A JURY TO MAKE THAT DECISION?

27 A. IF THAT WAS THE ONLY PROBLEM WAS ME TAKING
28 OUT THE WORD "TUMOR" AND A FEW OTHER THINGS LIKE THAT IN

-11189

1 GOING THROUGH MY NOTES HERE, WE WOULDN'T BE HERE.

2 Q. WELL, WAIT A SECOND. YOU TESTIFIED BEFORE
3 THAT YOU REMOVED A REFERENCE TO "STRAWBERRIES" AND
4 SOMETHING ABOUT THE MAFIA OUT OF YOUR NOTES, CORRECT?

5 A. YES.

6 Q. AND THAT WAS SOMETHING THAT ERIK MENENDEZ
7 TOLD YOU, AND I DON'T WANT TO WASTE TIME AND GO TO THE
8 EXACT REFERENCE. BUT DIDN'T ERIK MENENDEZ TELL YOU THAT
9 HIS FATHER PURCHASED A COMPANY CALLED "STRAWBERRIES",
10 AND THAT PART OF HIS JOB WAS TO GET RID OF THE SO-CALLED
11 PEOPLE INVOLVED IN THE MAFIA FROM THAT COMPANY?

12 A. HE TOLD ME THAT, I BELIEVE.

13 Q. AND HE NEVER TOLD YOU THAT THAT WAS NOT
14 TRUE, OR THAT HE DIDN'T BELIEVE THAT TO BE TRUE, DID HE?

15 A. CORRECT.

16 Q. BUT YOU DECIDED THAT THAT WASN'T TRUE, SO

17 YOU REMOVED THAT FROM YOUR NOTES, CORRECT?

18 A. YES.

19 Q. AND DID YOU TELL ERIK MENENDEZ THAT YOU

20 WERE REMOVING THAT PARTICULAR PASSAGE FROM YOUR NOTES?

21 A. I NEVER TOLD HIM I EVER REMOVED ANY WORD OR

22 PASSAGE.

23 Q. DID YOU ASK HIM FOR PERMISSION TO REMOVE OR

24 ALTER OR CHANGE ANYTHING THAT HE HAD TOLD YOU FROM YOUR

25 NOTES?

26 A. I DID NOT.

27 Q. AND SO YOUR JUSTIFICATION FOR REMOVING THAT

28 WAS BECAUSE YOU PERSONALLY DISBELIEVED IT, CORRECT?

-11188

1 A. I THOUGHT IT WAS A BUNCH OF BALONEY.

2 Q. YOU SAID "BULLSHIT," DIDN'T YOU?

3 A. WHEN I TESTIFIED, YES, I DID.

4 Q. AND THAT MEANS, WHEN YOU SAY "BULLSHIT,"

5 YOU MEAN SOMETHING THAT ERIK MENENDEZ IS CONSCIOUSLY

6 TELLING YOU TO BE A LIE, AS OPPOSED TO SOMETHING THAT

7 ERIK MENENDEZ MIGHT HONESTLY AND IN GOOD FAITH BELIEVE?

8 A. NO, IT DOESN'T MEAN THAT. MY RECOLLECTION

9 IS THAT WHEN HE TOLD ME THIS, HE HONESTLY BELIEVED IT.

10 AND I THINK WHEN I WENT BACK TO THE JAIL ON SATURDAY, I

11 ASKED HIM AND HE SAYS, "NO, THIS IS TRUE, I HONESTLY

12 BELIEVE THIS." AND I JUST THINK IT'S A BUNCH OF

13 BALONEY.

14 Q. WELL, YOU SAID YOU THINK IT'S A BUNCH OF
15 BULLSHIT?

16 A. YEAH.

17 Q. WHAT DO YOU MEAN BY "BULLSHIT"?

18 A. THAT I DON'T KNOW WHERE ALL THIS STUFF
19 COMES FROM. BUT I DON'T SEE ANY EVIDENCE OF IT, ANY
20 DOCUMENTATION. SO IT'S JUST A WASTE OF EVERYONE'S TIME
21 AND ENERGY TO HAVE THAT IN MY NOTES, ALL RIGHT. IT'S
22 NOT CLINICALLY SIGNIFICANT.

23 Q. YOU MEAN IF A PATIENT OF YOURS GIVES YOU A
24 PIECE OF INFORMATION THAT YOU CAN'T INDEPENDENTLY
25 SATISFY YOURSELF AS BEING TRUE, YOU, THE DOCTOR, THE
26 PSYCHIATRIST, THE PATIENT, THE WITNESS, WILL REMOVE IT;
27 IS THAT WHAT YOU'RE SAYING?

28 A. NO, OF COURSE NOT. IF I EVER GET TO THE

-11187

1 POINT THAT I HAVE TO COPY MY NOTES OR, FOR EXAMPLE, IF
2 WE'RE GOING TO DICTATE MY NOTES AS OPPOSED TO HAVING A
3 WRITTEN COPY, ALL RIGHT, A LOT OF DOCTORS DO THIS. THEY
4 COPY A FEW NOTES AND THEN THEY DICTATE THE NOTES, AND
5 THEY HAVE THIS SCRIBBLING AND THEY JUST THROW IT IN THE
6 GARBAGE, ALL RIGHT.

7 SO WHEN YOU'RE DICTATING STUFF, A LOT OF

8 TIMES DOCTORS DON'T DICTATE EVERY LITTLE SINGLE THING
9 THAT'S IN THEIR CRIBS. SOME OF THEIR DECISIONS YOU
10 WOULD SAY, "HEY, YOU CAN'T DO THAT. YOU CAN'T DICTATE
11 THAT. THAT'S IMPORTANT."

12 AND THE DOCTOR COULD SAY: "HEY, I'M NOT
13 GOING TO PAY ATTENTION TO THIS. IT'S NOT RELEVANT.
14 IT'S NOT IMPORTANT."

15 I HAVE TO MAKE JUDGMENTS. YOU CAN
16 CRITICIZE ME FOR MAKING A BAD JUDGMENT OR BEING STUPID,
17 BUT YOU HAVE TO DO THOSE KIND OF JUDGMENTS TO DO YOUR
18 WORK AS A DOCTOR. YOU CANNOT RECORD EVERY SINGLE WORD A
19 PATIENT SAYS. YOU CANNOT RECOLLECT, RECORD AND STORE
20 EVERY SINGLE SENTENCE AND ITEM FROM EVERY SINGLE
21 PATIENT. THERE JUST ISN'T ENOUGH SPACE. THERE ISN'T
22 ENOUGH TIME.

23 Q. BUT IN THIS CASE, DR. VICARY, YOU DID HAVE
24 THE TIME AND YOU DID RECORD WHAT ERIK MENENDEZ SAID,
25 CORRECT?

26 A. YES, I DID.

27 Q. AND YOU, ON YOUR OWN, FOR WHATEVER REASON,
28 REMOVED IT, DELETED IT, CHANGED YOUR NOTES TO REFLECT

-11186

1 THAT ERIK MENENDEZ HAD NOT SAID SOMETHING THAT HE HAD
2 PREVIOUSLY SAID AND WAS CONTAINED IN YOUR NOTES?

3 A. YES, I DID.

4 Q. AND THAT WAS NOT AT THE REQUEST OF

5 MS. ABRAMSON OR ANYONE ELSE?

6 A. CORRECT.

7 Q. AND YOUR ULTIMATE JUSTIFICATION FOR GOING

8 ALONG WITH MS. ABRAMSON'S PERSUASION, EVEN WHEN IT GOT

9 TO BE BITTER, WAS BECAUSE MS. ABRAMSON HAD TOLD YOU THAT

10 IF YOU DIDN'T DO IT, YOU WOULD BE TAKEN OFF THE CASE,

11 CORRECT?

12 A. YES.

13 Q. AND YOU FELT THAT THE JUSTIFICATION FOR

14 STAYING ON THE CASE WAS BECAUSE YOU WOULD BE HELPFUL TO

15 ERIK MENENDEZ; IS THAT CORRECT?

16 A. YES.

17 Q. SO YOU THOUGHT THAT IT WOULD BE BETTER FOR

18 ERIK MENENDEZ FOR YOU TO ALTER YOUR NOTES, AND GET

19 YOURSELF IN THE POSITION NOW BEFORE THE JURY IN A

20 CAPITAL CASE WHERE YOU HAVE LITTLE OR NO CREDIBILITY,

21 AND TESTIFY TO THOSE MATTERS SO THAT YOU COULD STAY ON

22 THIS CASE?

23 A. GIVEN THE POSITION THAT WE'RE IN NOW,

24 OBVIOUSLY, I WOULD MAKE A DIFFERENT DECISION AT THE

25 BEGINNING.

26 Q. BUT YOUR REASON FOR DOING IT WAS SO THAT

27 YOU COULD STAY ON THIS CASE?

28 A. AND HOPEFULLY PROVIDE INFORMATION THAT

1 WOULD BE HELPFUL, YES.

2 Q. DID YOU TESTIFY IN THE FIRST TRIAL?

3 A. YES, I DID.

4 Q. DID YOU COMMIT PERJURY?

5 A. NO, I DID NOT.

6 Q. DID YOU COMMIT PERJURY IN THIS TRIAL?

7 A. NO, I DID NOT.

8 Q. IN ANY MATTERS THAT HAVE BEEN PRESENTED TO
9 YOU, HAVE YOU LIED?

10 A. NO, SIR.

11 Q. THERE WAS A REFERENCE OF 8-7 THAT WAS
12 CONTAINED IN YOUR NOTES. I DON'T HAVE THE EXACT PAGE
13 CITE RIGHT NOW.

14 A. IT'S ON PAGE 7.

15 Q. ON PAGE 7 THAT YOU SAID WAS DELETED ON YOUR
16 OWN BECAUSE, "WE COULDN'T FIGURE OUT WHAT IT MEANT."
17 DO YOU REMEMBER THAT TESTIMONY?

18 A. YES.

19 Q. WHAT DO YOU MEAN YOU DELETED IT ON YOUR OWN
20 BECAUSE "WE COULDN'T FIGURE OUT WHAT IT MEANT"?

21 A. WELL, I SHOULD HAVE MORE CORRECTLY SAID,
22 SHE ASKED ME, "WHAT IS THIS HERE FOR? WHAT DOES IT
23 MEAN?"

24 AND I SAID, "I HAVE NO IDEA. I CAN'T
25 EXPLAIN IT."

26 SO WHEN I'M COPYING MY NOTES, I SAID, "I
27 DON'T KNOW WHAT THIS IS. IT DOESN'T SEEM TO HAVE ANY
28 EXPLANATION." SO I JUST FIGURED IT'S CONFUSING, SO

1 LEAVE IT OUT.

2 Q. SO MS. ABRAMSON DID NOT ASK YOU TO DELETE
3 IT, EVEN THOUGH THERE WAS DISCUSSION ABOUT WHAT IT
4 MEANT?

5 A. CORRECT. I DID THAT ON MY OWN INITIATIVE.

6 Q. SO THAT I UNDERSTAND THIS CORRECTLY, THERE
7 WERE SOME MATTERS THAT YOU DELETED BECAUSE MS. ABRAMSON
8 TOLD YOU TO DELETE, CORRECT?

9 A. CORRECT.

10 Q. THERE WERE SOME MATTERS THAT YOU DELETED
11 BECAUSE MS. ABRAMSON ASKED YOU TO EXPLAIN THEM, AND
12 BECAUSE YOU DIDN'T HAVE A GOOD EXPLANATION, YOU DELETED
13 THEM ON YOUR OWN?

14 A. YEAH. THERE WERE A COUPLE OF INSTANCES OF
15 THAT, WHERE THERE WAS JUST NO EXPLANATION. IT WAS VERY
16 CONFUSING. I COULDN'T FIGURE IT OUT.

17 Q. BUT MS. ABRAMSON DID NOT TELL YOU TO DELETE
18 THOSE?

19 A. NO, SHE JUST ASKED ME. SHE SAID, "WHAT
20 DOES THIS MEAN?"

21 "I DON'T KNOW."

22 Q. AND THERE WERE SOME ITEMS THAT YOU DELETED
23 TOTALLY AND COMPLETELY ON YOUR OWN?

24 A. YES.

25 Q. ARE THERE ANY OTHER CATEGORIES OF

26 JUSTIFICATIONS FOR DELETIONS OTHER THAN THE THREE I JUST
27 MENTIONED?

28 A. I DON'T THINK SO.

-11183

1 Q. IS THERE ANY WAY THAT WE CAN DETERMINE WITH
2 ANY RELIABILITY AND ACCURACY UNDER WHICH -- OR WHICH
3 JUSTIFICATION YOU MADE ANY OF THE DELETIONS THAT THE
4 PROSECUTORS BROUGHT UP HERE TODAY?

5 A. THERE IS NO OBJECTIVE WAY OF DETERMINING
6 THAT.

7 Q. IT'S JUST YOUR MEMORY AND YOUR RECALL,
8 CORRECT?

9 A. YES.

10 Q. DO YOU THINK IT SERVES YOUR PURPOSE BETTER
11 TO LAY OFF THE PURPOSES OF THE DELETIONS ON MS. ABRAMSON
12 CONCERNING YOUR PRESENT SITUATION?

13 A. I DO.

14 Q. WHY IS THAT?

15 A. WELL, WHAT WAS DONE WAS WRONG, AND THE
16 QUESTION WAS WHY IT WAS DONE AND WHO WAS RESPONSIBLE.
17 AND I THINK THAT IF WE'RE GOING TO DIVIDE
18 RESPONSIBILITY, I WILL TAKE 50 PERCENT, ALL RIGHT, AND I
19 WILL BE VERY HONEST AND DO MY BEST TO ANSWER ALL THE
20 QUESTIONS ABOUT THIS THAT ANYBODY WANTS TO ASK ME. I AM
21 NOT TRYING SHIRK MY RESPONSIBILITY. I AM NOT TRYING TO

22 DUMP IT ON MS. ABRAMSON. I AM TRYING TO BE HONEST. AND
23 WHEN IT COMES DOWN TO THE BOTTOM LINE, DO I TAKE 50
24 PERCENT OF THE RESPONSIBILITY? YOU BET I DO.
25 Q. AND WHAT I AM ASKING YOU, DR. VICARY, DON'T
26 YOU AGREE WITH ME, AT LEAST IN YOUR REPUTATION, YOUR
27 PROFESSIONAL STANDING IN THE COMMUNITY FROM THIS POINT
28 FORWARD, IN YOUR PROFESSIONAL STANDING WITH THE COURT

-11182

1 UPON WHICH YOU RELY SO GREATLY FOR YOUR LIVELIHOOD AND
2 CONTINUED WELL-BEING, YOUR PROFESSIONAL STANDING WITH
3 THE MEDICAL PROFESSION AND POTENTIAL CRIMINAL
4 PROSECUTION, THAT YOU TEND TO BENEFIT FROM PLACING MOST
5 OF THE BLAME ON MS. ABRAMSON?

6 A. YES.

7 MR. LEVIN: I HAVE NOTHING FURTHER.

8 THE COURT: MR. GESSLER.

9 MR. GESSLER: NO.

10 THE COURT: ANYTHING FURTHER?

11 MR. CONN: NO, NOTHING RIGHT NOW.

12 THE COURT: THANK YOU. YOU MAY STEP DOWN.

13 OR HOLD ON. LET'S TAKE THIS OPPORTUNITY TO
14 GET THESE ANSWERS TO COUPLE OF QUESTIONS. WE WILL
15 EXCLUDE THE PUBLIC, AND AFTER THOSE FEW QUESTIONS AS TO
16 POTENTIALLY PRIVILEGED MATERIAL, WE WILL TAKE A VERY
17 SHORT RECESS AND RESUME.

18 (PAGES 54355 THROUGH 54364
19 WERE HELD IN CAMERA AND SEALED
20 BY ORDER OF THE COURT.)

21
22 (A RECESS WAS TAKEN FROM
23 2:55 P.M TO 3:10 P.M.)

24
25
26
27
28

-11172

1 THE COURT: ALL RIGHT. WE WILL RESUME WITH THE
2 DEFENDANTS AND ALL COUNSEL PRESENT.
3 FIRST OF ALL, REGARDING EFFORTS TO LIMIT --
4 OR MOTIONS TO LIMIT THE TESTIMONY OF DR. VICARY, DID THE
5 DEFENSE WISH TO BE HEARD?

6 MR. LEVIN: YES, YOUR HONOR.

7 WITH RESPECT TO DR. VICARY'S TESTIMONY THAT
8 WE HEARD IN THE 402, I WISH TO ADDRESS TWO SEPARATE
9 ISSUES REGARDING THE EVIDENCE; AND THAT IS THE FIRST
10 LAYER OF EVIDENCE, WHICH I WOULD CALL AND DELINEATE AS
11 THAT EVIDENCE THAT DR. VICARY COULD TESTIFY TO -- THOSE
12 MATTERS THAT HE COULD TESTIFY TO THAT COULD BE
13 IMPEACHING DIRECTLY AGAINST ERIK, USED DIRECTLY AGAINST

14 ERIK MENENDEZ, FROM THOSE MATTERS THAT COULD BE USED TO
15 IMPEACH OR ATTACK DR. VICARY'S CREDIBILITY.

16 AND I WOULD LUMP IN CO-COUNSEL,
17 MS. ABRAMSON, INTO THAT REGARD, BECAUSE WE HAVE ALREADY
18 HEARD FROM THIS WITNESS TO THE JURY THAT A DELETION WAS
19 MADE AT THE BEHEST OF MS. ABRAMSON, AND THE REASON WHY.

20 AND IT'S REASONABLE TO INFER THAT IF THIS
21 WITNESS IS PERMITTED TO TESTIFY TO ANY DELETION AT ALL
22 WITH -- BY SANITIZING IT, THEN BY NOT SAYING AT WHOSE
23 DIRECTION YOU DID DELETE IT, IT WOULD BE INFERRED THAT
24 IT WOULD BE OR WAS AT THE DIRECTION OF MS. ABRAMSON.

25 SO I DON'T THINK THAT THERE IS A WAY THAT
26 THIS WITNESS SHOULD BE PERMITTED TO TESTIFY TO ANY
27 MATTER THAT HAS TO DO WITH IMPEACHING HIS CREDIBILITY,
28 OR THE CREDIBILITY OF MS. ABRAMSON, AND THAT IS AS TO

-11171

1 ANY MATTERS THAT WERE DELETED, OR THE FACT THAT THEY
2 WERE DELETED, OR THE REASON WHY THEY WERE DELETED.

3 THIS WITNESS, I BELIEVE, IF PERMITTED TO
4 CONTINUE TO TESTIFY -- AND I WOULD LIKE TO RESERVE ANY
5 COMMENTS AND OBJECTIONS I HAVE TO THE ENTIRETY OF HIS
6 TESTIMONY TO A LATER TIME -- BUT IF HE IS PERMITTED TO
7 TESTIFY, IT SHOULD BE LIMITED TO ANY STATEMENTS
8 ATTRIBUTED TO ERIK MENENDEZ THAT ARE RELEVANT TO THESE
9 PROCEEDINGS, THAT ARE NOT THE BASIS OF ANY PRIVILEGE

10 THAT DIRECTLY REBUT, REFUTE OR IMPEACH THE TESTIMONY OF
11 ERIK MENENDEZ GIVEN AT THIS TRIAL.

12 AND I THINK THAT MUCH, IF NOT ALL, OF WHAT
13 THIS WITNESS HAS ALREADY TESTIFIED TO REGARDING
14 STATEMENTS HE ATTRIBUTES TO ERIK MENENDEZ ARE
15 IRRELEVANT. THEY WERE SUBJECT TO PRIOR OR LATER RULINGS
16 OF THIS COURT REGARDING RELEVANCY AND ADMISSIBILITY, AND
17 THEY CERTAINLY SHOULD NOT BE USED AS A BASIS TO IMPEACH
18 ERIK MENENDEZ AT THIS TIME.

19 AND THERE ARE MANY MATTERS ABOUT WHICH ERIK
20 MENENDEZ --

21 THE COURT: LET'S TALK ABOUT THOSE THEN. WHICH
22 ONES ARE THEY?

23 MR. LEVIN: WELL, THE EVIDENCE WITH RESPECT TO
24 ANY ALLEGED HOMOSEXUALITY. THERE HAS ALREADY BEEN
25 RULINGS BY THIS COURT, AS I UNDERSTAND, THAT SUCH
26 EVIDENCE IS IRRELEVANT. ERIK MENENDEZ NEVER TESTIFIED
27 TO ANY OF THOSE MATTERS.

28 THE COURT: LET ME SAY THIS: THERE HAS NEVER

-11170

1 BEEN SUCH A RULING. THE RULINGS ALWAYS WERE RELATED TO
2 SPECIFIC OFFERS OF PROOF BY THE PROSECUTION WHICH COULD
3 NEVER BE CONNECTED TO ANY RELEVANT THEORY OF
4 ADMISSIBILITY, AND WHEN THOSE ISSUES AROSE DURING THE
5 TRIAL, THEY WERE LITIGATED. THERE HAS NEVER BEEN ANY

6 BROAD RULING ON THAT SUBJECT.

7 SO THAT IS THE STATUS OF THE RECORD IN THE
8 FIRST TRIAL, AND COUNSEL HAVE THE TRANSCRIPTS OF THOSE
9 PROCEEDINGS TO REFLECT THAT. THERE WAS NEVER ANY BROAD
10 BROAD RULING ON ANY SUCH MATTER.

11 MR. LEVIN: ALL RIGHT, YOUR HONOR.

12 WITH RESPECT TO EVIDENCE REGARDING
13 SO-CALLED HOMOSEXUALITY, THERE HAS BEEN NO TESTIMONY IN
14 THIS TRIAL BROUGHT OUT BY ERIK MENENDEZ, EITHER ON
15 DIRECT OR CROSS-EXAMINATION, THAT WOULD REBUT OR REFUTE
16 OR IMPEACH ANYTHING THAT ERIK MENENDEZ SAID.

17 BUT AS A SEPARATE AND DISTINCT ISSUE, I
18 WOULD ASK THAT THE COURT WEIGH AND BALANCE THAT
19 TESTIMONY UNDER 352 IN CONSIDERATION OF ITS PREJUDICIAL
20 IMPACT VERSUS ITS PROBATIVE VALUE.

21 IF INDEED THE PURPOSE OF THIS WITNESS IS TO
22 IMPEACH THINGS THAT ERIK MENENDEZ SAID, THERE ARE
23 SEVERAL THINGS THAT THIS WITNESS CAN TESTIFY TO, OR I'M
24 SURE WILL TESTIFY TO, IF PERMITTED, THAT WILL DIRECTLY
25 IMPEACH TESTIMONY -- AT LEAST COULD ARGUABLY IMPEACH
26 TESTIMONY THAT ERIK MENENDEZ GAVE.

27 THERE WOULD BE NO REASON TO GO INTO AN AREA
28 THAT IS HIGHLY PREJUDICIAL AND WOULD HAVE NO VALUE --

2 PROFFER; THAT BEING IMPEACHMENT OF ERIK MENENDEZ.

3 AND ALSO WITH RESPECT TO DR. VICARY'S
4 TESTIMONY IN THE TRIAL, HE NEVER TESTIFIED TO ANY ISSUE
5 REGARDING ERIK MENENDEZ' SEXUALITY. IT JUST DIDN'T COME
6 UP IN HIS TESTIMONY IN THE TRIAL.

7 AND SO EVEN RELATIVE TO HOW IT IMPACTS HIS
8 TESTIMONY FROM THIS POINT FORWARD, IT DOESN'T ADD OR
9 REBUT OR REFUTE ANYTHING HE'S ALREADY SAID.

10 THE COURT: OKAY. YOUR NEXT ARGUMENT.

11 MR. LEVIN: I'LL TRY TO TAKE THEM IN ORDER.

12 I THINK THAT -- AND I AM ASSUMING THAT
13 MR. CONN IS ATTEMPTING TO OFFER EVERYTHING THAT HE HAS
14 DONE IN THE 402. THERE ARE MANY MATTERS SUCH AS THE
15 INDICATION ON PAGE 7 OF THE REFERENCE IN MID AUGUST OF
16 "PLAYING LIKE AN ASS," WHICH IS REFLECTED IN ANOTHER
17 PLACE IN HIS NOTES.

18 THE EVIDENCE THAT GOES ONLY TO SHOW THAT
19 DR. VICARY REDACTED INFORMATION FROM HIS NOTES IS
20 IRRELEVANT. IT IS ONLY BEING OFFERED TO IMPEACH
21 DR. VICARY FOR ONE OF THE THREE REASONS FOR SETTING
22 FORTH THOSE REDACTIONS, AND FURTHER --

23 THE COURT: OKAY. IT SEEMS TO ME THAT SOME OF
24 THESE ARGUMENTS COULD BE DEFERRED UNTIL YOU HEAR WHAT
25 THE PEOPLE'S OFFER IS, SO THAT YOU DON'T GO ON AND
26 ASSUME THAT THERE ARE CERTAIN REASONS WHY THE PEOPLE ARE
27 ARGUING FOR ADMISSIBILITY. BUT TO THOSE THAT ARE
28 CRITICAL TO THE DEFENSE, PERHAPS YOU CAN SPEAK TO THOSE

1 RATHER THAN JUST ALL OF THEM.

2 MR. LEVIN: VERY WELL, YOUR HONOR.

3 WELL, WITH RESPECT TO THE EVIDENCE
4 CONCERNING THE MAFIA, THE DELETION OF THE SO-CALLED
5 "STRAWBERRIES" REFERENCE, THERE HAS BEEN EVIDENCE IN
6 THIS TRIAL THAT THAT WAS PRECISELY THE TRUTH, AND IT
7 WOULD SERVE NO PURPOSE, OR LITTLE PURPOSE, TO HAVE
8 DR. VICARY TESTIFY THAT HE DELETED A MATTER WHICH IS
9 TRUE, AND A MATTER WHICH ERIK MENENDEZ RELATED TO HIM,
10 AND HE TOOK IT OUT ON HIS OWN VOLITION.

11 I DON'T KNOW IF THAT WOULD BE A MATTER FOR
12 CROSS-EXAMINATION, BUT THE POINT IS IS THAT ANY MATTER
13 THAT ERIK MENENDEZ ACTUALLY STATED THAT THIS WITNESS
14 THEN DELETED IS CERTAINLY NOT IMPEACHMENT TO ERIK
15 MENENDEZ.

16 THE EVIDENCE REGARDING SO-CALLED
17 PREMEDITATION, THAT IS ONLY THIS WITNESS' GUESS,
18 SPECULATION. AND HE HAS TAKEN OUT OF CONTEXT CERTAIN
19 PASSAGES THAT HE FEELS -- AND PERHAPS EVEN TO SOME
20 DEGREE MS. ABRAMSON FELT, IF ONE IS TO ADOPT HIS VERSION
21 OF THE REASON FOR THE REDACTION, IT CERTAINLY -- HE
22 CERTAINLY NEVER TESTIFIED TO ANYTHING THAT ERIK MENENDEZ
23 SAID DIRECTLY THAT WOULD SMACK OF PREMEDITATION, OR
24 WOULD BE EVIDENCE OF PREMEDITATION.

25 AND WHEN THIS WITNESS INDICATED THAT HE
26 REMOVED THOSE REFERENCES FROM HIS REPORT, HE NEVER

27 TESTIFIED TO WHAT SPECIFICALLY HE RECALLS ERIK MENENDEZ
28 SAID. WE HAVE NO IDEA WHAT PARTICULAR PASSAGE HE'S

-11167

1 REFERRING TO, OR THE PROSECUTOR WOULD BE REFERRING TO,
2 FROM ERIK MENENDEZ' TESTIMONY IN THIS TRIAL THAT'S
3 ACTUALLY IMPEACHING. IT DOESN'T -- UNLESS IT REBUTS OR
4 REFUTES OR IS IMPEACHING OF SOMETHING THAT ERIK MENENDEZ
5 SAID, IT'S IRRELEVANT AND SHOULD NOT BE OFFERED TO THE
6 JURY.

7 NOW, WE DON'T KNOW, AND THERE IS NO WAY WE
8 CAN KNOW WHAT THIS WITNESS RECALLS SPECIFICALLY ERIK
9 MENENDEZ SAID, EXCEPT FOR THE PRESENCE OF SOME WORDS ON
10 A PIECE OF PAGE, AND THE WITNESS NOW COMING TO COURT AND
11 PUTTING HIS OWN SPIN ON IT.

12 SO TO THAT EXTENT ANY EVIDENCE THAT THIS
13 WITNESS MIGHT CALL OR CLASSIFY AS PREMEDITATION I THINK
14 IS IRRELEVANT, AND CERTAINLY ANY EVIDENCE THAT THIS
15 WITNESS DOESN'T HAVE A RECALL OF WHAT ERIK MENENDEZ
16 ACTUALLY SAID BACK IN 1990, 1991, 1992 AND SO FORTH
17 SHOULD BE ADMISSIBLE.

18 WITH RESPECT TO THE MATTERS ON PAGE 7 -- AT
19 THE TOP OF PAGE 7 THAT WERE REMOVED, THESE MATTERS WERE
20 PRIVILEGED. THEY STILL ARE PRIVILEGED, AND IT WOULD BE
21 IMPROPER FOR THIS JURY TO HEAR ANY TESTIMONY WITH
22 RESPECT TO THAT PARTICULAR EVIDENCE.

23 ALSO, DR. VICARY TESTIFIED THAT SOME OF THE
24 INFORMATION THAT HE OBTAINED FROM ERIK MENENDEZ WERE THE
25 SUBJECT OF DREAMS THAT ERIK MENENDEZ HAD, AND I DON'T
26 BELIEVE THAT SUCH EVIDENCE IS SUFFICIENTLY RELIABLE OR
27 MEETS THE TEST OF IMPEACHMENT. IF DR. VICARY OBTAINED
28 INFORMATION FROM ERIK MENENDEZ THAT HE RECALLS CAME TO

-11166

1 HIM BY WAY OF A DREAM, THAT TYPE OF EVIDENCE IS TOO
2 UNRELIABLE AND TOO SKEPTICAL TO EVER BE USED AS A BASIS
3 OF IMPEACHMENT IF IT CAME TO THIS WITNESS PURSUANT TO A
4 DREAM THAT ERIK MENENDEZ SAID HE HAD.

5 AND I AM -- YOUR HONOR, IS THERE ANY --
6 PERHAPS I SHOULD HEAR FROM THE PROSECUTION WITH RESPECT
7 TO WHAT PASSAGE THEY'RE INTENDING ON OFFERING
8 SPECIFICALLY, SO I WILL BE ABLE TO DIRECT MY ARGUMENT.

9 THE COURT: ALL RIGHT. OKAY.

10 MR. GESSLER, DID YOU WANT TO BE HEARD, OR
11 DO YOU WANT TO WAIT FOR THE PROSECUTION'S PRESENTATION?

12 MR. GESSLER: WELL, IF THE PROSECUTION HAS
13 OFFERED EVERYTHING THAT THEY'VE TALKED ABOUT THIS
14 MORNING, THEN I AM READY TO BE HEARD. IF THEY ARE
15 OFFERING ONLY PARTS OF IT, THEN IT WOULD BE EASIER TO
16 WAIT FOR THEM, AND THEN I CAN RESPOND.

17 MR. CONN: I THINK THAT IT IS OUR POSITION THAT
18 WE NEED TO ELICIT FROM THE WITNESS THE SCOPE OF THE

19 DELETIONS FROM HIS REVISED NOTES SO THAT THE JURY CAN
20 ASSESS HIS CREDIBILITY AS TO THE STATED REASONS FOR THE
21 DELETIONS. SO I THINK IT IS NECESSARY FOR US TO MAKE
22 SOME PASSING REFERENCE TO ALL OF THE MATERIAL THAT HE
23 DELETED.

24 HOWEVER, THAT'S NOT TO SAY THAT WE NEED TO
25 GET INTO THE DETAILS OF EACH AND EVERY STATEMENT OR AREA
26 THAT HE DELETED.

27 MY FEELING IS THAT THE -- AS TO PAGE 7, THE
28 MATTER AT THE TOP OF THE PAGE WHICH COUNSEL HAS ALLEGED

-11165

1 TO BE A PRIVILEGED MATERIAL IS NOT, IN FACT, PRIVILEGED
2 MATERIAL AT ALL. THE WITNESS TESTIFIED THAT THIS WAS
3 SOMETHING THAT ERIK MENENDEZ ASSERTED TO HIM AS A TRUE
4 FACT, NOT INDICATING WHAT HIS SOURCE OF INFORMATION WAS
5 CONCERNING THAT MATERIAL. THIS COULD BE SOMETHING THAT
6 JOSE MENENDEZ TOLD TO ERIK MENENDEZ. IT COULD BE
7 SOMETHING THAT -- THERE COULD BE A NUMBER OF
8 EXPLANATIONS FOR IT.

9 SO I WOULD SUBMIT THAT THERE IS NO BASIS
10 FOR THIS COURT TO CONCLUDE THAT THAT IS PRIVILEGED
11 MATERIAL IN THE ABSENCE OF THE TESTIMONY FROM THE
12 DEFENDANT THAT HE THINKS RELATES TO PRIVILEGE.

13 MS. ABRAMSON: EXCUSE ME, YOUR HONOR. WE HAD
14 ASKED TO APPROACH TO GIVE THE COURT INFORMATION ABOUT

15 THAT, AND THAT WAS HELD IN ABEYANCE, AND IT'S STILL IN
16 ABEYANCE.

17 THE COURT: OKAY. WE WILL GO ON TO OTHER
18 MATTERS.

19 MR. CONN: SO I WOULD ASK THAT THAT BE ADMITTED.

20 GOING DOWN THE PAGE, THE WITNESS SAID HE
21 DELETED A REFERENCE TO MID AUGUST. I DON'T THINK IT'S
22 NECESSARY FOR US TO GO OVER THAT.

23 FURTHER DOWN THE PAGE HE EXPLAINED THAT THE
24 REFERENCE TO HIS FATHER SAYING THAT HE PLAYED LIKE AN
25 ASS IS DUPLICATIVE OF SOMETHING ELSE ON THE PAGE.
26 THERE'S NO NEED TO MAKE REFERENCE TO THAT.

27 BUT THEN AT THE BOTTOM OF THE PAGE WHERE HE
28 SAID THAT THE DEFENDANT INDICATED THAT HE WANTS TO GO ON

-11164

1 TOUR, I THINK THAT THAT IS NECESSARY TO ELICIT FROM THE
2 WITNESS, BECAUSE ESSENTIALLY THE WITNESS INDICATED THAT
3 HE HAD NO GOOD REASON FOR DELETING THAT.

4 ON PAGE 18, THE SECOND PAGE THAT WE ARE
5 LOOKING AT HERE, WE WOULD ASK THAT THE COURT ALLOW US TO
6 GO INTO EACH OF THE FOUR PARAGRAPHS THERE, BECAUSE IT
7 RELATES TO SIGNIFICANT CONCESSIONS FROM THE DEFENDANT.

8 THE FIRST PARAGRAPH BEARING UPON TALKING TO
9 HIS BROTHER ABOUT LIFE WITHOUT THE PARENTS, THE COURT
10 HAS YET TO RULE ON WHETHER OR NOT WE CAN MAKE REFERENCE

11 TO THE FACT THAT HE HAD THOSE CONVERSATIONS WITH HIS
12 BROTHER LYLE.

13 IF THE COURT RULES THAT THAT IS INDEED
14 ADMISSIBLE, WE ASK THAT THE REFERENCE TO HIS FATHER
15 BEING UNWILLING TO PAY FOR THE HAIR ALSO BE ADMITTED
16 BASED UPON THE SAME THEORY THAT HE COULD BE
17 CROSS-EXAMINED, IF NECESSARY, BY BEING RECALLED TO THE
18 WITNESS STAND.

19 WE ALSO ASK THAT ALL REFERENCES TO THE
20 MAFIA BE ALLOWED, TO HIGHLIGHT FOR THE JURY EXACTLY HOW
21 THE DEFENDANT WAS SEEKING TO PLACE THE BLAME ELSEWHERE.
22 APPARENTLY THIS OCCURRED AT A POINT IN TIME PRIOR TO THE
23 DEFENDANT'S ADMISSION OF ANY RESPONSIBILITY FOR THE
24 KILLINGS IN THIS CASE.

25 ON PAGE 20, THERE IS A REFERENCE TO THE
26 FATHER CUTTING OFF LYLE MENENDEZ' HAIR PRESCRIPTION. I
27 THINK THAT THAT IS ALSO SUBJECT TO THE SAME RULING THAT
28 THE COURT WILL MAKE CONCERNING HIS FATHER BEING WILLING

-11163

1 OR UNWILLING TO PAY THE 1000 OR \$2000 A YEAR FOR THE
2 UPKEEP ON THE HAIRPIECE. WE WOULD LIKE TO GET INTO
3 THAT.

4 WE WOULD ALSO LIKE TO GET INTO THE
5 STATEMENT THAT HIS BROTHER SAID TO WAIT A WEEK. I THINK
6 THAT IS ALREADY BEFORE THE JURY. WE WANT TO ESTABLISH

7 THAT THAT IS A REDACTED MATTER.

8 IT'S NOT NECESSARY TO ELICIT TESTIMONY

9 CONCERNING THE THREE TIMES THAT HE HEARD HE WAS

10 DISOWNED, BUT WE WOULD LIKE TO GET INTO THE REFERENCE AT

11 THE BOTTOM OF THE PAGE THAT HE KNEW, OR SOMEONE KNEW,

12 THAT ERIK MENENDEZ HATED HIS MOTHER. THE SIGNIFICANT

13 THING THERE IS THAT THE DEFENDANT HATED HIS MOTHER. NOT

14 SO MUCH WHETHER HE KNEW IT OR HIS FATHER KNEW THAT HE

15 HATED HIS MOTHER.

16 TURNING TO PAGE 22, I THINK A CRITICAL AREA

17 OF EXAMINATION IS GOING TO BE THE REFERENCE AT THE TOP

18 OF THE PAGE WHERE THE DEFENDANT SAID THAT HE HATED HIS

19 MOTHER AND THE FATHER, AND THAT HE WANTED THEM OUT OF

20 HIS LIFE, AND HE WAS REFERRING TO A TIME PERIOD JUST ONE

21 WEEK PRIOR TO THE KILLINGS.

22 I THINK THIS IS A CRITICAL CONCESSION OF

23 THE DEFENDANT CONCERNING HIS MOTIVATION IN THIS CASE FOR

24 KILLING HIS PARENTS. I THINK THAT WE CAN SKIP OVER MOST

25 OF THE THINGS ON THAT PAGE, BUT I WOULD LIKE TO ELICIT

26 TESTIMONY -- WE WILL ALSO LEAVE OUT THE DREAM -- THE

27 ALLEGED DREAM MATERIAL. IN FACT, WE WILL LEAVE OUT

28 EVERYTHING ELSE ON THAT PAGE.

-11162

1 ON PAGE 28, THERE IS THE FIRST REFERENCE TO

2 THE HOMOSEXUALITY, AND I THINK THAT THIS IS CRITICAL TO

3 TAKE TESTIMONY CONCERNING THIS. PRIOR TO THIS TIME, WE
4 HAD NO EVIDENCE OF THIS TYPE OF ACTIVITY, AND I THINK
5 THAT IS THE REASON WHY THE COURT RULED THAT REFERENCES
6 TO THIS IN THE PAST MIGHT HAVE BEEN IMPROPER BY THE
7 PROSECUTION.

8 HOWEVER, NOW WE HAVE AN ADMISSION BY THE
9 DEFENDANT OF NUMEROUS HOMOSEXUAL ACTIVITY BEGINNING AT
10 THE AGE OF FIVE, AND ENDING UP UNTIL THE TIME OF 16. I
11 THINK THAT THIS NOT ONLY IMPEACHES THE DEFENDANT
12 CONCERNING HIS ALLEGATIONS OF BEING SO TRAUMATIZED BY
13 SEXUAL ASSAULT, BUT IT ALSO IMPEACHES THE TESTIMONY OF
14 HIS EXPERTS, BECAUSE THERE WAS AN EXPERT THAT SAID THAT
15 THE DEFENDANT WENT THROUGH A PERSONALITY CHANGE AT ABOUT
16 THE AGE OF FIVE OR SIX. I THINK YOU HAD ALAN ANDERSEN,
17 WHO ALSO SPOKE ABOUT THE PERSONALITY CHANGE AT FIVE OR
18 SIX, WHICH DR. WILSON SUGGESTED WAS AS A RESULT OF HIS
19 FATHER'S HOMOSEXUAL ASSAULT UPON HIM. NOW WE FIND OUT
20 THAT IT WAS A BABYSITTER WHO SEXUALLY ASSAULTED HIM.

21 SO I THINK THIS GOES RIGHT TO THE HEART OF
22 HIS ALLEGATIONS OF IMPROPER HOMOSEXUAL ADVANCES UPON HIM
23 BY HIS FATHER AND IMPEACHES HIS EXPERTS AS WELL.

24 SO WE WOULD ASK THAT ALL OF THE REFERENCES
25 TO HOMOSEXUALITY BE ADMITTED; ONCE AGAIN, PRESERVING THE
26 IDENTITY OF THE PERSONS INVOLVED. I DON'T THINK IT'S
27 NECESSARY TO GET INTO THAT, BUT THAT WOULD INCLUDE
28 REFERENCES THAT APPEAR ON PAGES 96 AND PAGE 62, AS WELL

1 AS THE FOLLOWING PAGES:

2 PAGE 29, WHERE THE DEFENDANT CONCEDED THAT
3 HIS FATHER FOUND OUT ABOUT A -- ONE OF THE INCIDENTS OR
4 ONE OF THE PERSONS, AND THAT HE WAS FURIOUS ABOUT THIS.

5 THE REFERENCE TO "HE LOVED MY BODY" ON PAGE
6 29 IS NOT SOMETHING THAT WE WILL NEED TO GO INTO.

7 WE WOULD LIKE TO GO INTO ALL OF THE
8 ALLEGATIONS ON PAGE 62 CONCERNING THE HOMOSEXUALITY.

9 ON PAGE 74, THE REFERENCE TO THE HOMOSEXUAL
10 LOVER IS SOMETHING THAT HAS ALREADY BEEN PRESENTED TO
11 THE JURY, SO THE ONLY ADDITIONAL FACT THAT WE WOULD WANT
12 TO ELICIT CONCERNING THIS IS THAT THIS WAS INDEED ONE OF
13 THE THINGS THAT WAS ELIMINATED FROM HIS NOTES AS
14 REQUESTED BY MS. ABRAMSON.

15 ON PAGE 95 WE WOULD LIKE TO GET INTO THE
16 DELETION OF THE REFERENCE TO TONY LEAVING IN DECEMBER OR
17 JANUARY, BECAUSE JUST AS WITH THE REST OF THE
18 ALLEGATIONS, THE REST OF THE INFORMATION CONCERNING
19 HOMOSEXUALITY, MS. ABRAMSON INSTRUCTED THE WITNESS THAT
20 SHE DID NOT WANT ANYTHING IN THE NOTES CONCERNING
21 HOMOSEXUALITY, AND THIS FITS INTO THE SAME CATEGORY.

22 AND THEN I THINK IT IS IMPORTANT TO
23 INTRODUCE TESTIMONY CONCERNING THE INCESTUOUS
24 RELATIONSHIP THAT IS ALLEGED AT THE TOP OF PAGE 95 BY
25 HIS -- OF HIS BROTHER WITH HIS MOTHER, AND THAT IT WAS
26 "IN HIS HEAD."

27 NOTHING WAS REVEALED DURING THE CLOSED

-11160

1 FROM THE JURY, REGARDLESS OF THE REASON WHY ERIK
2 MENENDEZ MADE THAT STATEMENT TO DR. VICARY. AND
3 WHATEVER MOTIVATION DR. VICARY HAS TO SEVER THAT
4 SENTENCE IN HALF, AND RETAIN HALF OF IT AND BURY THE
5 REST OF IT IS SOMETHING THAT IS IRRELEVANT.

6 AND THE JURY SHOULD BE MADE AWARE OF THE
7 FACT THAT DR. VICARY DID NOT HAVE ANY PERSONAL
8 KNOWLEDGE, AND YET HE REACHED A CONCLUSION. REGARDLESS
9 OF THE PURPOSE OR THE SOURCE OF THAT INFORMATION, HE
10 REACHED A CONCLUSION REGARDING THE TRUTHFULNESS OF THIS,
11 AND DECIDED TO BURY THE HALF OF THE NOTATION WHICH WAS
12 INCONSISTENT WITH THE CONCLUSION THAT HE REACHED.

13 SO I THINK THAT THAT IS RELEVANT.

14 AND THEN IN REGARD TO PAGE 96, THERE IS A
15 REFERENCE AT THE TOP OF THE PAGE TO A MR. SMITH. I
16 DON'T THINK IT'S NECESSARY TO GET INTO THAT.

17 THE COURT: OKAY.

18 LET'S HEAR FURTHER FROM COUNSEL FOR ERIK
19 MENENDEZ.

20 SINCE IT'S MORE ISOLATED, WE WILL HAVE --
21 AND MORE LIMITED -- WE WILL HAVE MR. GESSLER.

22 MR. GESSLER: YES, YOUR HONOR.

23 I WOULD LIKE TO GO THROUGH THE ONES WITH

24 LYLE MENENDEZ STARTING AGAIN AT PAGE 7.

25 THE FIRST SENTENCE AT THE TOP I BELIEVE IS

26 PRIVILEGED IN AND OF ITSELF, EVEN IF ERIK DID TELL HIM

27 THAT. IT'S ALSO DOUBLE HEARSAY, AND IT'S ALSO UNDER 352

28 TOTALLY IRRELEVANT, AND IT IS NOT IMPEACHING OF ERIK

-11159

1 MENENDEZ WHEN HE WAS ON THE STAND. I DON'T SEE ANY

2 REASON TO ADMIT THE FIRST LINE.

3 THE COURT: DID YOU INTEND TO GO INTO THAT,

4 MR. CONN?

5 MR. CONN: NO, YOUR HONOR. I AM ONLY

6 CONCERNED --

7 THE COURT: THEN PLEASE INTERRUPT AND TELL US IF

8 THESE ARE NOT AREAS YOU WANT TO GO INTO.

9 MR. CONN: YES. I AM JUST CONCERNED WITH THE

10 LAST FOUR LINES IN THAT SECTION.

11 MR. GESSLER: ALL RIGHT. AS TO THE -- THIS

12 IS PAGE 7.

13 YOUR HONOR, AS TO THE REST OF THE

14 INFORMATION, AND PARTICULARLY THAT WHICH IS SOUGHT TO BE

15 ELICITED BY MR. CONN AS TO LYLE MENENDEZ, IT IS SUBJECT

16 NOT ONLY TO THE PRIVILEGE OBJECTIONS PREVIOUSLY RAISED,

17 BUT IT IS EITHER DOUBLE HEARSAY OR TRIPLE HEARSAY AS TO

18 HIM, DEPENDING ON THE SOURCE. ALL WE KNOW IS THAT ERIK

19 TOLD THIS, ACCORDING TO DR. VICARY, TO DR. VICARY. BUT

20 HIS SOURCE OF IT, WHETHER IT CAME FROM THE DOCTOR OR
21 FROM LYLE MENENDEZ OR FROM JOSE MENENDEZ OR THE
22 MOTHER --

23 THE COURT: WHICH ARE YOU REFERRING TO?

24 MR. GESSLER: THE FACT HE ALSO SAW THE PARENTS,
25 THAT LAST FOUR LINES THERE, TOLD THEM --

26 THE COURT: RIGHT.

27 MR. GESSLER: I DON'T THINK THAT HAS BEEN MADE
28 PUBLIC RECORD YET.

-11158

1 THE COURT: AND YOU'RE SAYING THAT IT'S UNCLEAR
2 WHETHER THIS WAS SOMETHING ERIK MENENDEZ LEARNED FROM
3 OZIEL, HIS BROTHER, HIS MOTHER, HIS FATHER OR SOMEBODY
4 ELSE?

5 MR. GESSLER: OR IT MIGHT BE WORSE. IT MIGHT BE
6 THAT ERIK LEARNED IT FROM A PARENT WHO SAID: "I HEARD
7 IT FROM OZIEL," WHICH WOULD MAKE IT TRIPLE HEARSAY AS TO
8 LYLE MENENDEZ. AND THERE IS NO EXCEPTION FOR THE FIRST
9 TWO SOURCES THERE. DR. VICARY HAS NO MORE KNOWLEDGE AS
10 TO THE SOURCE OF THAT AND WHERE IT CAME FROM.

11 SO AS TO LYLE MENENDEZ, IT HAS MULTIPLE
12 HEARSAY OBJECTIONS. I THINK THERE HAS TO BE AN
13 EXCEPTION FOR EACH LAYER OF HEARSAY IN ORDER TO HAVE IT
14 ADMISSIBLE.

15 HERE WE DO NOT KNOW THE SOURCE, THE

16 RELIABILITY OF THE SOURCE, HOW MANY IT'S GONE THROUGH.
17 IT'S LIKE THE GAME OF GOSSIP, AS FAR AS WE KNOW, AS TO
18 WHERE IT EMANATED FROM AND IN WHAT FORM IT ENDED UP.

19 THE COURT: OKAY.

20 MR. GESSLER: AND I WOULD ALSO ASK, ALONG WITH
21 THAT, OF COURSE, FOR THE COURT TO APPLY 352 TO LYLE
22 MENENDEZ BASED ON THOSE PARTICULAR STATEMENTS, AS WELL
23 AS THE HEARSAY OBJECTIONS AND PRIVILEGE OBJECTIONS THAT
24 WE HAVE ALREADY RAISED.

25 AS TO -- I THINK PAGE 18 IS THE NEXT IN
26 ORDER, STARTING WITH THE ONE WEEK PRIOR, WHAT IT WOULD
27 BE TO BE WITHOUT THE PARENTS AND TALKING WITH LYLE.

28 I THINK AGAIN THAT'S SUBJECT TO ANDERSON

-11157

1 AND BRUTON OBJECTIONS. THIS DID NOT COME UP IN ERIK
2 MENENDEZ' DIRECT TESTIMONY TO THE JURY, AND IT SHOULD
3 NOT NOW BE ADMITTED AS IMPEACHING OF HIM, AND
4 PARTICULARLY NOT INsofar AS IT REGARDS LYLE MENENDEZ,
5 WHO IS DENIED CONFRONTATION UNDER BRUTON.

6 NOW, I HAVE LOOKED AT THESE CASES CITED BY
7 THE PROSECUTION FOR THE PROPOSITION THAT WE COULD -- OR
8 SOMEBODY, THE DISTRICT ATTORNEY IN THAT CASE OR US, I
9 GUESS, COULD RECALL ERIK MENENDEZ FOR FURTHER
10 CROSS-EXAMINATION.

11 THE CASE OF PEOPLE VERSUS BARBOSA I THINK

12 IS 30 YEARS OLD, AND IS THE ONLY CASE I HAVE EVER SEEN
13 IN ALL THE YEARS I'VE DONE SHEPPARD'S, IT'S NEVER BEEN
14 CITED ANYPLACE IN THE WORLD FOR ANY PROPOSITION, MUCH
15 LESS THAT PROPOSITION. IT RELIES UPON A CASE CALLED
16 PEOPLE VERSUS ROSOTO, A STATE SUPREME COURT CASE.
17 HOWEVER, IT IS DICTA IN ROSOTO, IN WHICH IT
18 WAS STATED, AND IN FACT THEY DID RECALL ONE OF THE
19 DEFENDANTS FOR FURTHER CROSS-EXAMINATION, WHO DENIED A
20 STATEMENT. THEY THEN PUT A POLICE OFFICER ON TO SAY
21 "YES, YOU DID TOO SAY THAT."
22 THE COURT STRUCK FIRST THE POLICE
23 OFFICER'S, WHAT WOULD NOW BE GREEN, BUT WAS NOT THEN A
24 STATEMENT, AND THEN STRUCK THE STATEMENT MADE BY THE
25 DEFENDANT RECALLED TO THE STAND AND TOLD THE JURY TO
26 IGNORE THEM.
27 ALL THE SUPREME COURT SAID WAS WELL, GEE,
28 MAYBE THE COURT DIDN'T HAVE TO DO THAT. BUT IT WAS AN

-11156

1 ISSUE NOT BRIEFED BEFORE THE SUPREME COURT. IT DOES NOT
2 STATE THE PROPOSITION THAT THE LATER CASE, BARBOSA,
3 PURPORTS TO STATE.
4 FURTHERMORE, I THINK IT WOULD BE A GROSS
5 VIOLATION OF THE UNITED STATES CONSTITUTION. I KNOW OF
6 NO CASES THAT HAVE GONE TO THE CIRCUIT COURTS OF APPEAL,
7 OR THE UNITED STATES SUPREME COURT, STANDING FOR THE

8 PROPOSITION THAT ONCE A DEFENDANT HAS FINISHED

9 TESTIFYING HE CAN BE RECALLED FOR FURTHER

10 CROSS-EXAMINATION BY ANY PARTY.

11 THERE IS ALSO THE ADDED PROBLEM IN THIS

12 CASE THAT WE'RE NOT EVEN IN THE PHASE OF THE CASE IN

13 WHICH ERIK MENENDEZ TESTIFIED. WE'RE IN A TOTALLY NEW

14 AND DIFFERENT PHASE, AND THAT IS PENALTY, IN WHICH HE

15 HAS NOT TESTIFIED.

16 SO ON ALL THOSE GROUNDS I WOULD OBJECT TO

17 THAT STATEMENT COMING IN, PARTICULARLY INSOFAR AS IT

18 PERTAINS TO TALKING WITH LYLE MENENDEZ.

19 I RAISE THE SAME OBJECTIONS AS TO HIS

20 FATHER WOULDN'T PAY ONE OR TWO THOUSAND A YEAR FOR THE

21 TOUPEE, AND THE STATEMENTS ABOUT GOING BACK TO PRINCETON

22 AND DISOWNED THAT ARE CONTAINED THERE.

23 AGAIN, THEY ARE HEARSAY AS TO LYLE

24 MENENDEZ. WE CANNOT CONFRONT ERIK MENENDEZ AS TO THOSE

25 STATEMENTS, OR WHETHER THAT IS WHAT HE SAID, OR IT WAS

26 ACCURATELY TAKEN DOWN.

27 FOR THE SAME REASONS AS I HAVE MENTIONED, I

28 DON'T THINK BARBOSA IS ANY AUTHORITY FOR THE FACT THAT

-11155

1 WE COULD CALL A CODEFENDANT BACK TO THE STAND IN A CASE

2 WHERE HIS LIFE IS AT STAKE.

3 IT ALSO IS NOT IMPEACHING OF ANY STATEMENTS

4 THAT ERIK MENENDEZ MADE IN HIS TESTIMONY-IN-CHIEF IN
5 THIS PARTICULAR TRIAL.

6 AGAIN, ON PAGE 20, THE SIMILAR SUBJECT
7 COMES UP ABOUT UNWILLING. IT SAYS "HAD B'S HAIR CUT
8 OFF."

9 THE COURT: CUT?

10 MR. GESSLER: I GUESS THAT COULD BE CONSTRUED AS
11 CUT.

12 MS. ABRAMSON: NO. IT'S "RX OFF".

13 THE COURT: CUT BROTHER'S HAIR PRESCRIPTION OFF.

14 MR. GESSLER: THIS IS THE ONLY MAN I'VE SEEN WHO
15 WRITES WORSE THAN I DO.

16 BUT ASSUMING THAT'S WHAT'S SAID, YOUR
17 HONOR, MY OBJECTIONS ARE THE SAME AS BEFORE, THAT THIS
18 DOES NOT GO TO TESTIFY TO IMPEACH TESTIMONY ERIK
19 MENENDEZ GAVE IN THE CASE-IN-CHIEF, AND WE ARE DENIED
20 CONFRONTATION OF THAT PARTICULAR STATEMENT FOR THE
21 REASONS I HAVE PREVIOUSLY STATED IN OTHER STATEMENTS.

22 I WOULD ALSO FEEL THAT 352 SHOULD BE
23 APPLIED IF THE COURT FEELS THAT THE OTHER OBJECTIONS ARE
24 NOT IN AND OF THEMSELVES VALID.

25 AGAIN, WE HAVE ON THAT PAGE: "BROTHER SAID
26 WAIT A WEEK."

27 DEFENDANT SAID: "I CAN'T TAKE ANOTHER
28 WEEK."

1 WHEN DR. VICARY WAS ASKED ABOUT THAT, I
2 THINK IT WAS FRIDAY, HE BASICALLY SAID HE COULD NOT PUT
3 THAT INTO A CONTEXT AS TO WHAT WAIT A WEEK WAS, AND "I
4 CAN'T TAKE ANOTHER WEEK."

5 IT MIGHT HAVE MEANT DOING SOMETHING DRASTIC
6 TO THE PARENTS. IT MIGHT HAVE MEANT SOMETHING ELSE,
7 TALKING TO THE FATHER, OR AT THIS POINT HE SIMPLY DID
8 NOT KNOW WHAT THAT MIGHT BE PERTAINING TO.

9 AND I THINK WITH THAT, THAT IT SHOULD NOT
10 BE ALLOWED TO COME IN, BECAUSE THERE'S NO ONE WHO CAN
11 NOW GIVE CONTEXT, EVEN AS TO ERIK MENENDEZ, AND MOST
12 PARTICULARLY AS TO LYLE MENENDEZ, WHO IS AGAIN ONE
13 PERSON FARTHER REMOVED, AND NEVER MADE THIS STATEMENT TO
14 DR. VICARY.

15 I THINK THE NEXT ASPECT THAT SEEMS TO BE
16 AFFECTING LYLE MENENDEZ IS PAGE 74, WHICH WE HAVE TALKED
17 ABOUT AS TO PRIVILEGE.

18 AND EVEN THOUGH THE STATEMENT OF ERIK
19 MENENDEZ TO DR. VICARY HAS COME OUT, THERE IS PRIVILEGE
20 THAT ATTACHES TO ANY FURTHER EXPLANATIONS. THERE IS
21 BOTH PRIVILEGES THAT WE HAVE DISCUSSED CONCERNING
22 DR. VICARY BASED ON DR. VICARY'S LATER STATEMENTS ABOUT
23 IT, ATTORNEY-CLIENT PRIVILEGES HERE THAT ARE INVOLVED IN
24 ANY EXPLANATION.

25 AND I WOULD ASK THAT NOT ONLY SHOULD THE
26 DISTRICT ATTORNEY BE PRECLUDED FROM GOING INTO
27 EXPLANATIONS FOR THAT, BUT SO SHOULD CO-COUNSEL FOR ERIK
28 MENENDEZ, BECAUSE AGAIN, IT WOULD BE A VIOLATION OF

1 PRIVILEGE AS IT PERTAINS TO LYLE MENENDEZ.

2 IF THAT CANNOT BE ACCOMPLISHED, IN FAIRNESS
3 TO ERIK MENENDEZ, THEN I WOULD ASK THE COURT TO EXERCISE
4 352, PARTICULARLY AS IT APPLIES TO LYLE MENENDEZ, WHO
5 WOULD BE IRREVOCABLY HARMED BY GOING INTO THAT, OR
6 HAVING THAT COME OUT TO THE JURY IN ORDER TO PROTECT
7 ERIK MENENDEZ' RIGHTS.

8 AND AS TO PAGE 95, THIS PART AT THE BOTTOM
9 OF THE PAGE ABOUT INCESTUOUS RELATIONSHIP, TAKING OUT
10 "IN HIS HEAD," I THINK THIS IS AGAIN IRRELEVANT TO LYLE
11 MENENDEZ. IT DOES NOT IMPEACH ERIK MENENDEZ IN ANY WAY
12 FROM WHAT HE SAID AT THE TRIAL.

13 THE ONLY PLACE THAT THIS CAME OUT AT ALL
14 WAS THROUGH JAMIE PISARCIK, A PEOPLE'S WITNESS, WHO
15 MENTIONED THAT IN GIVING PART OF HER TESTIMONY
16 CONCERNING HER STATEMENT WITH LYLE MENENDEZ, TALKING
17 ABOUT THE CRIMES THEMSELVES. ANY TIME WE TRIED TO GO
18 INTO IT, WE WERE PRECLUDED BY THE COURT AS TO ANY
19 FURTHER EVIDENCE ON THE INCESTUOUS RELATIONSHIP OF LYLE
20 AS BEING IRRELEVANT AND IMMATERIAL.

21 IT WOULD SEEM NOW NOT TO BE PROPER REBUTTAL
22 AGAINST LYLE, CERTAINLY FOR SOMETHING THAT WAS RULED
23 IRRELEVANT TO HIM IN THE CASE-IN-CHIEF. IT IS
24 IRRELEVANT AS TO ERIK MENENDEZ, BECAUSE IT DID NOT
25 IMPEACH ANYTHING THAT HE SAID. IT IS IRRELEVANT TO THE

26 ENTIRE PURPOSE OF A PENALTY HEARING, BECAUSE IT DOES NOT
27 GO TO ANY AGGRAVATING OR MITIGATING CIRCUMSTANCES.
28 I THINK I'VE COVERED THE ONES THAT THE

-11152

1 PROSECUTOR HAS MENTIONED CONCERNING LYLE MENENDEZ.

2 THE COURT: OKAY.

3 MR. LEVIN?

4 MR. LEVIN: YES, YOUR HONOR.

5 I WOULD BEGIN BY STATING THAT AGAIN, THAT
6 ALL THIS PROPOSED IMPEACHMENT IS OUTSIDE THE SCOPE,
7 BEYOND THE PURPOSE FOR WHICH THIS WITNESS WAS CALLED.

8 DR. DIETZ WAS A PROSECUTION WITNESS. HE
9 WAS IN POSSESSION OF THESE UNREDACTED NOTES. HE HAD A
10 COPY OF THEM, AND HE WAS CALLED AND INDEED DID TESTIFY
11 IN THIS TRIAL SPECIFICALLY TO IMPEACH ERIK MENENDEZ.
12 AND HE WAS NEVER ASKED ANY OF THESE QUESTIONS ON ANY OF
13 THESE MATTERS, AND HE COULD HAVE BEEN.

14 AND NOW WE ARE IN THE PENALTY PHASE, AND
15 DR. VICARY WAS CALLED BY MS. ABRAMSON ON VERY LIMITED
16 ISSUES, NONE OF WHICH GO TO THE MATTERS UPON WHICH ARE
17 THE BASIS OF THE PROSECUTION'S PROFFER.

18 SO ON THAT GROUND ALONE, I WOULD ASK THAT
19 THE COURT CONSIDER ONCE AGAIN NOT ALLOWING DR. VICARY TO
20 TESTIFY TO ANY OF THESE MATTERS, SINCE THE PROSECUTION
21 STIPULATES THAT IT HAD AN ORIGINAL COPY, OR A COPY OF

22 THE UNREDACTED NOTES, AND GOT THEM FROM DR. DIETZ.
23 ADDRESSING THE POINTS INDIVIDUALLY THAT
24 MR. CONN REFERS TO, ON PAGE 7 THERE IS A NOTATION THAT
25 SAYS "DEFENDANT WANTED TO GO ON TOUR. FATHER SAID NO."
26 THERE HAS BEEN NO EVIDENCE BROUGHT FORTH AS
27 TO WHAT TOUR HE'S REFERRING TO. IT'S VAGUE. IT STANDS
28 BY ITSELF. THERE IS NO INDICATION THAT IT IS

-11151

1 IMPEACHMENT TO ANYTHING THAT ERIK MENENDEZ TESTIFIED TO
2 THAT I RECALL.
3 WITH RESPECT TO THE REFERENCE ON PAGE 18
4 WITH REGARD TO THE TOUPEE, THE WITNESS TESTIFIED THAT
5 THAT ENTRY WAS IN REFERENCE TO ERIK MENENDEZ TELLING
6 HIM -- TELLING DR. VICARY THAT HE, LYLE MENENDEZ, HAD A
7 TOUPEE FOR THINNING HAIR, AND ALL THE NOTATIONS THERE
8 WERE BASED ON WHAT LYLE MENENDEZ TOLD HIM. AND THE
9 CONTEXT IN WHICH ERIK MENENDEZ RELATED IT INDICATED
10 NOTHING WAS INCONSISTENT OR SINISTER OR IMPEACHING TO
11 ANYTHING HE SAID. AS A MATTER OF FACT, ERIK MENENDEZ
12 DID TESTIFY THAT IN FACT IN THIS TRIAL THAT HE HAD HEARD
13 THESE MATTERS, OR MANY OF THEM, FROM LYLE MENENDEZ. BUT
14 ERIK MENENDEZ CERTAINLY WOULD WANT TO POINT OUT THAT
15 THESE WERE MATTERS UPON WHICH HE HAD HEARD FROM LYLE
16 MENENDEZ.
17 WITH RESPECT TO THE BOTTOM OF THE PAGE ON

18 PAGE 18, THE "STRAWBERRIES, THREW OUT MAFIA PEOPLE,"
19 THAT IS NOT IMPEACHING TO ANYTHING THAT ERIK MENENDEZ
20 TESTIFIED TO.

21 WE DON'T KNOW AT PAGE 18 ALSO WHAT DATE
22 WE'RE TALKING ABOUT, WHERE IN CONTEXT ERIK MENENDEZ --
23 OR AT LEAST WHERE IN CHRONOLOGY OF THE SIX YEARS THAT
24 DR. VICARY WAS WHEN HE WAS TALKING TO ERIK MENENDEZ.

25 SO THERE'S NO WAY TO TELL WHETHER OR NOT
26 THIS PARTICULAR ENTRY WAS, OR THIS PARTICULAR STATEMENT
27 BY ERIK MENENDEZ WAS IN 1990, 1991, WHAT MONTH. WE HAD
28 NUMEROUS NEWSPAPER ARTICLES. WE HAVE INTERVIEWS WITH

-11150

1 DETECTIVE ZOELLER. ERIK MENENDEZ HAD MADE COMMENTS VERY
2 SIMILAR TO THIS ALREADY -- OR HAD HEARD, OR IT WAS
3 PUBLIC KNOWLEDGE, CLEARLY, THAT JOSE MENENDEZ HAD
4 PROBLEMS WITH PEOPLE IN THE MAFIA, PERHAPS THEY WERE THE
5 ONES THAT HAD DONE IT.

6 BUT IN ANY EVENT, ERIK MENENDEZ ADMITS THAT
7 HE SHOT AND KILLED HIS PARENTS.

8 SO FOR THAT REASON IT OBVIOUSLY CAN'T COME
9 IN TO TRY TO SHOW THAT ERIK MENENDEZ IS TRYING TO POINT
10 THE FINGER AT THE MAFIA, WHEN HE'S ADMITTING ALL ALONG
11 THAT HE SHOT AND KILLED HIS PARENTS. SO I DON'T THINK
12 THAT THAT PARTICULAR REFERENCE HAS ANY RELEVANCE OR
13 ADMISSIBILITY IN THIS CASE.

14 THE REFERENCE ON PAGE 20: "WAIT A WEEK."

15 IT SAID "B SAID WAIT A WEEK," REFERRING TO LYLE
16 MENENDEZ.

17 AND THEN IT SAID: "DEFENDANT SAID I CAN'T
18 TAKE ANOTHER WEEK."

19 AGAIN, WE DON'T KNOW IN WHAT -- WHAT THE
20 REFERENCE IS. THIS IS APPARENTLY PRIOR TO ANY TIME THAT
21 ERIK MENENDEZ WAS SPEAKING TO DR. VICARY ABOUT
22 MOLESTATION, AND IT'S ONLY DR. VICARY'S SPECULATION AND
23 CONJECTURE AS TO WHAT ERIK MENENDEZ MIGHT HAVE BEEN
24 REFERRING TO.

25 AND I DON'T FIND THAT IT'S IMPEACHING. IF
26 IT'S IMPEACHING, WHAT IS IT IMPEACHING? WHAT DOES IT
27 REFUTE? WHERE DOES IT GO, TO WHAT SPECIFIC TESTIMONY
28 ERIK MENENDEZ GAVE AT THIS TRIAL THAT THE PROSECUTOR

-11149

1 COULD POINT TO WITH SPECIFICITY AND CLARITY TO SAY THAT
2 THIS IS AN IMPEACHING STATEMENT OF A PARTICULAR PIECE OF
3 TESTIMONY GIVEN BY ERIK MENENDEZ IN THIS TRIAL?

4 WITH RESPECT TO THE HOMOSEXUALITY
5 REFERENCES, I ADOPT MY PREVIOUS STATEMENTS UNDER 352.
6 THAT SHOULD NOT BE AN ISSUE BEFORE THIS JURY.

7 THERE IS A REFERENCE, HOWEVER, ON PAGE 62
8 CONTAINED IN THE NOTES WHERE ERIK MENENDEZ APPARENTLY
9 TOLD DR. VICARY THAT HE WAS EXPERIMENTING WITH

10 HOMOSEXUALITY, OR -- I'M SORRY, WITH RELATIONSHIPS WITH
11 MEN TO FIND OUT WHETHER OR NOT HE WAS HOMOSEXUAL
12 FOLLOWING THE MOLESTATION BY HIS FATHER; THAT HE DID NOT
13 KNOW, AND QUESTIONED HIS OWN SEXUALITY, AND WAS
14 EXPERIMENTING DURING CERTAIN TIMES OF HIS LIFE.

15 AND THAT'S -- THAT'S CERTAINLY NOT
16 INCONSISTENT WITH ANYTHING THAT ERIK MENENDEZ TESTIFIED
17 TO IN THIS TRIAL, AND IS NOT IMPEACHING OF ANYTHING.
18 AND IF THERE IS ANYTHING IT'S BEING OFFERED FOR, IT'S TO
19 TRY TO APPEAL TO HOMOPHOBIC JURORS ON THIS CASE WHO
20 MIGHT FEEL THAT "OH, ERIK MENENDEZ IS HOMOSEXUAL. HE
21 OBVIOUSLY MADE UP ALL THIS STUFF ABOUT MOLESTATION FROM
22 PERSONAL EXPERIENCES THAT HE HAD."

23 AND THAT WAS, I THINK -- AND I RECALL WHEN
24 I REVIEWED MOTIONS BROUGHT IN THE FIRST TRIAL, AND
25 ARGUMENTS AT THAT TIME, THAT THE COURT WAS CONCERNED
26 ABOUT THAT TYPE OF EVIDENCE COMING IN. I MAY BE
27 MISTAKEN, BUT I DO BELIEVE THAT THERE WAS SUBSTANTIAL
28 LITIGATION THAT OCCURRED IN THAT AREA.

-11148

1 THE COURT: WELL, THE CONCERN AROSE FROM
2 OBJECTIONS MADE BY COUNSEL FOR THE DEFENDANT, AND AT
3 THAT TIME THERE WAS NO NEXUS OR CONNECTION BETWEEN
4 WHATEVER THE PROSECUTION SOUGHT TO INTRODUCE AND ANY
5 RELEVANT ISSUE IN THE CASE.

6 SO WHEN FACED WITH THAT, AND WEIGHING ANY
7 POTENTIAL PREJUDICE VERSUS PROBATIVE VALUE, IF THERE IS
8 NO RELEVANCE AND IT DIDN'T PROVE ANYTHING, THEN THE
9 COURT WAS IN A POSITION OF HAVING TO EXCLUDE IT. THERE
10 WAS NO BASIS TO ADMIT IT.

11 MR. LEVIN: I ONLY POINT IT OUT BECAUSE I KNOW
12 THAT THE COURT HAD CONSIDERED THESE ISSUES BEFORE.

13 BUT I THINK AT THIS POINT IN TIME THERE IS
14 NOTHING THAT IS IMPEACHING WITH RESPECT TO WHAT ERIK
15 MENENDEZ HAS TESTIFIED TO IN THIS TRIAL. IT DOESN'T
16 IMPEACH OR REBUT OR REFUTE ANYTHING.

17 IT'S REALLY ONLY BEING OFFERED SO THAT ONE,
18 IT WILL BE USED IN A VERY PREJUDICIAL WAY AGAINST ERIK
19 MENENDEZ FOR PEOPLE WHO DO NOT LIKE HOMOSEXUALS AND FEEL
20 THAT THEY ARE NOT ENTITLED TO THE SAME DEGREE OF
21 SCRUTINY AND FAIRNESS AS PEOPLE WHO ARE NOT. AND THERE
22 IS THAT IN OUR SOCIETY, AND PERHAPS THERE ARE THOSE
23 MEMBERS ON OUR JURY. WE DIDN'T SCREEN THESE PEOPLE FOR
24 THEIR ATTITUDES AND FEELINGS TOWARDS HOMOSEXUALS, AND
25 THE REAL PURPOSE THAT MR. CONN WANTS TO BRING IT IN IS
26 FOR VERY PREJUDICIAL REASONS.

27 I THINK THE COURT SHOULD ENGAGE IN A VERY
28 STRICT BALANCING UNDER 352, AND SHOULD SCRUTINIZE THE

2 PROBATIVE VALUE, WHICH IS --

3 MS. ABRAMSON: EXCUSE ME, YOUR HONOR. I WOULD
4 LIKE TO INTERJECT BASED UPON THE PROSECUTION'S ARGUMENT
5 IN THIS AREA. MR. CONN APPARENTLY WANTS TO BE ABLE TO
6 ARGUE THAT THE OPINIONS OF DR. WILSON THEREFORE ARE
7 UNDERMINED SOMEHOW BECAUSE HE DIDN'T HAVE THIS
8 INFORMATION.

9 AND I WANT TO INDICATE ON THE RECORD THAT
10 DR. WILSON DID HAVE THE EXACT SAME SET OF NOTES THAT
11 DR. DIETZ HAD, AND DR. WILSON THEREFORE HAD THIS
12 INFORMATION AT THE TIME THAT HE WAS DOING HIS
13 EVALUATION. AND, IN FACT, I HAVE THE SET OF NOTES THAT
14 DR. WILSON HAD HERE WITH ME, WITH HIS NOTATIONS IN THE
15 MARGINS, IF THE COURT WANTS TO SEE THEM.

16 THE COURT: NO, I DON'T. BUT I DON'T THINK
17 MR. CONN ARGUED THAT.

18 MS. ABRAMSON: WELL, YES, HE DID. HE SAID IT
19 GOES TO THE OPINION OF DR. WILSON, THAT THIS MATERIAL IS
20 HERE, AND THE ASSUMPTION WAS THAT DR. WILSON DIDN'T HAVE
21 THIS MATERIAL.

22 THE COURT: WELL, I INFERRED FROM THE PEOPLE'S
23 ARGUMENT -- POSITION, THAT PERHAPS THEY WOULD HAVE BEEN
24 ABLE TO CROSS-EXAMINE DR. WILSON IN A DIFFERENT FASHION
25 IF THEY HAD HAD THIS INFORMATION AT THE TIME
26 DR. WILSON WAS ON THE WITNESS STAND, BUT THEY DIDN'T
27 HAVE THAT.

28 MS. ABRAMSON: WELL, MY UNDERSTANDING, YOUR

1 HONOR, WITHOUT BELABORING IT, BUT MY UNDERSTANDING IS
2 THAT WHAT MR. CONN HAS SAID ON THE RECORD BEFORE IS, AT
3 THE VERY BEGINNING OF THIS CASE, WHEN HE CAME ON IT, HE
4 TOOK A LOOK AT THE SET OF DR. VICARY'S NOTES AND THEN
5 NEVER LOOKED AT THEM AGAIN.

6 AND DR. WILSON TESTIFIED THAT HE RELIED ON
7 DR. VICARY'S NOTES, AND THOSE NOTES WERE AVAILABLE IF
8 THE PEOPLE WANTED THEM AT THAT POINT. MR. CONN SAYS
9 THEY LOST THEIRS OR MISPLACED THEIRS, OR NEVER SAW THEM
10 AGAIN, AND OBVIOUSLY HAD NO INTEREST IN THEM. AND I
11 CAN'T BELIEVE IT'S BECAUSE MR. CONN REMEMBERED EVERY
12 WORD, SINCE MOST OF THEM ARE TOTALLY UNINTELLIGIBLE IN
13 THESE NOTES.

14 SO THE PEOPLE NEVER ASKED DR. WILSON --
15 THEY NEVER ASKED TO SEE DR. VICARY'S NOTES. THEY NEVER
16 ASKED DR. WILSON ABOUT THE CONTENTS. IN FACT, THEY
17 SPECIFICALLY DIDN'T, IF I REMEMBER THE TACTIC NOW, ASK
18 DR. WILSON A SINGLE WORD ABOUT ANYTHING IN DR. VICARY'S
19 NOTES THAT HE MAY HAVE RELIED ON, OR NOT RELIED ON,
20 BECAUSE THEY WERE PREVENTING -- THEIR EFFORTS AT THAT
21 POINT WERE TO PREVENT DR. VICARY FROM BEING CALLED AS A
22 WITNESS IN THE GUILT PHASE.

23 MOREOVER, THEY NEVER MADE ANY INQUIRY
24 WHATSOEVER OF DR. WILSON CONCERNING THIS AREA, AND THERE
25 IS NO -- NOTHING ON THIS RECORD -- THERE IS NO EXPERT
26 OPINION, AND THERE IS NO, I WOULD SUBMIT, EXPERT THEORY

27 THAT THIS INFORMATION -- AND JUST TO PUT IT IN CLEARER
28 CONTEXT -- ABOUT A CHILD'S EXPERIMENTING WITH OTHER

-11145

1 CHILDREN, WHICH IS ALL THIS IS.

2 THE COURT: HE WAS A TEENAGER.

3 MS. ABRAMSON: WELL, 16 IS STILL A CHILD, AND

4 THAT'S WHEN ADOLESCENTS EXPERIMENT.

5 THE COURT: HE WAS A TEENAGER AT THAT TIME.

6 LET'S NOT GET OVERLY DRAMATIC ON THIS. CLEARLY YOU

7 CAN'T PUT THE GENIE BACK IN THE BOTTLE AND ASK WHAT THE

8 PROSECUTION WOULD OR WOULD NOT HAVE DONE HAD THEY HAD

9 THESE NOTES IN 1993, AND HAD THEY BEEN ABLE TO DIGEST

10 THEM PRIOR TO THE COMMENCEMENT OF THIS TRIAL.

11 AND TO ARGUE THAT THINGS WERE AS THEY WERE

12 BECAUSE THE PROSECUTION JUST WASN'T INTERESTED IN NOTES

13 BEGS THE ISSUE. THEY DIDN'T HAVE THE NOTES.

14 MS. ABRAMSON: BUT THE POINT IS, YOUR HONOR, ON A

15 RELEVANCY ASSESSMENT THERE IS NOTHING THE PROSECUTION

16 CAN POINT TO THAT INDICATES THAT THIS INFORMATION IS

17 INCONSISTENT IN ANY WAY WITH THE MOLESTATION HISTORY.

18 THE COURT: OKAY. THAT'S MR. LEVIN'S ARGUMENT AS

19 TO RELEVANCE.

20 WHY DON'T YOU CONTINUE, MR. LEVIN.

21 MR. LEVIN: I JUST HAVE TWO MORE POINTS.

22 I THINK THAT THERE WAS A REFERENCE BY

23 DR. VICARY OF ONE OF THE -- HE WAS LUMPING SOMETHING
24 INTO HOMOSEXUAL ACTIVITY AND TALKING ABOUT ERIK MENENDEZ
25 BEING RAPED. IF I HEARD HIM CORRECTLY, I THINK HE WAS
26 TALKING ABOUT HE DELETED SOME REFERENCE THAT ERIK
27 MENENDEZ MADE THAT HE WAS RAPED BY A BABYSITTER WHEN HE
28 WAS FIVE YEARS OLD, AND HE DELETED THAT BECAUSE HE WAS

-11144

1 TOLD TO DELETE ALL REFERENCES OF HOMOSEXUAL ACTIVITY.

2 WELL, I HARDLY FIND -- ALTHOUGH I DIDN'T
3 CROSS-EXAMINE HIM -- THAT THAT COULD BE DEEMED TO BE A
4 HOMOSEXUAL RELATIONSHIP IF YOU'RE FIVE YEARS OLD AND
5 YOU'RE RAPED BY A BABYSITTER.

6 BUT IF THAT'S -- IF THAT'S WHAT THE
7 PROSECUTOR IS SEEKING TO PRODUCE BY WAY OF TESTIMONY OF
8 THIS WITNESS, I THINK THAT SHOULD BE EXCLUDED.

9 THERE IS ALSO A REFERENCE ON PAGE -- I
10 BELIEVE IT WAS 95, THAT MR. CONN WANTS TO BRING IN A
11 REFERENCE TO A "TONY." AND ALL IT SAID WAS -- AT LEAST
12 ALL THE NOTES SAY: "DEPRESSED WHEN TONY LEFT IN
13 DECEMBER, JANUARY. NO TIME TO GET DEPRESSED WHEN HE'S
14 AROUND."

15 WHAT RELEVANCE THAT COMMENT HAS, I HAVE NO
16 IDEA. IT DOESN'T HAVE ANY RELEVANCE AT ALL TO THE
17 MATTERS BEFORE THE COURT. IT HAS NO IMPEACHMENT VALUE.
18 IT'S NOT REBUTTING OR REFUTING ANYTHING ERIK MENENDEZ

19 TESTIFIED TO. AND WHAT DR. VICARY TESTIFIED TO ABOUT
20 WHAT HIS RECALL WAS OF THIS PERSON, TONY, IT WAS
21 SOMEBODY IN JAIL WITH ERIK MENENDEZ.
22 SO UNLESS -- I DON'T KNOW WHAT MR. CONN IS
23 HOPING. I SUPPOSE HE HOPES THAT THE JURY WILL THINK
24 THAT ERIK MENENDEZ WAS HAVING SOME RELATIONSHIP WITH A
25 PERSON NAMED TONY IN JAIL. BUT THAT'S CERTAINLY
26 RIDICULOUS TO EVEN SUGGEST. AND SO I WOULD ASK THAT THE
27 COURT NOT PERMIT THAT PARTICULAR STATEMENT TO BE
28 TESTIFIED TO BY THIS WITNESS.

-11143

1 AND I THINK I COVERED ALL THE ONES DIRECTLY
2 THAT HE MR. CONN REFERRED TO. IF I DIDN'T, I OBJECT TO
3 THEM, TOO.

4 THE COURT: ALL RIGHT.

5 MR. CONN, WHAT IS THE RELEVANCE OR THE
6 OFFER AS TO THE REASONS FOR DELETIONS, AND THE ROLE,
7 WHATEVER ROLE IT IS, THAT MS. ABRAMSON PLAYED IN
8 DELETIONS, ACCORDING TO THE WITNESS?

9 WHY IS THAT RELEVANT IMPEACHMENT?

10 MR. CONN: I THINK THAT IN SIMPLY EXPLORING WITH
11 THE WITNESS THE REASON WHY HE DID TAKE ACTION WHICH HE
12 NOW CONCEDES TO BE WRONG, AND HE SAID IT'S WRONG, IT IS
13 NECESSARY TO EXPLORE HIS MOTIVATION. AND I THINK THAT
14 THERE IS NO WAY TO HAVE HIM STATE WHY HE DID SOMETHING,

15 WHICH HE ACKNOWLEDGES TO BE WRONG, WITHOUT SPECIFYING
16 THE PRECISE REASON FOR DOING IT. I JUST DON'T THINK IT
17 CAN BE SEVERED OFF FROM THAT.

18 IF WE CAN SHOW SIMPLY THAT THIS WAS A
19 BIASED WITNESS AND HE DID THIS ALL ON HIS OWN WITHOUT
20 THE INFLUENCE OF ANYONE, I WOULDN'T FIND ANYTHING WRONG
21 WITH GOING THAT FAR.

22 THE COURT: WHAT ABOUT THE IMPACT ON
23 REPRESENTATION FOR ERIK MENENDEZ, AND HOW HE MIGHT BE
24 AFFECTED BY THAT?

25 MR. CONN: MY ANALYSIS OF THAT IS THAT ERIK
26 MENENDEZ IS REPRESENTED BY CONFLICT-FREE COUNSEL WHO IS
27 PREPARED TO CONCLUDE THE REMAINDER OF THE CASE, AND TO
28 REPRESENT ERIK MENENDEZ BOTH IN CROSS-EXAMINATION OF

-11142

1 WITNESSES TO BE CALLED BY THE PROSECUTION, FOR THE
2 REMAINDER OF THE EXAMINATION OF THIS PARTICULAR WITNESS,
3 AS WELL AS IN ARGUMENT.

4 I BELIEVE THAT THE -- MR. LEVIN IS MORE
5 THAN QUALIFIED TO DO THAT. I THINK THAT MERELY BECAUSE
6 MS. ABRAMSON APPEARS TO HAVE PLAYED AN IMPROPER AND
7 UNETHICAL ROLE IN REGARD TO THESE NOTES, THAT IS
8 SOMETHING THAT CAN'T BE KEPT FROM THE JURY.

9 I JUST DON'T SEE HOW WE CAN KEEP IT FROM
10 THE JURY AT THIS POINT. THE EFFECT WOULD BE MUCH THE

11 SAME AS WHEN A WITNESS, OR ANY OTHER PERSON, ACTS ON
12 BEHALF OF THE DEFENDANT AND TRIES TO INTERFERE IN SOME
13 WAY WITH THE PRESENTATION OF EVIDENCE AGAINST THE
14 DEFENDANT. THE JURY IS INSTRUCTED NOT TO HOLD THAT
15 AGAINST THE DEFENDANT, UNLESS THERE IS EVIDENCE TYING
16 HIM INTO THE COMMISSION OF THAT WRONGFUL ACT.

17 HERE I THINK THAT THE JURY SHOULD BE
18 INSTRUCTED THAT THE ACTIONS OF MS. ABRAMSON SHOULD NOT
19 BE IN ANY WAY ATTRIBUTED TO ERIK MENENDEZ, BECAUSE THERE
20 IS NO EVIDENCE INDICATING THAT HE PLAYED ANY ROLE IN
21 THAT WHATSOEVER.

22 SO I THINK THAT FORTUNATELY WE DO HAVE
23 MR. LEVIN HERE TO CONCLUDE WITH THE REMAINDER OF THE
24 TRIAL, AND HE WILL -- ERIK MENENDEZ WILL BE REPRESENTED
25 BY EFFECTIVE COUNSEL THROUGHOUT THE REMAINDER OF THE
26 PROCEEDINGS.

27 THE COURT: ALL RIGHT.

28 DID YOU WISH TO BE HEARD ON THAT POINT,

-11141

1 MR. LEVIN?

2 MR. LEVIN: WELL, WHAT MR. CONN IS TRYING TO SAY
3 IS HE WANTS TO TURN THIS INTO A TRIAL -- HE DOESN'T WANT
4 THE VICTIMS MENTIONED. HE WAS ALWAYS QUICK TO POINT OUT
5 OF HOW THIS IS NOT A CASE ABOUT THE VICTIMS, AND THIS IS
6 A POINT WHERE -- THIS IS NOT A TRIAL ABOUT BASHING THEM.

7 BUT HE CERTAINLY WANTS TO BASH MS. ABRAMSON.

8 THIS IS A TRIAL. THIS IS A PENALTY PHASE

9 TO DETERMINE WHETHER ERIK MENENDEZ SHOULD LIVE OR DIE,

10 AND HE SHOULD BE -- THAT DECISION SHOULD BE BASED ON

11 WHAT HE DID ON STATUTORY FACTORS IN AGGRAVATION AND

12 STATUTORY FACTORS IN MITIGATION. THERE IS NOTHING ABOUT

13 THESE MATTERS THAT THE JURY COULD USE TO MAKE OR TO --

14 THAT WOULD LEAD TO A DEATH JUDGMENT THAT COULD BE

15 SUSTAINED.

16 AND IT WOULD BE HIGHLY IMPROPER. IT WOULD

17 BE AGAINST ALL THE RULES THAT HAVE BEEN PROMULGATED IN

18 THE CALIFORNIA DEATH PENALTY SCHEME, TO AT THIS POINT,

19 JUST BECAUSE THE PROSECUTION HAS THE OPPORTUNITY TO

20 IMPUGN THE CHARACTER AND IMPEACH THE CREDIBILITY OF MS.

21 ABRAMSON, THE LEAD ATTORNEY FOR A DEFENDANT IN A CAPITAL

22 CASE, TO DO SO BECAUSE IT WANTS TO DO SO. IT HAS

23 ABSOLUTELY NO RELEVANCE TO

24 MR. MENENDEZ.

25 THIS WITNESS TESTIFIED THAT ERIK MENENDEZ

26 PLAYED NO PART IN THE DELETIONS. HE DIDN'T ASK HIM FOR

27 HIS PERMISSION. HE DIDN'T TELL HIM IT HAD BEEN DONE.

28 AS A MATTER OF FACT, HE EVEN MADE DELETIONS OF THINGS

-11140

1 THAT ERIK MENENDEZ TOLD HIM, BECAUSE HE DIDN'T BELIEVE

2 ERIK MENENDEZ FROM OTHER SOURCES.

3 BUT THE POINT IS IS THAT THERE HAS BEEN
4 PREJUDICE TO ERIK MENENDEZ ENOUGH ALREADY. AND WE HAVE
5 HAD AN EXTENSIVE AMOUNT OF LITIGATION CONCERNING WHAT
6 HAS ALREADY BEEN PRESENTED BEFORE THE JURY, AND I THINK
7 THAT TO SOME DEGREE THOSE MATTERS HAVE NOT EVEN BEEN
8 RESOLVED.

9 MR. CONN WANTS TO GO FURTHER, AND THAT
10 WOULD BE ABSOLUTELY IMPROPER. IF ANYTHING, WE SHOULD BE
11 TALKING ABOUT WHAT, IF ANYTHING, CAN BE DONE TO CURE THE
12 DAMAGE AND THE PREJUDICE THAT'S ALREADY BEEN DONE, AND
13 I -- THAT'S WHY WE'VE BEEN SCREAMING FOR MISTRIALS,
14 BECAUSE WE DON'T BELIEVE IT'S POSSIBLE THAT THIS COURT
15 COULD CURE THAT DAMAGE, AND NOW MR. CONN IS SAYING "I
16 WANT TO DO MORE."

17 SO I THINK THAT UNTIL WE EVEN START TO
18 DISCUSS WHETHER OR NOT THE DAMAGE THAT'S BEEN DONE CAN
19 BE CURED, WE SHOULDN'T EVEN BE DISCUSSING WHETHER MORE
20 COULD BE HEAPED ON ERIK MENENDEZ. IT'S ABSOLUTELY
21 IMPROPER.

22 THE COURT: ALL RIGHT.

23 MR. CONN: MAY I RESPOND TO THAT?

24 THE COURT: YES.

25 MR. CONN: I THINK THAT THE ANALOGY TO PLACING
26 THE PARENTS ON TRIAL IS A SOMEWHAT APPROPRIATE ANALOGY,
27 BECAUSE IN THIS TRIAL, THE DEFENDANTS WERE PERMITTED TO
28 MAKE THEIR ALLEGATIONS AGAINST THE PARENTS. AND WHY?

1 BECAUSE IT WAS INEXTRICABLY INTERTWINED WITH THE
2 EVIDENCE IN THIS CASE, ACCORDING TO THEM, ACCORDING TO
3 THEIR PRESENTATION OF THE EVIDENCE, AND SO THE RULING OF
4 THE COURT WAS NOT THAT THE DEFENDANTS COULD NOT IN ANY
5 WAY, SHAPE OR FORM MAKE ALLEGATIONS AGAINST THEIR
6 PARENTS. TO THE CONTRARY, THE COURT RULED THAT IF IT IS
7 INVOLVED IN THE EVIDENCE, THERE IS NO WAY TO SEPARATE
8 THE ALLEGATIONS FROM THE EVIDENCE IN THIS CASE, AND IT
9 IS NECESSARY TO ALLOW IT.

10 WELL, HERE WE HAVE A VERY SIMILAR
11 SITUATION. THERE IS NO WAY TO SEPARATE THE TESTIMONY OF
12 DR. VICARY FROM THE REASON WHY HE DECIDED TO MAKE
13 DELETIONS FROM HIS NOTES. IT IS, ONCE AGAIN,
14 INEXTRICABLY INTERTWINED.

15 SO JUST AS THE COURT ALLOWED ALLEGATIONS OF
16 THE PARENTS TO BE PRESENTED INTO THE EVIDENCE, BUT SAW
17 TO IT THAT THE PARENTS WERE NOT UNNECESSARILY PLACED ON
18 TRIAL; SO TOO, IN THIS CASE WHAT THE COURT SHOULD DO IS
19 ALLOW DR. VICARY TO STATE THE REASONS WHY HE MADE THE
20 DELETIONS AS HE DID WITHOUT ALLOWING THE PROSECUTION OR
21 DR. VICARY TO UNNECESSARILY PLACE MS. ABRAMSON ON TRIAL.

22 THE ISSUE HERE -- FOR EXAMPLE, IT OCCURRED
23 TO ME, SHOULD WE BE ABLE TO PRESENT EVIDENCE CONCERNING
24 WHETHER OR NOT WE DID RECEIVE THE UNREDACTED NOTES, OR
25 HOW WE FINALLY CAME ACROSS THE COPY OF UNREDACTED NOTES?

26 AND THE MORE I THOUGHT ABOUT IT, THE MORE I
27 REALIZED THAT'S IRRELEVANT, BECAUSE WE WOULD BE PLACING

-11138

1 ENOUGH THAT THIS JURY KNOWS WHY DR. VICARY DID WHAT HE
2 DID, AND WE WILL LET IT GO AT THAT.

3 THE COURT: OKAY. LET ME RULE ON THAT ISSUE AT
4 THIS POINT, AND THEN WE'LL GO INTO THE SPECIFICS OF THE
5 OFFERS HERE.

6 THE ISSUE BROUGHT BEFORE THE JURY BY THE
7 TESTIMONY OF DR. VICARY RELATES TO WHAT HE SAYS AS FAR
8 AS HIS OPINIONS ABOUT THE DEFENDANT, ERIK MENENDEZ, AND
9 HIS INCARCERATION AND BEHAVIOR, DEMEANOR IN THE JAIL,
10 AND THE PROGRESS HE'S MADE, THE DIAGNOSIS HE MADE OF
11 ERIK MENENDEZ, THINGS OF THAT NATURE. AND THE SCOPE OF
12 THE EXAMINATION THUS FAR IN FRONT OF THE JURY, IN MY
13 VIEW, WAS CERTAINLY PROPER AND WELL WITHIN THE SCOPE OF
14 THE DIRECT EXAMINATION THAT OCCURRED.

15 AS FAR AS THE PURPOSE OF DR. VICARY'S
16 TESTIMONY AND HOW IT IS ATTACKED, THE ISSUE IS DR.
17 VICARY'S CREDIBILITY, AND NOT THAT OF COUNSEL FOR THE
18 DEFENDANT.

19 AND DR. VICARY HAS ACKNOWLEDGED NUMEROUS
20 MODIFICATIONS OF THE NOTES AND HAS INDICATED HIS
21 AWARENESS THAT IT WAS IMPROPER TO DO SO. AND THOSE
22 ACKNOWLEDGMENTS ARE ALREADY BEFORE THE JURY, AND TO SOME
23 EXTENT CAN BE FURTHER BROUGHT BEFORE THE JURY IN

24 CONTINUATION OF CROSS-EXAMINATION TO TEST HIS

25 CREDIBILITY.

26 THAT DOESN'T BRING BEFORE THE JURY AND MAKE

27 RELEVANT THE INSTRUCTIONS THAT DR. VICARY SAYS HE HAD

28 FROM MS. ABRAMSON ON THIS SUBJECT, BECAUSE THAT DOESN'T

-11137

1 FURTHER THE IMPEACHMENT OF VICARY IN REGARD TO HIS BIAS

2 OR HIS ACKNOWLEDGMENT OF IMPROPER CONDUCT. IT JUST

3 TENDS TO IMPEACH THE CREDIBILITY OF COUNSEL FOR THE

4 DEFENDANT, AND IT DOESN'T ACCOMPLISH A LEGITIMATE

5 PURPOSE IN THIS EXAMINATION.

6 AND THESE ANALOGIES TO THE VICTIMS AND

7 EVIDENCE OFFERED, AND WHAT IS AND WHAT IS NOT ADMISSIBLE

8 IN REGARD TO THE VICTIMS, OR WHAT WAS NOT ADMISSIBLE AND

9 WHAT WAS ADMISSIBLE REGARDING THE VICTIMS DURING THE

10 TRIAL MISSES THE POINT, BECAUSE THE VICTIMS' STATUS IN

11 THIS CASE VIS-A-VIS THE DEFENDANTS IS MUCH DIFFERENT

12 THAN THE STATUS OF COUNSEL IN A TRIAL REPRESENTING A

13 DEFENDANT, AND THERE IS REALLY NO COMPARISON BETWEEN

14 THEM. THEY ARE ENTIRELY DIFFERENT ISSUES.

15 AND IN BALANCING WHATEVER PROBATIVE VALUE

16 IS DERIVED BY IMPEACHING DR. VICARY'S TESTIMONY VERSUS

17 THE POTENTIAL PREJUDICE, AND ATTACKING COUNSEL FOR

18 ALLEGATIONS OF MISCONDUCT, IT SEEMS TO ME THAT THE

19 PROPER COURSE IS TO PERMIT IMPEACHMENT OF DR. VICARY

20 REGARDING HIS ACTIVITY WITHOUT REFERENCE TO INSTRUCTIONS
21 HE RECEIVED FROM MS. ABRAMSON.
22 IT OCCURRED TO ME IN DR. VICARY'S
23 EXPLANATIONS TODAY, AS FAR AS HOW HE MODIFIED PAGES IN
24 THE NOTES, THAT THOSE DESCRIPTIONS -- OR THE MANNER IN
25 WHICH HE DID THESE MODIFICATIONS SO THAT NOBODY WOULD
26 KNOW THERE WERE MODIFICATIONS -- IS IN VARIANCE WITH HIS
27 TESTIMONY LAST WEEK WHERE HE SAID IT WAS JUST A
28 COINCIDENCE THAT THINGS LOOKED ALIKE IN THE REDACTED AND

-11136

1 NON-REDACTED VERSIONS.

2 BUT THAT AGAIN GOES TO DR. VICARY'S
3 CREDIBILITY, NOT THAT OF COUNSEL.

4 SO WHAT HAS ALREADY OCCURRED BEFORE THE
5 JURY IN REGARD TO DR. VICARY'S TESTIMONY AS TO WHY
6 DELETIONS OCCURRED, THAT IS BEFORE THE JURY. IT WAS
7 MENTIONED WITHOUT OBJECTION, AND THE TESTIMONY IS THERE.

8 AND I AM NOW FACED WITH THE LENGTHY
9 CROSS-EXAMINATION. THE PEOPLE PROPOSE TO BRING OUT
10 FURTHER CONVERSATIONS BETWEEN THE DEFENDANT -- BETWEEN
11 DR. VICARY AND MS. ABRAMSON OF HER MOTIVATION IN THIS
12 REGARD, AND I JUST DON'T THINK THAT IT ACCOMPLISHES THE
13 PURPOSE OF IMPEACHING DR. VICARY, WHICH IS THE PURPOSE
14 OF THAT EVIDENCE.

15 SO, THEREFORE, ANY EXAMINATION ON THAT

16 SUBJECT WILL BE LIMITED TO THE ACTIVITIES OF DR. VICARY
17 AND HIS ACKNOWLEDGMENT OF HIS AWARENESS THAT HE WAS
18 WRONG TO DO THIS.

19 I CAN'T FORECLOSE THE POSSIBILITY THAT IN
20 REDIRECT EXAMINATION SOMEHOW THIS AREA MIGHT BE TOUCHED
21 UPON FURTHER. IT'S NOT POSSIBLE FOR ME TO KNOW EXACTLY
22 WHAT WILL BE ASKED, AND HOW THESE EXAMINATIONS WILL BE
23 CONDUCTED. BUT THAT IS MY RULING AS FAR AS THE
24 EXAMINATION BY THE PROSECUTION.

25 MR. LEVIN: YOUR HONOR, MIGHT I JUST BE HEARD ON
26 ONE POINT WITH RESPECT TO THAT?

27 THE COURT: YES. VERY BRIEFLY, PLEASE.

28 MR. LEVIN: I DON'T KNOW HOW THIS WITNESS CAN

-11135

1 EXPLAIN THAT HE REDACTED INFORMATION FROM HIS REPORTS,
2 ADMITTING IT WAS WRONG, WITHOUT AN INFERENCE -- A DIRECT
3 INFERENCE GOING TO THE JURY THAT MS. ABRAMSON WAS THE
4 CAUSE AND REASON OF THAT REDACTION, WHICH IS IMPROPER
5 BECAUSE THIS WITNESS TESTIFIED THAT HE HAD THREE LEVELS
6 OF REDACTIONS. THERE WERE VERY FEW THAT MS. ABRAMSON
7 TOLD HIM TO REDACT. OTHERS THEY JUST HAD A DISAGREEMENT
8 IN PREPARATION OF TESTIMONY AND HE REDACTED THEM, AND
9 THEN EVEN OTHERS HE TOOK OUT ON HIS OWN.

10 THE COURT: THAT'S NOT -- VERY FEW IS JUST
11 CONTRARY TO HIS TESTIMONY.

12 MR. LEVIN: OKAY, A LOT. BUT DO WE KNOW WHICH
13 ONES? AND IF WE DON'T KNOW WHICH ONES, WE NEVER WILL
14 KNOW WHICH ONES, BECAUSE DR. VICARY COULDN'T TELL US.

15 BUT THE POINT IS THAT EVERY REDACTION THAT
16 HE TESTIFIES HE MADE WILL BE ATTRIBUTED DIRECTLY TO
17 MS. ABRAMSON, COMPOUNDING THE PROBLEM.

18 THE COURT: WELL, I'VE ALREADY RULED THAT WHAT
19 HAS ALREADY BEEN SAID, IT'S ON THE RECORD, AND IT'S
20 THERE. IT WAS PRESENTED WITHOUT OBJECTION WHEN IT
21 OCCURRED, AND IT'S ON THE RECORD. THERE IS NOTHING I
22 CAN DO ABOUT THAT. BUT WE'RE DEALING NOW WITH A
23 PROPOSAL FOR FURTHER EXAMINATION OF THIS WITNESS.

24 MR. LEVIN: I JUST WANT TO ADD ONE THING, AND
25 THAT IS THE COURT CAN DO SOMETHING ABOUT IT, AND IF THE
26 COURT FINDS JUST IN THE INTERESTS OF JUSTICE TO ENSURE
27 THAT ERIK MENENDEZ RECEIVES A FAIR PENALTY TRIAL, THE
28 COURT CAN CONCLUDE THAT FROM WHAT'S BEEN PRESENTED IN

-11134

1 THIS COURT, THAT MS. ABRAMSON WAS INEFFECTIVE NOT ONLY
2 FOR CALLING THAT WITNESS, BUT FOR FAILING TO OBJECT.

3 THE COURT: NOW YOU'RE GOING TO SOMETHING ELSE,
4 AND YOU'RE ASKING FOR HER REMOVAL. LET'S HOLD OFF ON
5 THAT. LET'S FINISH ONE THING AT A TIME HERE.

6 MR. LEVIN: JUST SO I'M CLEAR, I AM NOT ASKING
7 FOR HER REMOVAL. I AM ASKING FOR THE COURT TO ANALYZE

8 THIS IN THE WAY OF SAYING: LOOK, IF THERE HAS BEEN --
9 AND I CAN CONCLUDE THAT THERE WAS A PROBLEM WITH THIS
10 WITNESS' TESTIMONY, AND THE FACT COUNSEL DIDN'T OBJECT
11 AND SHOULD HAVE, WHY SHOULD WE IN A PENALTY TRIAL ALLOW
12 THE WITNESS TO CONTINUE TO HEAP MORE DAMAGING EVIDENCE
13 AGAINST A CAPITAL DEFENDANT?

14 THE COURT: BECAUSE THE DEFENDANT PUT HIM ON THE
15 WITNESS STAND. THE DEFENDANT PROPOSED A BENEFIT FROM
16 HIS TESTIMONY, AND THE PEOPLE HAVE A RIGHT TO
17 CROSS-EXAMINE AND IMPEACH HIS TESTIMONY. THAT'S WHY.

18 MR. LEVIN: THE COURT HAS AN OVERRIDING DUTY TO
19 ENSURE THE DEFENDANT GETS A FAIR PENALTY TRIAL.

20 THE COURT: THAT'S TRUE. BUT THE DEFENDANT
21 ELECTED TO HAVE THIS WITNESS TAKE THE WITNESS STAND, AND
22 THAT IS THE CURRENT STATUS OF THE CASE. AND THE WITNESS
23 IS BEING CROSS-EXAMINED. HE WAS ON THE WITNESS STAND
24 FOR QUITE A WHILE EXPRESSING HIS VIEWS ABOUT THE
25 DEFENDANT, HIS PERSONAL OPINIONS ABOUT THE VICTIMS IN
26 THIS CASE, AND ALL SORTS OF MATTERS, AND THE PEOPLE HAVE
27 A RIGHT TO CHALLENGE HIS CREDIBILITY.

28 ALL RIGHT. NOW LET'S GO TO THE SPECIFIC

-11133

1 OFFERS HERE.

2 THE FIRST ON PAGE 7, THE FIRST PARAGRAPH
3 I'LL HOLD OFF FINAL RULING UNTIL I HEAR THE OFFER OF THE

4 DEFENSE AS TO WHY THEY ALLEGE THAT THIS IS PRIVILEGED.
5 NOT PRIVILEGED JUST BECAUSE OF DR. VICARY, BECAUSE THERE
6 IS NO SUCH PRIVILEGE. THERE IS NOT A PRIVILEGE CLAIMED
7 AT THIS POINT REGARDING DR. VICARY, BUT FOR OTHER
8 REASONS.

9 AND ALSO I WILL DEFER RULING ON THAT
10 RELATING TO THE MULTIPLE HEARSAY OBJECTION OF THE
11 DEFENSE FOR LYLE MENENDEZ.

12 REGARDING THE REFERENCE ON THE BOTTOM OF
13 PAGE 7: "DEFENDANT WANTED TO GO ON TOUR. FATHER SAID
14 NO," THAT RELATES TO THE DEFENDANT'S TESTIMONY AT THE
15 TIME OF THE GUILT PHASE, AND THE COURT WOULD PERMIT
16 THAT.

17 ON PAGE 18, THE REFERENCE TO: "ONE WEEK
18 PRIOR TALKING WITH LYLE WHAT IT WOULD BE LIKE WITHOUT
19 THE PARENTS." THERE'S BEEN A LOT OF ARGUMENT ON THAT
20 SUBJECT AS TO WHETHER IT IS ADMISSIBLE, AND THE ISSUE
21 RELATES TO RIGHT OF CONFRONTATION AND ADDITIONAL
22 ARGUMENTS BY THE PROSECUTION THAT THERE IS SOME CASE
23 AUTHORITY THAT THE DEFENSE FOR LYLE MENENDEZ CAN CALL
24 ERIK MENENDEZ BACK TO THE WITNESS STAND.

25 WITHOUT RULING ON THAT SUBJECT, WHICH
26 ENTAILS VARIOUS SUB-ISSUES, SUCH AS WHAT OCCURS IF ONE
27 DEFENDANT DOES CALL THE OTHER DEFENDANT TO THE WITNESS
28 STAND, AND THAT DEFENDANT REFUSES TO TESTIFY FURTHER, OR

1 IF ANY SANCTIONS COULD BE IMPOSED ON THE PERSON WHO
2 REFUSES TO TESTIFY, WITHOUT PLAYING THAT OUT AND SEEING
3 HOW IT WOULD BE PRESENTED, JUST DEALING WITH MY ANALYSIS
4 HERE THAT THE DEFENDANT, ERIK MENENDEZ, WAS A WITNESS
5 FOR LYLE MENENDEZ FOR 15 OR SO DAYS, WAS SUBJECT TO
6 EXTENSIVE EXAMINATION BY BOTH COUNSEL FOR ERIK MENENDEZ,
7 WAS AVAILABLE FOR CROSS-EXAMINATION BY LYLE MENENDEZ'
8 COUNSEL -- ALTHOUGH NOT EXAMINED ON THIS PARTICULAR
9 REFERENCE -- CERTAINLY THE CREDIBILITY OF ERIK MENENDEZ
10 AS TO THE VERSION OF EVENTS THAT WEEK WAS PRESENTED TO
11 THE JURY, AND THE JURY IS STILL CALLED UPON TO EVALUATE
12 THAT VERSION OF EVENTS IN MAKING A DETERMINATION AS TO A
13 FACTOR IN AGGRAVATION; THAT IS, CIRCUMSTANCES OF THE
14 CRIME ITSELF.

15 AND MY VIEW IS THAT LYLE MENENDEZ HAS HAD
16 THE RIGHT TO CONFRONT AND CROSS-EXAMINE ERIK MENENDEZ ON
17 THIS GENERAL SUBJECT. AND WHETHER THIS PARTICULAR
18 PHRASE WAS THE SUBJECT OF THE QUESTIONING IS IMMATERIAL.
19 HE HAS BEEN CROSS-EXAMINED IN GENERAL, AND HAS BEEN
20 AVAILABLE TO BE CROSS-EXAMINED ON THE EVENTS OF THAT
21 WEEK.

22 FURTHER, THE COURT OBSERVES THAT THERE IS
23 STRONG INDICIA OF RELIABILITY AS TO THIS STATEMENT WHEN
24 ONE REFERS TO THE DECEMBER 11TH TAPE-RECORDING WHERE
25 REFERENCES SIMILAR TO THIS ARE FOUND IN THE VOICE OF
26 LYLE MENENDEZ.

27 SO FOR THOSE REASONS, THE COURT'S VIEW IS
28 THAT THAT PARTICULAR REFERENCE IS ADMISSIBLE IN THIS

1 PENALTY PHASE TO IMPEACH THE TESTIMONY OF ERIK MENENDEZ.

2 AS FAR AS THESE OTHER REFERENCES TO THE
3 TOUPEE, THAT WAS NOT SUBJECT TO EXAMINATION DURING THE
4 TESTIMONY OF ERIK MENENDEZ. IT'S UNCLEAR THE SOURCE OF
5 THAT INFORMATION. IT'S UNCLEAR THE TIMING OF IT.

6 AND THEREFORE, WEIGHING ANY POTENTIAL
7 PROBATIVE VALUE AGAINST ITS POTENTIAL PREJUDICE, THE
8 COURT SUSTAINS THE OBJECTION TO THAT.

9 AS FAR AS REFERENCES TO MAFIA AND DRUG
10 MONEY, THINGS OF THAT NATURE, IT'S UNCLEAR TO ME THAT
11 THIS IS IMPEACHING OF ERIK MENENDEZ IN ANY WAY. THE
12 ONLY VALUE OF IT IS THE FACT THAT IT WAS DELETED FROM
13 THE PAGE AS TO ATTACK THE CREDIBILITY OF DR. VICARY.

14 THERE ARE OTHER REFERENCES, TOO. THERE
15 WILL BE REFERENCES TO DELETIONS ON THIS PAGE, INCLUDING
16 THE ONE THAT I'VE JUST REFERRED TO REGARDING THE
17 CONVERSATION THE WEEK PRIOR.

18 SO I DON'T SEE THAT THERE IS REALLY ANY
19 PROBATIVE VALUE IN THIS PARTICULAR REFERENCE IN THAT
20 IT'S MY RECOLLECTION, UNLESS COUNSEL CAN POINT TO THE
21 OPPOSITE OR THE CONTRARY, THAT THIS WAS INFORMATION THAT
22 WAS TESTIFIED ABOUT BY THE DEFENDANT IN HIS OWN
23 TESTIMONY DURING THE TRIAL; THAT HE HAD AN AWARENESS OF
24 HIS FATHER'S ACTIVITIES, OR HAD HEARD ABOUT THESE
25 THINGS. SO I DON'T SEE THAT THERE IS ANY IMPEACHMENT

26 THERE.

27 THEREFORE, THE OBJECTION IS SUSTAINED TO
28 THAT.

-11130

1 AND ON PAGE 20, THE REFERENCE TO THE FATHER
2 CUTTING OFF HIS BROTHER'S HAIR PRESCRIPTION.

3 AGAIN, THERE IS NO REFERENCE TO WHEN THAT
4 OCCURRED, AND THE PROBATIVE VALUE OF THIS IS
5 SUBSTANTIALLY OUTWEIGHED BY ITS POTENTIAL FOR PREJUDICE
6 AND CONFUSION. I DON'T RECALL THE DEFENDANT EVER BEING
7 EXAMINED ON THIS PARTICULAR SUBJECT WHEN ERIK MENENDEZ
8 WAS ON THE WITNESS STAND.

9 SO IT'S REALLY NOT IMPEACHING ON ANY
10 SUBJECT UNLESS IT WAS IN THE CONTEXT OF EVENTS THAT
11 WEEK, AND I DON'T -- THE WEEK OF THE MURDERS, AND I
12 DON'T SEE THAT THAT'S ANY AREA THAT WOULD SUPPORT THAT
13 PARTICULAR INTENTION.

14 REGARDING THE CONVERSATION ON PAGE 20 THAT
15 THE BROTHER SAID, "WAIT A WEEK."

16 THE DEFENDANT SAID, "I CAN'T TAKE ANOTHER
17 WEEK," THAT FALLS WITHIN THE SAME CATEGORY AS THE
18 CONVERSATION THAT I DISCUSSED ON PAGE 18 ABOUT TALKING
19 ABOUT WHAT LIFE WOULD BE WITHOUT PARENTS.

20 AGAIN, THIS IS A CONVERSATION THAT
21 REASONABLY ONE COULD INFER RELATES TO THE EVENTS THE

22 WEEK OF THE MURDERS AND IS IMPEACHING OF THE DEFENDANT'S
23 TESTIMONY, AND I DON'T FIND IT HAVING THE AMBIGUITY THAT
24 HAS BEEN ARGUED HERE. IT SEEMS TO BE FAIRLY CLEAR AS TO
25 WHAT IS MEANT.

26 AND AGAIN, IT IS CONSISTENT WITH, AND I
27 FIND ITS INDICIA OF RELIABILITY IN THE DECEMBER 11TH
28 TAPE-RECORDING, WHEN ONE RECALLS THE CONVERSATIONS OF

-11129

1 THE DEFENDANTS, ERIK AND LYLE MENENDEZ, WITH DR. OZIEL.

2 AND THIS AGAIN WAS THE SUBJECT OF -- IN
3 GENERAL -- OF CROSS-EXAMINATION OF THE DEFENDANT DURING
4 THE COURSE OF HIS TESTIMONY. AND THE DEFENDANT, LYLE
5 MENENDEZ, WAS AFFORDED THE RIGHT OF CONFRONTATION AND
6 CROSS-EXAMINATION.

7 THEREFORE, THE DEFENSE OBJECTION TO IT IS
8 OVERRULED.

9 IN REFERENCE TO THE STATEMENT AT THE BOTTOM
10 OF PAGE 20: "KNEW I HATED MOTHER."

11 AGAIN, THAT IS MOTIVATION, OR POTENTIAL
12 MOTIVE EVIDENCE, AND IS IMPEACHING OF THE DEFENDANT,
13 ERIK MENENDEZ' TESTIMONY.

14 AND THEREFORE THE COURT FINDS THE PROBATIVE
15 VALUE OF THAT SUBSTANTIALLY OUTWEIGHS ITS POTENTIAL FOR
16 PREJUDICE, AND IT WILL BE RECEIVED AND IS ADMISSIBLE TO
17 IMPEACH THE TESTIMONY OF BOTH THE DEFENDANT AND OF

18 DR. VICARY.

19 LIKEWISE, ON PAGE 22, THE TOP PORTION

20 REGARDING HIS HATRED OF HIS PARENTS.

21 AGAIN, THAT IS IMPEACHING OF THE DEFENDANT,

22 ERIK MENENDEZ' TESTIMONY, AND IS ADMISSIBLE IN THIS

23 PENALTY PHASE BASED UPON THE NATURE OF THE DIRECT

24 EXAMINATION OF ERIK MENENDEZ.

25 I DON'T RECALL, MR. CONN, AS TO PAGE 22,

26 THE MIDDLE OF THE PAGE, WHETHER YOU HAD A POSITION ON

27 THOSE REFERENCES.

28 MR. CONN: NO. I WAS NOT OFFERING ANYTHING ELSE

-11128

1 ON THAT PAGE.

2 THE COURT: AS FAR AS THE REFERENCES TO SEXUAL

3 CONTACT BETWEEN THE DEFENDANT AND OTHER MALES AT VARIOUS

4 STAGES IN HIS LIFE.

5 AGAIN, THE PEOPLE DON'T OFFER THIS AS

6 EVIDENCE OF ANY RELEVANCE OTHER THAN THE FACT THAT IT

7 WAS DELETED BY DR. VICARY. I HAVEN'T HEARD IT

8 ARTICULATED FOR SOME OTHER REASON WHY THIS EVIDENCE

9 WOULD OTHERWISE BE ADMISSIBLE, UNLESS I'M MISSING

10 SOMETHING.

11 MR. CONN: AS I INDICATED, I THINK THAT THIS PUTS

12 INTO -- THIS PUTS ALL OF HIS ALLEGATIONS OF SEXUAL

13 ASSAULT IN NEW PERSPECTIVE. THE FACT THAT HE HAD THESE

14 VARIOUS ONGOING HOMOSEXUAL RELATIONSHIPS WITH DIFFERENT
15 PERSONS CASTS A NEW LIGHT ON ALL THESE ALLEGATIONS OF
16 SEXUAL ABUSE. WAS HE TRULY SEXUALLY ABUSED BY HIS
17 FATHER? IF SO, DOES THAT -- ISN'T THAT IMPEACHED
18 SOMEWHAT BY HIS ADMISSION TO DR. VICARY THAT HE IS
19 HAVING HOMOSEXUAL EXPERIENCES WITH OTHER PEOPLE?
20 ALSO IN REGARD TO HIS EXPERTS, HIS EXPERT
21 SAID THERE WAS A PERSONALITY CHANGE AT ABOUT THE AGE OF
22 FIVE OR SIX YEARS OLD. ALAN ANDERSEN WAS CALLED FOR
23 THAT. HIS EXPERTS RELIED ON THAT AS EVIDENCE THAT HIS
24 FATHER SEXUALLY ASSAULTED HIM AT THAT AGE.
25 NOW WE LEARN THAT HE WAS SEXUALLY MOLESTED
26 BY A BABYSITTER. THAT CALLS INTO QUESTION THE
27 CONCLUSION OF THE EXPERT, AND IT ALSO CALLS INTO
28 QUESTION HIS OWN ALLEGATIONS THAT THE TRAUMATIC EVENT,

-11127

1 IF INDEED ONE DID OCCUR TO HIM DURING THIS PERIOD OF
2 TIME, WAS BROUGHT ABOUT BY HIS FATHER.

3 SO I THINK THAT THIS CALLS INTO QUESTION
4 HIS CREDIBILITY AS WELL AS THE CREDIBILITY OF HIS
5 EXPERTS.

6 THE COURT: I HAVE A VAGUE RECOLLECTION, AND I
7 DON'T KNOW IF IT'S CLEARLY REFLECTED IN THE RECORD OR
8 JUST INFERENTIALLY, THAT MS. BOZANICH -- OR MRS.
9 BOZANICH WANTED TO INQUIRE OF DR. VICARY ABOUT SEXUALITY

10 AND ITS RELATIONSHIP TO THIS CASE.

11 AND I DON'T RECALL WHETHER THAT WAS DONE ON
12 THE RECORD WHEN SHE MADE THAT INQUIRY, OR INDICATED THAT
13 SHE WANTED TO DO IT AND SPOKE WITH DR. VICARY OFF THE
14 RECORD. BUT I RECALL VAGUELY THAT SOMETHING ALONG THOSE
15 LINES OCCURRED. AND IT WOULD ASSIST ME IN EVALUATING
16 THIS IN THE CONTEXT OF VICARY'S TESTIMONY AS WELL IF YOU
17 COULD FIND OUT IF IT'S AVAILABLE.

18 MS. ABRAMSON: YOUR HONOR, IT WAS DR. BURGESS,
19 NOT DR. VICARY.

20 THE COURT: NO. I RECALL IT IN THE CONTEXT OF
21 DR. VICARY. NOW WHETHER IT WAS A QUESTION ACTUALLY
22 ASKED OF VICARY OR ONLY THAT MS. BOZANICH WANTED TO TALK
23 TO HIM, I DON'T RECALL. BUT IT'S MY RECOLLECTION --

24 MS. ABRAMSON: THERE WAS INQUIRY CONCERNING
25 DR. BURGESS ALONG THOSE LINES, AND THEN THERE WAS A 402
26 REGARDING DR. VICARY.

27 THE COURT: WHATEVER IT WAS, MS. BOZANICH IS THE
28 ONE WHO ULTIMATELY EXAMINED DR. VICARY IN FRONT OF THE

-11126

1 JURY.

2 MS. ABRAMSON: SHE ASKED PERMISSION OF THE COURT
3 AT ONE TIME -- I THINK I KNOW WHAT THE COURT IS THINKING
4 OF -- I CAN FIND THAT QUESTION VERY QUICKLY -- BECAUSE
5 SHE WANTED TO KNOW IF IT WOULD OPEN THE DOOR TO OTHER

6 THINGS, AND I WILL FIND THAT FOR THE COURT.

7 THE COURT: AS I SAID, I RECALL THERE BEING
8 SOMETHING MORE TO IT THAN THAT. ALL THESE DISCUSSIONS
9 WERE ALL ON THE RECORD. IT'S JUST A QUESTION OF WHETHER
10 THE WITNESS WAS ASKED ABOUT THIS OR NOT IN OPEN COURT,
11 OR IN A CLOSED COURTROOM, OR WHETHER IT WAS JUST A
12 CONVERSATION THAT OCCURRED BETWEEN THE WITNESS AND THE
13 DOCTOR AND MRS. BOZANICH.

14 SO I AM GOING TO DEFER RULING ON THOSE
15 MATTERS UNTIL I GET THAT ADDITIONAL INFORMATION.

16 MS. ABRAMSON: YOUR HONOR, I THINK IT HAD TO DO
17 WITH THE PHOTOGRAPHS, THE NEW ORLEANS PHOTOGRAPHER.

18 THE COURT: I DON'T RECALL THE SPECIFICS OF IT,
19 BUT EVERYBODY HAS THE TRANSCRIPTS, AND SOMEBODY CAN FIND
20 IT.

21 THE REFERENCE ON PAGE 20 IN THE MIDDLE OF
22 THE PAGE THERE, AS I RECALL, IS SOMETHING THE
23 PROSECUTION WANTED TO USE.

24 MR. LEVIN: THAT'S "WAIT A WEEK," YOUR HONOR?

25 THE COURT: NO. I'M SORRY. I AM MISSING A PAGE
26 HERE. LET'S SEE.

27 SEVENTY-FOUR I GUESS IT IS, BUT I CAN'T
28 READ IT. MAYBE NOT.

1 MS. TOWERY: I THINK IT'S 29, JUDGE. THAT LOOKS

2 LIKE 29.

3 THE COURT: OKAY. IT'S RIGHT AFTER, IN THE
4 TRUNCATED VERSION OF JUST THE DELETIONS. IT FOLLOWS 28,
5 SO 29.

6 DID YOU WANT TO USE THAT, MR. CONN, OR NOT?

7 MR. CONN: YES.

8 THE COURT: IT CERTAINLY TENDS TO IDENTIFY
9 SOMEONE ELSE.

10 MR. CONN: YES. WE WOULD LIKE TO USE AS MUCH OF
11 THAT AS WE CAN.

12 THE COURT: WELL, BY USING IT, IT CERTAINLY WILL
13 IDENTIFY THE OTHER PERSON.

14 MR. CONN: WELL, I THINK THAT --

15 THE COURT: BECAUSE THE EVENT HAS ALREADY BEEN
16 THE SUBJECT OF TESTIMONY.

17 MR. CONN: MY PRIMARY CONCERN WAS SIMPLY TO GET
18 IN THE NATURE OF THE RELATIONSHIP. AND IN MY
19 EXAMINATION OF DR. VICARY, I DIDN'T GO INTO THAT ALL OF
20 THE WAY. WHAT I MERELY BROUGHT OUT CONCERNING THAT
21 INCIDENT WAS THAT HIS FATHER DID FIND OUT ABOUT THE
22 RELATIONSHIP, AND THAT HE WAS FURIOUS. I WOULD HAVE NO
23 OBJECTION TO GOING THAT FAR, BUT THEN AGAIN, THAT IS
24 DEPENDENT UPON THE COURT'S RULING CONCERNING THE
25 HOMOSEXUALITY.

26 THE COURT: WELL THIS HAS AN ADDITIONAL FEATURE
27 TO IT. IT TENDS TO DISCREDIT THE VERSION OF WITNESSES
28 REGARDING THAT EVENT -- OR AT LEAST ONE WITNESS ABOUT

1 THAT EVENT. I THINK IT WAS YOUR WITNESS.

2 MS. ABRAMSON: EXACTLY.

3 THE COURT: ON THAT EVENT AS TO WHAT THE
4 MOTIVATION WAS FOR THAT EVENT TO HAVE OCCURRED. I DON'T
5 RECALL ANYBODY ELSE TESTIFYING ABOUT THAT BUT YOUR
6 WITNESS.

7 MR. CONN: ONCE AGAIN, I THINK THAT'S CONTINGENT
8 UPON THE COURT'S RULING CONCERNING THE HOMOSEXUALITY
9 ISSUE. IF THE COURT RULED THAT THE HOMOSEXUALITY ISSUE
10 WERE RELEVANT, THEN I THINK I WOULD LIKE TO GET IN AT
11 LEAST A PORTION OF THAT INCIDENT.

12 THE COURT: WELL, I AM SAYING WHEN YOU GET IN A
13 PORTION, YOU GET TO THE BALANCE OF IT, AND IT CUTS BOTH
14 WAYS. IT TENDS TO DISCREDIT THE TESTIMONY OF YOUR
15 WITNESS, THE TESTIMONY ABOUT THAT SUBJECT, THAT
16 PARTICULAR EVENT.

17 ALL RIGHT. I WILL DEFER RULING ON THE
18 ISSUE OF THE HOMOSEXUALITY UNTIL I SEE REFERENCE TO THAT
19 FROM THE FIRST TRIAL, SPECIFICALLY IN REGARD TO VICARY'S
20 TESTIMONY.

21 MS. ABRAMSON: YOUR HONOR, I HAVE THE LOCATION IN
22 THE FIRST TRIAL OF THE 402 THAT I HAVE IN MIND. THAT
23 MIGHT NOT BE WHAT THE COURT HAS IN MIND, BUT I CAN
24 DIRECT THE COURT IN ANY EVENT TO THE TESTIMONY.

25 DR. VICARY TESTIFIED ON DECEMBER 2ND, 1993,
26 BOTH HIS -- AND I THINK HE STARTED ON DECEMBER 1ST AND

27 IT WENT OVER TO DECEMBER 2ND. DECEMBER 1ST OVER TO

28 DECEMBER 2ND.

-11123

1 THE 402 IS ON DECEMBER 2ND, IF THAT'S WHAT
2 THE COURT HAS IN MIND. IT'S NOT REALLY ON THIS POINT,
3 BUT AT PAGE 23,556.

4 THE COURT: IT MIGHT VERY WELL BE A VERY BRIEF
5 REFERENCE.

6 MS. ABRAMSON: NO.

7 THE COURT: I'M SAYING -- WHAT I'M THINKING OF IS
8 IT MIGHT BE A VERY BRIEF REFERENCE WHERE MRS. BOZANICH
9 ASKS, "CAN I ASK DR. VICARY ABOUT THIS?" AND PERHAPS IT
10 WAS SUGGESTED THAT SHE DO SO IN A CONVERSATION RATHER
11 THAN TESTIMONY, AND PERHAPS SHE DID THAT.

12 ANYWAY, I HAVE A RECOLLECTION OF THAT. I
13 CAN'T REMEMBER FURTHER THAN THAT.

14 OKAY. AS FAR AS THE -- PAGE 94, THE
15 REFERENCE TO THE ALLEGED HOMOSEXUAL LOVER OF THE FATHER.

16 MS. ABRAMSON: THAT'S ALREADY OUT, YOUR HONOR.

17 THE COURT: DO THE PEOPLE WANT TO GO INTO IT
18 FURTHER?

19 AND THE FACT THAT IT WAS DELETED, AND THE
20 COURT FINDS THAT THE PROBATIVE VALUE OF THAT AND THE
21 FURTHER REFERENCE TO THAT IS SUBSTANTIAL AND IS PROPER
22 IMPEACHMENT OF THE DEFENDANT.

23 MR. LEVIN: I'M SORRY, PROPER OR IMPROPER?
24 THE COURT: PROPER IMPEACHMENT.
25 MS. ABRAMSON: IT'S ALREADY BEEN BEFORE THE JURY,
26 YOUR HONOR.
27 THE COURT: I UNDERSTAND THAT THE PEOPLE INTEND
28 TO GO INTO IT AND PURSUE IT SOME MORE.

-11122

1 MR. GESSLER: THAT IMPLICATES THE PRIVILEGE, YOUR
2 HONOR.
3 THE COURT: NOT AS IT CAME OUT IN THE TESTIMONY
4 HERE.
5 MR. GESSLER: NO, IF IT CAME OUT FURTHER.
6 THE COURT: WELL, AS IT HAS BEEN PRESENTED -- AS
7 I HAVE HEARD IT HERE IN COURT, THEN IT CERTAINLY DOESN'T
8 INVADE ANY PRIVILEGE.
9 MR. GESSLER: YOU MEAN THE PART THAT YOU HEARD
10 TODAY, OR THE PART THAT'S BEFORE THE JURY?
11 THE COURT: THE PART I HEARD TODAY.
12 MR. GESSLER: I THINK THE PART YOU HEARD TODAY,
13 YOUR HONOR, IMPLICATES NOT ONLY DOCTOR-PATIENT
14 PRIVILEGE, BUT ALSO ATTORNEY-CLIENT PRIVILEGE, IF YOU
15 GET TO THE LAST TWO SENTENCES OF WHAT DR. VICARY SAID AT
16 THAT TIME. HE IS REFERRING TO A CONVERSATION HE HAD
17 WITH MS. ABRAMSON REGARDING THE DEFENDANT.
18 MR. GESSLER: THAT'S CORRECT. REGARDING MY

19 DEFENDANT, YOUR HONOR.

20 THE COURT: NO, REGARDING HER CLIENT.

21 MS. ABRAMSON: IT'S MORE COMPLICATED THAN THAT.

22 MR. GESSLER: IT'S MORE COMPLICATED THAN THAT,

23 BASED ON THE OFFER WE MADE.

24 MS. TOWERY: EXCUSE ME. I THOUGHT THAT THE OFFER

25 MR. CONN MADE WAS THAT THE ONLY ADDITIONAL FACT THAT HE

26 WANTED TO GET INTO WITH RESPECT TO THAT ENTRY WAS THAT

27 IT HAD BEEN ELIMINATED FROM THE NOTES.

28 MR. CONN: THAT'S CORRECT.

-11121

1 THE COURT: RIGHT.

2 MR. GESSLER: IF THAT'S ALL HE WANTS TO DO

3 WITHOUT EXPLANATION, THEN I HAVE NO OBJECTION.

4 THE COURT: OKAY.

5 MR. GESSLER: ON THAT POINT.

6 THE COURT: OKAY. AS FAR AS PAGE 95, I DON'T SEE

7 THAT THIS REFERENCE TO TONY HAS ANY PROBATIVE VALUE.

8 IT'S TOTALLY AMBIGUOUS AS TO WHAT IT MEANS, OTHER THAN

9 THE FACT IT WAS DELETED. THERE ARE MANY OTHER DELETIONS

10 AND MODIFICATIONS ABOUT WHICH DR. VICARY WILL BE

11 QUESTIONED, AND THIS CERTAINLY WON'T ADD ANYTHING TO THE

12 ATTACK ON HIS CREDIBILITY.

13 REGARDING THE BOTTOM OF PAGE 95. AGAIN,

14 THAT IMPLICATES THE CODEFENDANT, AND THERE IS NOTHING

15 WITHIN THE TESTIMONY OF ERIK MENENDEZ THAT THIS
16 IMPEACHES, AND THERE IS NO BASIS FOR -- NO BASIS IN THE
17 NOTES AS TO WHERE ERIK MENENDEZ OBTAINED THIS
18 INFORMATION.

19 THEREFORE, THE COURT IS GOING TO SUSTAIN
20 THE OBJECTION OF LYLE MENENDEZ TO THAT.

21 I BELIEVE THAT'S THE TOTALITY OF THESE
22 MATTERS.

23 MS. ABRAMSON: NINETY-SIX, YOUR HONOR.

24 MS. NAJERA: NINETY-SIX IS DEFERRED.

25 MS. ABRAMSON: NINETY-SIX IS -- THE WITNESS
26 WASN'T ACTUALLY QUESTIONED ABOUT. THERE IS TWO
27 COMPLETELY DIFFERENT PIECES THERE, ONE ABOVE THE LINE,
28 ONE BELOW THE LINE ON THE BOTTOM. AND IN THE 402 NO ONE

-11120

1 ACTUALLY GOT INTO THE ONE ABOVE THE LINE, AND THE PART
2 BELOW THE LINE RELATES TO THESE OTHER SEXUALITY ISSUES.

3 THE COURT: YES. AS I SAID, I WILL HOLD OFF. IF
4 EITHER SIDE CAN FIND SOMETHING TO ASSIST ME, I WILL LOOK
5 AT IT ON THE SUBJECT OF REFERENCES TO HOMOSEXUALITY IN
6 THE FIRST TRIAL, SPECIFICALLY REGARDING DR. VICARY'S
7 TESTIMONY.

8 OKAY. WHAT OTHER ISSUES DO COUNSEL HAVE IN
9 REGARD TO THE TESTIMONY OF DR. VICARY?

10 MR. GESSLER: I WISH TO PUT ON THE RECORD, YOUR

11 HONOR, A STATEMENT I MADE EARLIER TODAY, THAT IS THAT WE
12 HAVE FILED WITH THE COURT A DECLARATION FROM MICHAEL
13 BURT, WHO WAS COUNSEL FOR LYLE MENENDEZ AT THE LAST
14 TRIAL, THAT HE DID NOT RECEIVE ANY NOTES CONCERNING ERIK
15 MENENDEZ FROM DR. VICARY. HE DID RECEIVE NOTES ON A
16 DIFFERENT CASE FROM DR. VICARY, BUT NOT ON THIS CASE.

17 WE HAVE ALSO CONTACTED DR. HART, WHO ORALLY
18 STATED THAT HE RECEIVED -- DID NOT RECEIVE ANY WRITTEN
19 NOTES OF DR. VICARY BEFORE THE FIRST TRIAL OR BEFORE HIS
20 APPEARANCE IN THIS TRIAL. HE WAS GOING TO AN
21 APPOINTMENT. WE WILL TRY TO GET A FAX TO THE COURT ON
22 THAT AS SOON AS WE CAN CONTACT HIM TO CONFIRM IT.

23 WE HAVE ALSO TALKED TO DR. CONTE, EVEN
24 THOUGH NOT NAMED BY DR. VICARY, AN EXPERT USED BY LYLE
25 MENENDEZ AT THE LAST TRIAL WHO NEVER RECEIVED THE NOTES
26 FROM DR. VICARY. I WANT TO MAKE THAT A MATTER OF RECORD
27 WITH THE COURT.

28 THE COURT: OKAY.

-11119

1 MS. ABRAMSON: YES, YOUR HONOR. I WANTED TO MAKE
2 A MATTER OF RECORD WITH THE COURT AS WELL THAT
3 DR. BURGESS AND DR. TYLER DID NOT RECEIVE DR. VICARY'S
4 NOTES PRIOR TO THEIR TESTIMONY, OR AT ANY TIME WITH
5 RESPECT TO THEIR TESTIMONY IN THE FIRST TRIAL. IF THEY
6 HAD, IT WOULD HAVE OBVIOUSLY BEEN THE ORIGINAL VERSION,

7 BECAUSE THE REDACTION DIDN'T OCCUR UNTIL MONTHS AFTER
8 THEY HAD COMPLETED THEIR TESTIMONY.

9 BUT THE FACT IS THAT HIS NOTES WERE NOT
10 DISTRIBUTED TO WITNESSES AT THAT TIME WHO HAD AMPLE
11 OPPORTUNITY TO SEE THE DEFENDANT EARLY ENOUGH IN TIME,
12 AND FURTHER THAT THE ONLY TWO EXPERTS; IN FACT, TO WHOM
13 DR. VICARY'S NOTES WERE EVER DISTRIBUTED WERE
14 DR. WILSON AND DR. DIETZ, AND THEY RECEIVED THE
15 ORIGINALS.

16 THE COURT: ALL RIGHT. DID YOU HAVE ANYTHING
17 FURTHER TO SAY IN RECORD TO THE MODIFICATIONS OF THESE
18 NOTES, MS. ABRAMSON?

19 MS. ABRAMSON: YOUR HONOR, YOU KNOW, I'M IN AN
20 IMPOSSIBLE SITUATION. IT WOULD BE VERY NICE AND FULL OF
21 SELF-INTEREST FOR FOR ME TO MAKE A STATEMENT ABOUT ON
22 HOW MANY POINTS I VIGOROUSLY DISAGREE WITH DR. VICARY'S
23 TESTIMONY.

24 BUT BY THE SAME TOKEN I THINK IT VIOLATES
25 PRIVILEGES AND DUTIES I OWE TO MY CLIENT. AS MUCH AS I
26 WOULD LIKE TO CONTRADICT HIM FOR MY OWN PERSONAL
27 REASONS, I DON'T FEEL I CAN DO THAT IN THIS SETTING. I
28 HAVE ALWAYS BEEN WILLING TO DO THAT TO THE COURT IN

-11118

1 CAMERA. I JUST DON'T SEE ANY WAY, UNLESS MY CO-COUNSEL
2 WANT TO CALL ME AS A WITNESS -- UNLESS THEY WANT TO CALL

3 ME AS A WITNESS, AND I HAVEN'T HEARD FROM ANY OF THEM
4 THAT THEY WANT TO DO THAT YET, I DON'T FEEL FREE TO
5 SIMPLY MAKE THAT RECORD JUST TO BENEFIT MYSELF.

6 THE COURT: OKAY. MR. GESSLER, YOU HAD A MOTION
7 THAT YOU BROUGHT UP AT THE COMMENCEMENT OF THESE
8 PROCEEDINGS.

9 MR. LEVIN: YOUR HONOR, BEFORE WE LEAVE THIS
10 ISSUE --

11 THE COURT: YES.

12 MR. LEVIN: I WANTED TO KNOW IF THE PROSECUTION
13 IS GOING TO GO INTO ANY OTHER AREAS WITH THIS WITNESS
14 OTHER THAN WHAT WE HAVE DETERMINED IN THIS 402. AND IF
15 THERE ARE, I WOULD LIKE TO KNOW WHAT THEY ARE AND HAVE
16 THOSE MATTERS SUBJECT TO FURTHER 402 HEARINGS.

17 THE COURT: WELL, WITH THE UNDERSTANDING THAT NO
18 ONE KNOWS WHAT HE'S GOING TO SAY UNTIL THE QUESTION IS
19 ASKED OF THE WITNESS, DO YOU ANTICIPATE OTHER AREAS OF
20 INQUIRY?

21 MR. CONN: YES. THIS IS CROSS-EXAMINATION OF A
22 DEFENSE WITNESS. WHAT CAUSED THE BREAK IN THE
23 PROCEEDINGS, AND WHICH WARRANTED THIS DISCUSSION FOR THE
24 PAST SEVERAL DAYS, WAS THE DELETIONS.

25 BUT ASIDE FROM THE DELETIONS, I THINK THAT
26 THERE IS SOME RELEVANT MATERIAL IN HIS NOTES THAT WE
27 WOULD WANT TO GET INTO.

28 MR. LEVIN: WELL, HE SHOULD BE SUBJECT TO THE

1 SAME 402 RULINGS TO DETERMINE WHETHER THEY'RE RELEVANT
2 AND ADMISSIBLE, AND YOU KNOW, WITHIN THE SCOPE OF WHAT
3 WE'VE BEEN DISCUSSING.

4 THE COURT: I AM NOT GOING TO CONDUCT ANY FURTHER
5 HEARINGS ON THOSE SUBJECTS. THE ONLY REASON FOR THESE
6 HEARINGS WAS TO DEAL WITH THESE DELETIONS AND POTENTIAL
7 PREJUDICE.

8 THE PROSECUTION IS ON NOTICE THAT THEY ARE
9 NOT TO MAKE ANY INQUIRY OF THE WITNESS REGARDING ANY
10 CONVERSATIONS THAT WERE REPORTED TO HIM BY ERIK MENENDEZ
11 OF CONVERSATIONS HE HAD WITH HIS BROTHER OR ANY
12 STATEMENTS ATTRIBUTED TO HIS BROTHER WITHOUT NOTICE TO
13 THE COURT OUTSIDE THE PRESENCE OF THE JURY.

14 MR. LEVIN: AND ALSO, YOUR HONOR, THE -- I WOULD
15 ASK THE COURT TO EITHER DIRECTLY ADMONISH DR. VICARY --
16 I WOULD PREFER IF THE COURT DIRECTLY ADMONISH
17 DR. VICARY NOT TO BLURT OUT, OR ANY WAY, DIRECTLY OR
18 INDIRECTLY, INFER THE REASONS FOR THE DELETIONS. ANY
19 MATTERS THAT THE COURT HAS INDICATED IT FINDS WOULD BE
20 PREJUDICIAL TO ERIK MENENDEZ DURING HIS TESTIMONY,
21 WHETHER THAT COMES FROM THIS COURT OR THE PROSECUTION, I
22 THINK NEEDS TO BE COMMUNICATED WITH THE WITNESS.

23 THE COURT: ALL RIGHT. MR. GESSLER?

24 MR. FITZGERALD: I WILL ADVISE DR. VICARY, AND
25 PERHAPS COUNSEL CAN IN THE MORNING.

26 THE COURT: ALL RIGHT.

27 MR. GESSLER?

-11116

1 STAND BY BOTH THE MOTION FOR MISTRIAL THAT I MADE LAST
2 WEEK, AND THE MOTION THAT I MADE THIS MORNING TO RELIEVE
3 MS. ABRAMSON -- TO HAVE THE COURT RELIEVE MS. ABRAMSON,
4 AND I DO THAT ON THE GROUNDS THAT, ALTHOUGH THE COURT
5 HAS CERTAINLY ENGAGED IN DAMAGE CONTROL TODAY, THAT MY
6 GREAT FEAR IS THAT THE DAMAGE FROM WHAT HAPPENED -- I
7 GUESS IT WAS THURSDAY NOW, I GET LOST IN TRACK OF THE
8 DAYS -- BUT I THINK IT WAS THURSDAY MORNING WHEN
9 DR. VICARY WAS ON THE STAND AND TOLD THE JURY THAT THAT
10 REDACTION WAS AT THE REQUEST OF MS. ABRAMSON.

11 THAT IN MY OPINION CANNOT BE CURED. THE
12 HARM THAT THAT HAS TO LYLE MENENDEZ CANNOT BE OVERCOME.
13 I KNOW OF NO WAY TO OVERCOME IT.

14 I WOULD ASK, AND WE WILL ASK IF MY MOTION
15 IS DENIED, FOR AN INSTRUCTION FROM THE COURT AND A
16 STIPULATION FROM THE PROSECUTION, BUT I DON'T BELIEVE
17 THAT THOSE IN AND OF THEMSELVES WILL BE ADEQUATE.

18 I THINK THE ONLY WAY TO PROTECT LYLE
19 MENENDEZ' RIGHTS TO KEEP THIS PENALTY TRIAL FOR HIM FROM
20 NOW BECOMING A REFERENDUM WITH THE JURY AS TO THEIR
21 VIEWS OF LESLIE ABRAMSON, THAT ONCE WE HAD THE
22 ACTIVITIES OF THURSDAY MORNING, THAT IT'S TOO LATE TO
23 UNDUE THAT IN ANY WAY OTHER THAN REMOVING HER AS AN

24 ISSUE IN THE CASE, AND I DO SAY THAT WITH THE SAME
25 RELUCTANCE I DID THIS MORNING, BOTH AS A FRIEND AND AN
26 ADMIRER OF MS. ABRAMSON AS A LAWYER.

27 THE COURT: OKAY.

28 AS TO THE MOTION FOR MISTRIAL, THIS WAS

-11115

1 ALREADY ARGUED, AND THE COURT STATED ITS REASONS FOR
2 DENYING THE MOTION LAST WEEK. I JUST DON'T FIND THAT
3 THERE IS ANY PREJUDICE TO THE DEFENDANT, LYLE MENENDEZ,
4 BY REASON OF THE DISCLOSURES MADE BY THE WITNESS
5 REGARDING THE ACTIVITIES OF MS. ABRAMSON, AND CERTAINLY
6 THE PEOPLE HAVE OFFERED TO STIPULATE THAT THE COUNSEL
7 FOR LYLE MENENDEZ DID NOT HAVE THE UNREDACTED NOTES; AND
8 FURTHER, THE COURT WOULD ADMONISH THE JURY NOT TO
9 CONSIDER THE CONDUCT OF COUNSEL IN ANY FASHION IN MAKING
10 THEIR DECISION AS TO WHAT PUNISHMENT TO IMPOSE IN THIS
11 CASE; THAT THE CONDUCT OF COUNSEL IS TOTALLY IRRELEVANT
12 TO THAT DECISION, AND SHOULD NOT IN ANY WAY BE DISCUSSED
13 OR ENTERED INTO IN THEIR DELIBERATIONS.

14 SO THE COURT WOULD MAKE THAT STATEMENT TO
15 THE JURY.

16 THEREFORE, I FIND NO GROUNDS TO GRANT THE
17 MOTION FOR MISTRIAL.

18 AS FAR AS THE MOTION TO REMOVE MS. ABRAMSON
19 MADE BY LYLE MENENDEZ. AGAIN, SHE IS COUNSEL FOR ERIK

20 MENENDEZ, NOT LYLE MENENDEZ. HE HAS NO STANDING TO SEEK
21 HER REMOVAL, AND THE CURATIVE METHODS AND MEASURES THAT
22 THE COURT HAS OUTLINED AND HAS SPENT A GREAT DEAL OF
23 TIME DISCUSSING WITH COUNSEL IN REGARD TO THE NATURE OF
24 THE FURTHER EXAMINATION OF DR. VICARY CERTAINLY ADDS
25 ADDITIONAL INSULATION TO LYLE MENENDEZ FROM ANY NEGATIVE
26 IMPACT THAT MIGHT BE CAUSED BY THE TESTIMONY OF
27 DR. VICARY REGARDING MS. ABRAMSON.

28 MR. GESSLER: THE ONLY STATEMENT I WOULD ASK TO

-11114

1 MAKE, YOUR HONOR, IS THAT THE -- I DISAGREE WITH THE
2 COURT AS TO WHETHER WE HAVE STANDING FOR LYLE MENENDEZ
3 TO RAISE THIS ISSUE. I DO THAT ON FEDERAL GROUNDS, THAT
4 I THINK ANY DEFENDANT AT ANY TIME IN ANY CASE -- AND
5 MOST PARTICULARLY IN A CAPITAL CASE -- HAS STANDING TO
6 ASK THE COURT TO TAKE ANY ACTION THAT WILL ASSURE DUE
7 PROCESS OF LAW FOR HIS RIGHTS.

8 AND IT WAS IN THAT SPIRIT THAT I MADE THIS
9 MOTION, WITH OR WITHOUT CALIFORNIA CASE LAW, ALTHOUGH
10 THERE IS CALIFORNIA CASE LAW.

11 AND SO I WOULD JUST BRING THAT TO THE
12 COURT'S ATTENTION AS FAR AS THE STANDING ISSUE IS
13 CONCERNED.

14 THE COURT: OKAY. WELL, THE ONE CASE THAT YOU
15 CITED TO THE COURT WAS A CASE IN WHICH A DEFENDANT

16 DIDN'T COOPERATE WITH HIS LAWYER, AND THE LAWYER
17 THEREFORE STOOD MUTE, OR SAT MUTE THROUGHOUT THE
18 PROCEEDINGS, AND DIDN'T DO ANYTHING ON BEHALF OF HIS
19 CLIENT.

20 AND THE SUPREME COURT CLEARLY FOUND THAT
21 THAT WAS INEFFECTIVE ASSISTANCE OF COUNSEL. THAT HAD
22 NOTHING TO DO WITH A CODEFENDANT THAT HAS HIS OWN RIGHT
23 TO COUNSEL.

24 MR. GESSLER: YOUR HONOR, I REALIZE THAT, AS DOES
25 THE COURT. BUT THE BASIS UPON WHICH THAT CASE WAS
26 DECIDED IS, OF COURSE, FAR BROADER THAN THAT, AND THAT
27 IS ON THE COURT'S POWERS TO CONTROL THE PROCEEDINGS TO
28 ASSURE A FAIR TRIAL FOR EVERYONE BEFORE IT, AND THAT WAS

-11113

1 THE REASON THE MOTION WAS BROUGHT.

2 YOU COULD SAY THAT THAT CASE HAD A
3 DIFFERENT NAME, AND WASN'T NAMED MENENDEZ, AND THAT
4 WOULD DISTINGUISH IT. THERE ARE MANY WAYS IN WHICH A
5 DEFENDANT CAN BE DENIED A FAIR TRIAL BY THINGS THAT
6 HAPPEN; SOME OF THOSE BY ACTS OF HIS COUNSEL, SOME OF
7 THOSE BY ACTS OF SOMEBODY ELSE'S COUNSEL.

8 IT MAKES NO DIFFERENCE HOW IT COMES ABOUT.
9 THE END RESULT IS THE COURT'S ABILITY AND DUTY TO ENSURE
10 A FAIR TRIAL FOR ALL PARTIES, AND IN THIS CASE
11 SPECIFICALLY FOR LYLE MENENDEZ, AND IT WAS WITH THAT

12 THAT THE MOTION HAS BEEN RAISED.

13 THE COURT: OKAY. WELL, THE COURT FEELS THAT IT
14 IS CERTAINLY FULFILLING ITS OBLIGATION IN THAT REGARD BY
15 THE MEASURES THAT I HAVE OUTLINED HERE, BEARING IN MIND,
16 AGAIN, THAT WE ARE TALKING NOT JUST ABOUT THE TRIAL OF
17 LYLE MENENDEZ, BUT THE TRIAL OF ERIK MENENDEZ, WHICH IS
18 PROPERLY JOINED AND PRESENTED TO A SINGLE JURY. AND THE
19 PROCEDURES I HAVE OUTLINED, I THINK, ARE APPROPRIATE TO
20 PROTECT THE RIGHTS OF LYLE MENENDEZ.

21 MR. LEVIN, YOU BEGAN THESE PROCEEDINGS WITH
22 A MOTION.

23 MR. LEVIN: YES, YOUR HONOR.

24 I ALSO VERY REGRETFULLY MOVE THAT
25 MS. ABRAMSON BE REMOVED AS COUNSEL FROM THESE
26 PROCEEDINGS. I CITED THE COURT TO THE LUCEV CASE, WHICH
27 I BELIEVE GIVES THE COURT THE INHERENT POWER TO RELIEVE
28 COUNSEL WHERE IT BECOMES EVIDENT THAT COUNSEL'S

-11112

1 PERFORMANCE HAS CREATED A SITUATION OF CONFLICT THAT
2 WOULD IMPINGE UPON THE RIGHTS AND CONTINUED RIGHTS OF
3 THE DEFENDANT.

4 IN THIS CASE, MS. ABRAMSON ASSERTED HER
5 PRIVILEGE AGAINST SELF-INCRIMINATION. SHE HAS WITHDRAWN
6 THAT. SHE NOW SAYS THAT SHE WANTS TO TELL THE COURT
7 CERTAIN REASONS FOR THESE REDACTIONS, BUT REFUSES TO DO

8 SO.

9 AT THIS POINT, THERE IS NO WAY IN WHICH
10 ERIK MENENDEZ CAN IMPEACH OR REHABILITATE THIS WITNESS,
11 BECAUSE HE DOES NOT KNOW EXACTLY AND PRECISELY WHAT
12 MS. ABRAMSON WOULD SAY.

13 FRANKLY, IT IS MY OPINION THAT SHE
14 SHOULDN'T SAY ANYTHING, BECAUSE I DON'T KNOW WHAT IT IS
15 THAT SHE WOULD SAY, WHETHER SHE WOULD MAKE MATTERS WORSE
16 FOR MR. MENENDEZ, OR WHETHER SHE WOULD SAY SOMETHING
17 THAT WOULD SOMEHOW NEGATIVELY AFFECT HIS RIGHTS.

18 THE COURT: ARE YOU SAYING YOU HAVE NOT SPOKEN
19 WITH HER ABOUT THESE REDACTIONS AND THE VARIOUS EVENTS
20 THAT WERE DESCRIBED BY DR. VICARY?

21 MR. LEVIN: NOT SPECIFICALLY.

22 THE COURT: ARE YOU SAYING THAT FOR SOME REASON
23 YOU ARE FORECLOSED FROM DOING THAT; THAT THERE WOULD BE
24 SOME REASON THAT WOULD PREVENT YOU FROM TALKING TO HER
25 AND FINDING OUT WHAT SHE KNOWS AND WHAT SHE WOULD SAY IF
26 SHE WAS CALLED AS A WITNESS?

27 MR. LEVIN: I THINK THAT I AM IN A VERY DELICATE
28 POSITION WITH RESPECT TO THAT, BECAUSE THEN I WOULD HAVE

-11111

1 TO BE ASSESSING THE CREDIBILITY OF MY CO-COUNSEL, AND
2 THEN I WOULD BE IN THE CONFLICTING POSITION OF TRYING TO
3 DETERMINE WHAT WOULD BE THE BEST POSITION FOR ERIK

4 MENENDEZ TO BE IN.

5 I SUPPOSE ONE COULD LOOK AT THIS IN TERMS
6 OF ASSESSING IT TO ITS SIMPLEST FORM OF SAYING EITHER
7 MS. ABRAMSON COMMITTED MISCONDUCT IN 1993, INCOMPETENCE
8 IN 1996, OR SHE DIDN'T. NOW, WHICH POSITION WOULD IT BE
9 BETTER FOR ERIK MENENDEZ TO BE IN?

10 I DON'T KNOW. I WOULD ASSUME THAT IT WOULD
11 BE BETTER FOR ERIK MENENDEZ TO TAKE THE POSITION IN THAT
12 SITUATION THAT MS. ABRAMSON WAS INCOMPETENT FOR HIM.

13 NOW, IF I TRY TO PUT ON ANY EVIDENCE OR
14 TAKE --

15 THE COURT: WHEN YOU SAY BETTER FOR HIM, WHAT ARE
16 YOU TALKING ABOUT? FOR APPELLATE PURPOSES, OR BEFORE
17 THIS JURY?

18 MR. LEVIN: I AM NOT SAYING BETTER FOR HIM FOR
19 APPELLATE REVIEW. I AM SAYING THAT IT IS UNCERTAIN TO
20 ME WHAT IS IN THE BEST INTERESTS OF ERIK MENENDEZ WITH
21 RESPECT TO WHAT POSITION TO TAKE IN FRONT OF THIS JURY.

22 I DON'T KNOW. I DO KNOW THIS: THAT I
23 WOULD NEVER, UNDER ANY CIRCUMSTANCE, CALL MS. ABRAMSON
24 AS A WITNESS BEFORE THIS JURY. I DON'T THINK IT'S
25 PROPER, I DON'T THINK THAT IT WOULD BE BENEFICIAL, AND I
26 DON'T REALLY CARE WHAT IT IS THAT SHE WOULD SAY. I
27 DON'T THINK THAT IT WOULD BENEFIT ERIK MENENDEZ.

28 ALL I KNOW IS THAT AT THIS POINT IN TIME

1 ERIK MENENDEZ STANDS IN A VERY PRECARIOUS POSITION. I

2 THINK HIS LIFE IS AT THE PRECIPICE.

3 I THINK THAT MS. ABRAMSON'S PARTICIPATION

4 IN THESE PROCEEDINGS WILL, INDEED, AS MR. GESSLER

5 INDICATED, CAUSE A REFERENDUM BY THE JURY TO DECIDE

6 WHETHER OR NOT MS. ABRAMSON COMMITTED MISCONDUCT, AND

7 RETURN A DEATH JUDGMENT, IF INDEED THEY FEEL THAT SHE

8 DID, WHICH IS NOT PROPER CONSIDERATION.

9 I THINK IT'S IN ERIK MENENDEZ' BEST

10 INTERESTS TO HAVE MS. ABRAMSON REMOVED. I KNOW IT

11 CREATES A SITUATION OF AN EMPTY CHAIR. I AM PREPARED TO

12 DEAL WITH THAT, AND THAT IS WHAT I THINK IS IN THE BEST

13 INTERESTS OF MR. MENENDEZ AT THIS TIME.

14 AND ALSO FOR PURPOSES OF CONTROL. IF

15 INDEED THE ISSUE TURNS ON CONFLICT-FREE COUNSEL, IF

16 INDEED ERIK MENENDEZ' RIGHTS HINGE ON MY CREDIBILITY AND

17 MY ABILITY TO BRING THIS CASE TO A CONCLUSION,

18 REGARDLESS OF WHATEVER TACTICAL OR STRATEGIC POSITIONS

19 THERE MAY BE, I HAVE TO BE IN A POSITION TO DO SO. I

20 KNOW OF NO OTHER WAY -- ALTHOUGH IT IS TERRIBLY PAINFUL

21 FOR ME TO STAND BEFORE THE COURT AND MAKE THIS

22 ASSERTION -- FOR ME TO BE IN CONTROL OF THOSE STRATEGIC

23 DECISIONS WITH MS. ABRAMSON ON THE CASE.

24 SO EITHER I REMAIN ON THE CASE AS

25 CO-COUNSEL, CONFLICT-FREE OR NOT, NOT IN A POSITION TO

26 REALLY ADVANCE THE RIGHTS OF ERIK MENENDEZ IN THE BEST

27 MANNER THAT I DEEM APPROPRIATE TO SEEK A SUCCESSFUL

28 PENALTY DETERMINATION FOR HIM, OR I AM A CONFLICT-FREE

1 LAWYER AND THUS IN CHARGE OF SUCH STRATEGIC DECISIONS.

2 SO IN THAT MANNER I SEE OF NO WAY, AT LEAST
3 ON THE COUNSEL ISSUE, FOR MS. ABRAMSON TO CONTINUE.

4 THE COURT: OKAY.

5 THE COURT HAS DEVOTED A GREAT DEAL OF TIME
6 TO THIS ISSUE, BECAUSE ALTHOUGH MR. GESSLER ASKED THE
7 COURT TO RELIEVE COUNSEL FOR ERIK MENENDEZ, AND THE
8 COURT IN MY VIEW RIGHTLY DENIED THAT REQUEST, THE FOCUS
9 REALLY IS ON THE BEST INTEREST OF THE DEFENDANT, ERIK
10 MENENDEZ, IN THIS REGARD.

11 THE COURT DID APPOINT INDEPENDENT COUNSEL
12 TO CONFER WITH AND ADVISE MR. MENENDEZ ON THIS SUBJECT,
13 AND ALL OF YESTERDAY WAS DEVOTED JUST TO THAT PURPOSE.
14 MUCH OF YESTERDAY WAS DEVOTED TO FIRST LOCATING COUNSEL,
15 HAVING COUNSEL COME IN, COUNSEL CONFERRING WITH THE
16 DEFENDANT, AND VARIOUS DISCUSSIONS WITH THE DEFENDANT
17 REGARDING HIS DESIRES AS TO WHETHER HE WANTED
18 MS. ABRAMSON TO CONTINUE OR NOT.

19 AND I AM STILL IN A POSITION OF WANTING TO
20 KNOW THE POSITION OF ERIK MENENDEZ ON THAT SUBJECT, AND
21 I WANT TO RESOLVE THIS TODAY.

22 SO LET ME INQUIRE OF ERIK MENENDEZ, IF
23 YOU'RE PREPARED TO STATE YOUR POSITION?

24 MR. LEVIN: YOUR HONOR, I -- I WOULD ASK THE
25 COURT TO CONDUCT THE REMAINDER OF THESE PROCEEDINGS,

26 ESPECIALLY WITH RESPECT TO ERIK MENENDEZ, IN CAMERA. I
27 THINK THAT HE IS PERHAPS GOING TO SAY SOMETHING THAT'S
28 THE RESULT OF AN ATTORNEY-CLIENT COMMUNICATION, OR HE'S

-11108

1 GOING TO SAY SOMETHING ON THE RECORD THAT IS GOING TO BE
2 PERHAPS HARMFUL TO HIS CASE, AND I PERSONALLY DON'T FEEL
3 THAT HE SHOULD HAVE TO MAKE ANY PUBLIC DECLARATION AT
4 THIS TIME.

5 MS. ABRAMSON: I AGREE, YOUR HONOR. I THINK IT
6 SHOULD BE IN CAMERA.

7 THE COURT: ANYBODY ELSE WISH TO BE HEARD ON THAT
8 SUBJECT? OTHER THAN YOU, MR. MENENDEZ.

9 OKAY. THEN WE'LL EXCLUDE THE PUBLIC.

10 MS. O'NEILL: HOLD ON, YOUR HONOR.

11 THE COURT: AND THE DISTRICT ATTORNEY AND THE
12 L.A. TIMES AND EVERYBODY ELSE. THIS IS A CLOSED HEARING
13 IN WHICH THE COURT WILL DISCUSS THE MATTER OF
14 REPRESENTATION WITH ERIK MENENDEZ AND HIS LAWYERS, WITH
15 THE UNDERSTANDING THAT HE MIGHT BE CALLED UPON TO
16 DISCLOSE PRIVILEGED INFORMATION, AND THEREFORE THE COURT
17 FINDS GOOD CAUSE TO CLOSE THE HEARING.

18 HOWEVER, THIS MATTER WILL BE BACK IN
19 SESSION AS SOON AS WE DEAL WITH MR. MENENDEZ AND THAT
20 ISSUE.

21 SO, WE'LL BE IN A BRIEF RECESS.

22 (PAGES 54429 THROUGH 54442
23 WERE HELD IN CAMERA AND SEALED
24 BY ORDER OF THE COURT.)

25
26
27
28

-11093

1 (THE FOLLOWING PROCEEDINGS WERE
2 HELD IN OPEN COURT OUT OF THE
3 PRESENCE OF THE JURY:)

4

5 THE COURT: LET ME ASK YOU, MR. LEVIN, WHY DID
6 YOU NEED THAT INVESTIGATOR?

7 MR. LEVIN: THAT WAS ONLY FOR DR. VICARY.

8 MS. ABRAMSON: I WOULD JOIN IN THAT, YOUR HONOR.

9 THE COURT: DO YOU STILL NEED HIM?

10 MR. LEVIN: NO, JUST FOR TODAY. I ONLY NEEDED
11 YOU TO SIGN SO HE WILL GET PAID FOR TODAY, SO I CAN GET
12 HIM ON THE CASE.

13 THE COURT: JUST FOR THIS ONE DAY ONLY?

14 MR. LEVIN: YES, JUST FOR TODAY.

15 THE COURT: HOW MANY HOURS WAS THAT?

16 MR. LEVIN: WELL, HE WAS HERE ALL DAY. I HAD HIM
17 HERE IN THE MORNING. HE WAS HERE EIGHT HOURS.

18 THE COURT: ALL RIGHT.

19 THE DISTRICT ATTORNEY IS BACK, THE COUNSEL
20 FOR THE CODEFENDANT IS BACK, AND WE ARE NOW READY TO
21 RESUME.

22 THE ISSUE IN REGARD TO THE REPRESENTATION
23 OF ERIK MENENDEZ HAS BEEN RESOLVED, AND BOTH MR. LEVIN
24 AND MS. ABRAMSON WILL CONTINUE AS COUNSEL.

25 THE COURT FINDS THERE IS NO CONFLICT OF
26 INTEREST BETWEEN THE REPRESENTATION OF MS. ABRAMSON AND
27 THE DEFENDANT THAT WOULD REQUIRE HER REMOVAL; AND
28 THEREFORE, THERE IS NO BASIS TO REMOVE HER AS COUNSEL

-11092

1 FOR THE DEFENDANT, ERIK MENENDEZ, ALONG WITH MR. LEVIN.

2 ALL RIGHT. TOMORROW MORNING WE WILL RESUME
3 WITH THE TESTIMONY OF DR. VICARY.

4 ARE THERE ANY OTHER MATTERS THAT COUNSEL
5 WISH TO ADDRESS REGARDING THAT TESTIMONY, OTHER THAN THE
6 ONE ISSUE HELD IN ABEYANCE?

7 MS. NAJERA: YES, YOUR HONOR -- NO. I'M SORRY.
8 JUST THE ONE ISSUE HELD IN ABEYANCE.

9 THE COURT: DO YOU HAVE SOMETHING THAT YOU WANT
10 TO SHOW ME? IS THERE SOMETHING?

11 MS. NAJERA: YES, YOUR HONOR. I BELIEVE THAT YOU
12 ASKED US TO FIND IN THE TRANSCRIPTS WHERE IT WAS THAT
13 THIS ISSUE CAME UP ONCE BEFORE, AND IT DID IN FACT COME

14 UP ONCE BEFORE WHERE DR. VICARY WAS ASKED BY
15 MS. BOZANICH AT THE TIME THAT ERIK MENTIONED SEXUAL
16 ABUSE: "DID YOU TAKE SEXUAL HISTORY FROM HIM?"
17 DR. VICARY ANSWERED: "NO, I DID NOT."
18 AND THEN MS. ABRAMSON ASKED FOR A SIDE BAR,
19 AND NEVER BOTHERED TO CLEAR UP THE RECORD THAT IN FACT
20 HE HAD, AND THAT IS ON PAGE 23503 IN VOLUME 135, AND
21 THAT'S WHERE THE DISCUSSION TOOK PLACE.
22 THE COURT: 23503?
23 MS. NAJERA: 23503, VOLUME 135.
24 MS. ABRAMSON: YOUR HONOR, I WOULD ASK THE COURT
25 TO READ THEM THROUGH. I AM WELL-FAMILIAR WITH THAT
26 CITATION, AND THERE IS NOTHING IN -- TAKING A SEXUAL
27 HISTORY IS A SPECIFIC THING THAT ONE DOES, AND IF YOU
28 WILL READ THROUGH THE NEXT -- HIS FOLLOWING ANSWERS AS

-11091

1 TO WHY IT WAS HE DIDN'T, YOU WILL SEE THERE IS NO
2 INCONSISTENCY, AND THAT THAT'S NOT A BASIS TO INTRODUCE
3 THIS EVIDENCE.
4 THE COURT: I WILL LOOK AT THAT.
5 IT ALSO OCCURS TO ME THAT THERE WAS SOME
6 DISCUSSION BETWEEN THE COURT AND MRS. BOZANICH AND MS.
7 ABRAMSON ON THE SUBJECT OF WHETHER SHE SHOULD ASK THOSE
8 QUESTIONS, AND THINGS ALONG THOSE LINES, AND I DON'T
9 RECALL THE SPECIFICS OF IT, BUT WHAT YOU JUST MENTIONED

10 IS WHAT I WAS THINKING ABOUT.

11 MS. NAJERA: THE DISCUSSION FOLLOWED. THAT'S
12 WHAT STARTED THE DISCUSSION. AND APART FROM THAT, YOUR
13 HONOR, THEN APPARENTLY --

14 THE COURT: THERE WAS DISCUSSION BEFORE SHE ASKED
15 THAT QUESTION, I BELIEVE. THAT WAS MY RECOLLECTION.

16 MS. NAJERA: THERE IS DISCUSSION IMMEDIATELY
17 FOLLOWING THAT AS WELL.

18 AND WITH REGARDS TO THE DISCUSSION THAT THE
19 COURT ALSO RECALLED ASKING COUNSEL TO TALK TO DR. VICARY
20 ABOUT, MR. KURIYAMA DID IN FACT HAVE A DISCUSSION WITH
21 DR. VICARY WHERE HE ASKED HIM WHETHER HE KNEW OF ANY
22 HOMOSEXUAL RELATIONSHIP WITH INDIVIDUALS OTHER THAN HIS
23 FATHER, AND DR. VICARY TOLD MR. KURIYAMA THAT NO, HE HAD
24 NO OTHER KNOWLEDGE, AND THEN HE WAS ASKED --

25 MS. ABRAMSON: GO AHEAD.

26 MS. NAJERA: THAT WAS THE SUBSTANCE OF THE
27 CONVERSATION, IF MR. KURIYAMA RECALLED WHAT HE TESTIFIED
28 TO.

-11090

1 THE COURT: THIS IS MR. KURIYAMA SPEAKING WITH
2 DR. VICARY?

3 MS. ABRAMSON: NO. MR. KURIYAMA SPEAKING WITH
4 THE COURT.

5 THE COURT: YOU JUST SPOKE TO MR. KURIYAMA ABOUT

6 THAT?

7 MS. NAJERA: THAT'S CORRECT, YOUR HONOR.

8 MS. ABRAMSON: WELL, IT'S CERTAINLY NOT ON THE
9 RECORD THAT WAY, YOUR HONOR. WHAT'S ON THE RECORD THAT
10 MR. KURIYAMA REPORTS BACK TO THE COURT IS THAT HE HAS
11 HANDED DR. VICARY SOME RECENT POLICE REPORTS, AND
12 MR. KURIYAMA REPRESENTS TO THE COURT THAT DR. VICARY --
13 YOU WILL SEE. IT'S ON THE RECORD.

14 THE COURT: WHY DON'T YOU FIND THOSE THINGS IN
15 THE RECORD.

16 MS. ABRAMSON: HERE, JUDGE.

17 THE COURT: IS THAT ALL THAT YOU HAVE, WHAT YOU
18 JUST TOLD ME ABOUT?

19 MS. NAJERA: THAT'S ALL, YOUR HONOR.

20 THE COURT: MS. ABRAMSON, GIVE ME THE CITATION.

21 MS. ABRAMSON: JUDGE, I HAD THE 402 HEARING.

22 AND HERE IT IS, JUDGE. LET ME JUST HAND IT
23 TO YOU. THIS IS A COPY OF THAT 402 HEARING ON THAT
24 ISSUE. IT SHOWS YOU HOW IT BEGAN WITH MR. KURIYAMA'S
25 REPRESENTATIONS, AND WHERE IT GOES.

26 THE COURT: OKAY. THIS IS PAGE 23556 THROUGH TWO
27 23572.

28 MS. ABRAMSON: DECEMBER 2ND, '93.

-11089

1 MS. NAJERA: YOUR HONOR, IT'S VOLUME 135. IT'S

2 THE SEALED PART OF IT, SO IT IS TAKEN OUT OF THE

3 TRANSCRIPT, WHICH IS 135. SO I IMAGINE IT'S 135-A.

4 THE COURT: OKAY.

5 AND THIS, MS. ABRAMSON, YOU BELIEVE

6 REFLECTS THE CONVERSATION MR. KURIYAMA HAD ABOUT

7 DR. VICARY?

8 MS. ABRAMSON: YEAH. I THINK IT STARTS OUT WITH

9 MR. KURIYAMA MAKING REPRESENTATIONS TO THE COURT, YOUR

10 HONOR.

11 THE COURT: OKAY. I WILL READ THAT, AND I WILL

12 ALSO READ VOLUME 135, THE PAGE CITED BY THE PROSECUTION

13 AT PAGE 23503.

14 AND WAS THE MATERIAL THAT YOU REFERRED TO

15 INVOLVING MR. KURIYAMA BEFORE 23505, MS. NAJERA, OR

16 AFTER THAT?

17 MS. NAJERA: IT'S BEFORE THAT, YOUR HONOR.

18 THE COURT: OKAY. AND THAT'S IN AN UNSEALED OR

19 SEALED VOLUME?

20 MS. NAJERA: THAT IS IN THE UNSEALED VOLUME.

21 THE COURT: OKAY. VOLUME 135?

22 MS. NAJERA: CORRECT.

23 THE COURT: OKAY. OKAY.

24 ANYTHING ELSE NOW RELATING TO THE TESTIMONY

25 OF DR. VICARY?

26 MS. ABRAMSON: NOT AT THE MOMENT, YOUR HONOR, BUT

27 I AM SURE WE WILL THINK OF SOMETHING OVERNIGHT.

28 THE COURT: YOU BETTER NOT. HE IS GOING TO BE ON

1 THE WITNESS STAND FIRST THING IN THE MORNING.

2 MR. LEVIN: YOUR HONOR, I WOULD ASK THAT BEFORE
3 THE WITNESS TAKES THE STAND IN FRONT OF THE JURY THAT
4 THE COURT CONDUCT AN INQUIRY OF EACH JUROR INDIVIDUALLY
5 CONCERNING ANY EXPOSURE TO ANY PUBLICITY.

6 THE COURT: MY VIEW IS WE'RE GOING TO START WITH
7 THE TESTIMONY OF DR. VICARY. AT SOME POINT I WILL MAKE
8 INQUIRY, BUT I DON'T SEE IT HAS TO BE DONE RIGHT AWAY,
9 BEFORE THE JURY FORGETS WHAT IT LOOKS LIKE TO SEE A
10 WITNESS ON THE WITNESS STAND.

11 MR. LEVIN: I WILL STATE, YOUR HONOR, THAT THIS
12 MATTER HAS GOTTEN EXTENSIVE PUBLICITY, PERHAPS MORE
13 PUBLICITY THAN ANYTHING ELSE THAT HAS HAPPENED IN THE
14 CASE THUS FAR, AND I CANNOT ENVISION THAT ANY MEMBER OF
15 THE JURY, IF NOT ALL OF THEM, HAVE NOT BEEN EXPOSED TO
16 THEM OR SEEN HEADLINES THAT MS. ABRAMSON TOOK THE 5TH
17 AMENDMENT, AND WHAT EFFECT IT MIGHT HAVE ON THEM, AND
18 WHAT THE COURT IS GOING TO DO.

19 I WOULD ASK THAT SUCH INQUIRY BE TAKEN
20 BEFORE THE WITNESS TESTIFIES.

21 MR. GESSLER: WE JOIN IN THAT MOTION, YOUR HONOR.

22 THE COURT: I WILL DO IT AT SOME POINT, BUT I
23 WANT TO GET STARTED WITH THE WITNESS, AND I DON'T SEE
24 THAT THERE IS ANY DIFFERENCE DOING IT AT THE OUTSET OR
25 SOMETIME LATER.

26 MR. FITZGERALD: WHAT TIME DO YOU WANT DR. VICARY

27 HERE, YOUR HONOR?

28 THE COURT: 8:30. 8:30 PROMPTLY.

1 MR. FITZGERALD: OKAY.

2 THE COURT: WE WILL BE IN RECESS UNTIL TOMORROW

3 AT 8:30.

4 (AT 5:40 P.M. PROCEEDINGS WERE

5 ADJOURNED UNTIL 8:30 A.M. THE

6 FOLLOWING DAY.)

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 THE PEOPLE OF THE STATE OF)
5 CALIFORNIA,)

6 PLAINTIFFS,)
7)

8 VS.) NO. BA 068880

9 ERIK GALEN MENENDEZ, AND)

JOSEPH LYLE MENENDEZ,)

10 DEFENDANTS.)
11)

12 REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

13 TUESDAY, APRIL, 9, 1996

14 VOLUME 324

15 (SEALED PAGES 54204 THROUGH 54221)

(SEALED PAGES 54332 THROUGH 54363)

16 (SEALED PAGES 54429 THROUGH 54442)

19 APPEARANCES:

20 (SEE APPEARANCE PAGE)

1 APPEARANCES:

2
3 FOR THE PEOPLE: GIL GARCETTI
4 DISTRICT ATTORNEY
5 BY: DAVID CONN, DEPUTY
6 AND
7 CAROL NAJERA, DEPUTY
8 18000 CRIMINAL COURTS BLDG.
9 210 WEST TEMPLE STREET
10 LOS ANGELES, CA 90012
11

12
13 FOR THE DEFENDANT
14 JOSEPH LYLE MENENDEZ: MICHAEL P. JUDGE,
15 PUBLIC DEFENDER
16 BY: CHARLES GESSLER, DEPUTY
17 AND
18 TERRI TOWERY, DEPUTY
19 210 WEST TEMPLE
20 LOS ANGELES, CA 90012
21

22 FOR THE DEFENDANT
23 ERIK GALEN MENENDEZ: LESLIE ABRAMSON
24 ATTORNEY AT LAW
25 4929 WILSHIRE BOULEVARD
26 SUITE 940
27 LOS ANGELES, CA 90010
28
29 BARRY LEVIN, ESQ.
30 11661 SAN VICENTE BOULEVARD
31 LOS ANGELES, CA 90049
32

33
34 MARY LU MURPHY
35 CSR NO. 5178
36 MARILYN FADALE,
37 CSR NO. 4547
38 OFFICIAL REPORTERS

1 INDEX FOR VOLUME 324 PAGES 54203 THROUGH 54449

2
3 DAY DATE SESSION PAGE VOL.
4

4 TUESDAY, APRIL 9, 1996 A.M. 54203 324
TUESDAY, APRIL 9, 1996 P.M. 54309 324

5

PROCEEDINGS

6

7 MOTION TO RELIEVE
MS. ABRAMSON

8 BY MR. GESSLER 54221 324

9 WITHDRAWAL OF
5TH-AMENDMENT RIGHTS

10 BY MS. ABRAMSON 54231 324

11

ARGUMENT RE MOTION TO LIMIT

12 DR. VICARY'S TESTIMONY 54364 324

13 RULING 54398 324

14 RULING 54421 324

15

16 CHRONOLOGICAL INDEX OF WITNESSES

17

WITNESSES: DIRECT CROSS REDIRECT RECROSS VOL.

18

VICARY,

19 WILLIAM

(402)

20 (CONT'D) 54309-C 324

54332-C 324

21

25 LEGEND:

26 A = MS. ABRAMSON

C = MR. CONN

27 G = MR. GESSLER

K = MS. TOWERY

28 L = MR. LEVIN

N = MS. NAJERA

1 EXHIBITS INDEX

2 EXHIBITS: MARKED RECEIVED VOL.
(NONE MARKED THIS VOLUME.)

