

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 VS.) NO. BA 068880

8 ERIK GALEN MENENDEZ, AND)

9 JOSEPH LYLE MENENDEZ,)

10 DEFENDANTS.)

11
12 REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

13 WEDNESDAY, APRIL 10, 1996

14 VOLUME 325

15 (SEALED PAGES 54477 THROUGH 54478)
16 (SEALED PAGES 54565 THROUGH 54566)

17
18 APPEARANCES:

19 (SEE APPEARANCE PAGE)

1 APPEARANCES:

2

FOR THE PEOPLE: GIL GARCETTI
3 DISTRICT ATTORNEY
BY: DAVID CONN, DEPUTY
4 AND
CAROL NAJERA, DEPUTY
5 18000 CRIMINAL COURTS BLDG.
210 WEST TEMPLE STREET
6 LOS ANGELES, CA 90012

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8

FOR THE DEFENDANT
9 JOSEPH LYLE MENENDEZ: MICHAEL P. JUDGE,
PUBLIC DEFENDER
10 BY: CHARLES GESSLER, DEPUTY
AND
11 TERRI TOWERY, DEPUTY
210 WEST TEMPLE
12 LOS ANGELES, CA 90012

13

14

FOR THE DEFENDANT
15 ERIK GALEN MENENDEZ: LESLIE ABRAMSON
ATTORNEY AT LAW
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SUITE 940
17 LOS ANGELES, CA 90010

18

BARRY LEVIN, ESQ.
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19 LOS ANGELES, CA 90049

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21

MARY LU MURPHY
22 CSR NO. 5178
MARILYN FADALE,
23 CSR NO. 4547
OFFICIAL REPORTERS

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54450

1 VAN NUYS, CALIFORNIA; WEDNESDAY, APRIL 10, 1996

2 9:10 A.M.

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

4 (APPEARANCES AS HERETOFORE NOTED.)

5 (MARILYN A. FADALE, OFFICIAL REPORTER.)

6 (MARY LU MURPHY, OFFICIAL REPORTER.)

7

8 (THE FOLLOWING PROCEEDINGS WERE

9 HELD IN OPEN COURT, OUT OF THE

10 PRESENCE OF THE JURY:)

11

12 THE COURT: ALL RIGHT. IN THE TRIAL, THE

13 DEFENDANTS ARE IN COURT WITH THEIR LAWYERS, THE

14 PEOPLE ARE HERE.

15 WHILE WE'RE WAITING FOR THE JURY TO COME

16 OVER, WE HAVE A FEW LOOSE ENDS TO DEAL WITH.

17 FIRST OF ALL, DEALING WITH THE SCOPE OF

18 THE TESTIMONY OF THE WITNESS, DR. VICARY, THERE WERE

19 SOME ISSUES THAT I HELD IN ABEYANCE UNTIL I HAD A
20 CHANCE TO REVIEW SOME MATERIAL. AND I NEED A LITTLE
21 MORE ASSISTANCE FROM COUNSEL ON SOME MATTERS HERE.

22 ON THIS PAGE 7, THE UPPER PORTION,
23 DELETED PORTION, AND THE LAST LINE OF THAT DELETION,
24 WAS THERE TESTIMONY DURING THE PROCEEDINGS HERE, IN
25 THIS TRIAL, FROM THE DEFENDANT, ERIK MENENDEZ,
26 WHETHER ON CROSS OR OTHERWISE, REGARDING HIS
27 AWARENESS THAT HIS PARENTS WERE LOCKING DOORS?

28 MS. ABRAMSON: IT'S IN THE TAPE-RECORDED

54451

1 INTERVIEW OF, I THINK, SEPTEMBER 17TH, YOUR HONOR.

2 THE COURT: WAS HE ALSO QUESTIONED ABOUT
3 THAT?

4 MS. ABRAMSON: I DON'T REMEMBER.

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

6 (ATTORNEY LEVIN AND DEFENDANT, ERIK
7 MENENDEZ, CONFER SOTTO VOCE.)

8

9 THE COURT: MY FOCUS IS WHETHER OR NOT THIS
10 IS IMPEACHING OF HIS TESTIMONY.

11 MS. ABRAMSON: NO.

12 MR. LEVIN: YOUR HONOR, I RECALL MR. MENENDEZ
13 TESTIFYING THAT THEY WERE LOCKING THEIR DOORS.

14 MS. ABRAMSON: SO IT'S NOT IMPEACHING, YOUR
15 HONOR.

16 THE COURT: WELL, THAT IS THE DEFENSE
17 POSITION.

18 I WANT TO HEAR THE PEOPLE'S POSITION AS
19 WELL, SINCE THEY ARE OFFERING THE EVIDENCE, AND SEE
20 IF THEY HAVE ANY DIFFERENT VIEW.

21 MS. ABRAMSON: YOU'RE ONLY TALKING ABOUT THAT
22 ONE LINE, I TAKE IT?

23 THE COURT: THAT'S WHAT I'M ASKING ABOUT.

24 MS. ABRAMSON: THE REST OF THE MATERIAL WE
25 HAVEN'T BEEN -- I DON'T RECALL SPECIFICALLY WHAT THE
26 DEFENDANT'S TESTIMONY WAS IN THAT REGARD. I DO
27 RECALL THERE WAS SOME QUESTIONING CONCERNING THE
28 LOCKING OF DOORS. I THINK THIS IS IMPEACHING OF THE

54452

1 DEFENDANT BECAUSE THE CONTEXT OF THIS IS HE SAYS
2 THAT THE PARENTS WERE APPARENTLY AWARE THAT THEY
3 WERE --

4 MS. ABRAMSON: THIS IS THE PRIVILEGED MATTER
5 THAT WE HAVE ASKED NOT BE LAID OUT ON THE RECORD.

6 THE COURT: OKAY. WELL, I'LL HEAR YOUR CLAIM
7 OF PRIVILEGE AND AS TO THE BASIS FOR IT, AND THEN
8 I'LL PURSUE THE ARGUMENT OF THE DISTRICT ATTORNEY IN

9 THAT REGARD.

10 BUT I'M REALLY FOCUSING ON THIS LAST

11 QUESTION AT THIS POINT.

12 MR. CONN: RIGHT.

13 INsofar AS THAT, I SIMPLY DON'T RECALL

14 OFFHAND WHAT HIS TESTIMONY WAS. I THINK THAT THE

15 OVERALL CONTEXT OF THE SEVERAL LINES TOGETHER DOES

16 IMPEACH HIS TESTIMONY.

17 THE COURT: AND THE NEXT QUESTION HAS TO DO

18 WITH PAGE 29, THAT CENTER SECTION THAT WAS DELETED.

19 WAS THIS INCIDENT DESCRIBED DURING THE

20 TESTIMONY OF THE DEFENDANT? I RECALL IT COMING OUT

21 DURING TESTIMONY OF A REBUTTAL WITNESS. BUT MY

22 QUESTION IS: DID IT COME OUT DURING THE DEFENDANT'S

23 TESTIMONY?

24 MS. ABRAMSON: NO, YOUR HONOR.

25 MR. CONN: I DON'T RECALL WHETHER IT DID OR

26 NOT.

27 MS. ABRAMSON: IT ONLY CAME OUT ON REBUTTAL

28 THROUGH THE PEOPLE'S WITNESS. WE WEREN'T ALLOWED TO

54453

1 GET INTO IT, THAT'S CORRECT.

2 MR. GESSLER: AT THE VERY END OF REBUTTAL.

3 THE COURT: I RECALL IT COMING OUT IN THAT

4 PHASE.

5 MS. ABRAMSON: I RECALL OUR BEING FORECLOSED
6 FROM --

7 MR. LEVIN: I REMEMBER, YOUR HONOR. I HAD
8 ATTEMPTED TO, AND THE PROSECUTION HAD OBJECTED. THE
9 COURT SUSTAINED THE PROSECUTION'S OBJECTION, AND
10 LATER ON, BECAUSE OF FURTHER DEVELOPMENTS, IT BECAME
11 RELEVANT, AND I WAS ALLOWED TO GO INTO IT.

12 THE COURT: SO MY INQUIRY OF THE PROSECUTION
13 THEN IS: IS THIS IMPEACHING OF THE DEFENDANT'S
14 TESTIMONY IN ANY WAY?

15 MR. CONN: NO. I'M NOT CONCERNED SO MUCH
16 ABOUT THIS PARTICULAR STATEMENT. I'LL WITHDRAW
17 THAT.

18 MY CONCERN IS REALLY IN REGARD TO THE
19 OTHER ALLEGATIONS, OR THE OTHER STATEMENTS
20 CONCERNING HOMOSEXUALITY.

21 THE COURT: ALL RIGHT. AND THERE'S ALSO
22 REFERENCE --

23 THE BAILIFF: JUDGE, THE JURY IS WALKING.

24 THE COURT: OKAY. GO AHEAD.

25 (THE JURY ENTERS THE JURY ROOM

26 AND THE PROCEEDINGS WERE RESUMED.)

27 THE COURT: THE NEXT QUESTION I HAVE RELATES
28 TO PAGE 28, THE BOTTOM PORTION OF IT.

1 MR. LEVIN: I'M SORRY, YOUR HONOR. WHAT

2 PAGE?

3 THE COURT: PAGE 28, THE BOTTOM PORTION.

4 WAS THERE CROSS-EXAMINATION OF THE

5 DEFENDANT, OR DIRECT EXAMINATION OF THE DEFENDANT,

6 OR EXAMINATION OF MS. SMITH, REGARDING THE MOTHER'S

7 REACTION OR KNOWLEDGE OF WHY THE DEFENDANT BROKE UP

8 WITH MS. SMITH?

9 MS. ABRAMSON: THOSE ARE TWO DIFFERENT

10 QUESTIONS.

11 THE COURT: WELL, I'M JUST ASKING WHETHER

12 THERE WAS ANY SUCH TESTIMONY.

13 MS. ABRAMSON: NOTHING LIKE WHAT'S HERE.

14 THE COURT: I DON'T CARE IF IT WAS LIKE

15 WHAT'S HERE. I'M JUST ASKING IF THERE'S ANYTHING IN

16 THE RECORD THAT RELATES TO THOSE SUBJECTS, EITHER BY

17 MS. SMITH OR BY THE DEFENDANT?

18 MS. ABRAMSON: I DON'T THINK SO.

19 MR. LEVIN: NO. I DON'T BELIEVE SO.

20 MR. CONN: I DON'T RECALL.

21 THE COURT: IT SEEMS TO ME THERE WAS

22 TESTIMONY, WHETHER IT'S THIS TRIAL OR THE FIRST

23 TRIAL, FROM THE DEFENDANT REGARDING THE MOTHER'S

24 CONCERN ABOUT THE DEFENDANT NOT DATING GIRLS. AND

25 I'M TALKING ABOUT ERIK MENENDEZ. PERHAPS I'M WRONG.

26 MS. ABRAMSON: IF IT WAS IN THE FIRST TRIAL,

27 YOUR HONOR -- IT MAY HAVE BEEN IN THE FIRST TRIAL.

54455

1 THE COURT: I'M NOT TALKING ABOUT YOUR

2 ARGUMENT. I'M JUST ASKING FOR --

3 MS. ABRAMSON: THERE WAS SOME VERY CRYPTIC
4 INFORMATION IN THE FIRST TRIAL THAT HAS NOT BEEN
5 BROUGHT IN FRONT OF THIS JURY.

6 THE COURT: IS THERE ANY RECOLLECTION BY THE
7 PROSECUTION ON THAT SUBJECT?

8 MR. CONN: I BELIEVE IN THIS TRIAL THE
9 DEFENDANT ALSO SPOKE ABOUT THE FACT THAT HIS MOTHER
10 WANTED HIM TO --

11 MS. ABRAMSON: GET A GIRLFRIEND.

12 MR. CONN: -- DATE GIRLS; AND, IN FACT, GAVE
13 HIM A SIX-MONTH DEADLINE. THAT CAME OUT IN THIS
14 TRIAL. I JUST DON'T REMEMBER ANY SPECIFIC REFERENCE
15 TO WHAT OCCURRED FOLLOWING THE BREAK-UP WITH
16 KIRSTEN.

17 MS. ABRAMSON: THAT'S BEFORE HE EVER MET
18 KIRSTEN.

19 THE COURT: WAS THERE ANY TESTIMONY IN THIS
20 FIRST TRIAL AS TO THE DEFENDANT'S REASONS FOR
21 BREAKING UP WITH HIS GIRLFRIEND?

22 MS. ABRAMSON: NO.

23 MR. CONN: NO, I BELIEVE THAT KIRSTEN
24 INDICATED THAT SHE WAS NEVER GIVEN A REASON. I
25 THINK THE DEFENDANT, ERIK MENENDEZ, ATTRIBUTED THE
26 BREAK-UP TO HIS FATHER IN SOME WAY.

27 MS. ABRAMSON: NO. I DON'T BELIEVE SO. THAT
28 HE ATTRIBUTED THE TELEPHONE CALL, BUT THAT'S NOT

54456

1 WHAT BROKE THEM UP.

2 THE COURT: WELL, THAT IS SEPARATE FROM --

3 MS. ABRAMSON: RIGHT.

4 THE COURT: -- THE MOTHER'S ACTIVITIES IN THIS
5 REGARD.

6 MY INQUIRY THEN IS: WHY WOULD THIS BE
7 IMPEACHING OF THE DEFENDANT'S TESTIMONY?

8 MR. CONN: WELL, AGAIN, I THINK THAT -- I'M
9 LOOKING AT IT IN THE BROADER PERSPECTIVE, NOT SO
10 MUCH WHETHER THERE IS A SINGLE LINE OR SENTENCE IN
11 HERE WHICH IMPEACHES HIS TESTIMONY.

12 BUT HERE IS A PERSON -- ERIK MENENDEZ
13 DESCRIBED A SITUATION OCCURRING WITH HIS FATHER
14 WHICH IGNORES THE REALITY, WHICH HE EXPRESSED TO
15 DR. VICARY, CONCERNING HOMOSEXUAL RELATIONSHIPS. I
16 THINK THOSE HOMOSEXUAL RELATIONSHIPS PUT HIS
17 ALLEGATIONS CONCERNING HIS FATHER IN A DIFFERENT

18 PERSPECTIVE. IT SHEDS NEW LIGHT ON IT, AND MIGHT
19 ALLOW THE JURY TO CONCLUDE THAT DEFENDANT'S
20 STATEMENTS CONCERNING HIS FATHER WERE NOT TRUTHFULLY
21 EXPRESSED TO THEM IN LIGHT OF THESE HOMOSEXUAL
22 EXPERIENCES.

23 THE COURT: WELL, MY QUESTION THEN IS: WHAT
24 IS THE CONNECTION BETWEEN THE TWO? HOW DO YOU LEAP
25 THE GAP BETWEEN CONSENSUAL HOMOSEXUAL RELATIONS AND
26 ALLEGATIONS OF SEXUAL MOLESTATION OVER AN EXTENDED
27 PERIOD OF TIME BY THE FATHER?

28 MR. CONN: WELL, IF YOU LOOK AT THE TESTIMONY

54457

1 OF THE DEFENDANT IN A BROADER CONTEXT, HE DESCRIBES,
2 FOR EXAMPLE, HIS REACTION TO HIS ENTIRE EXPERIENCE
3 WITH HIS FATHER AND HOW IT JUST AFFECTED HIS SENSE
4 OF SELF AND HIS SELF-IMAGE, AND HE WANTED TO KILL
5 HIMSELF, HE FELT SUICIDAL, AND HE HATED HIMSELF, AND
6 COULDN'T LIVE WITH HIMSELF.

7 MEANWHILE, HE'S RUNNING AROUND HAVING
8 HOMOSEXUAL --

9 MS. ABRAMSON: OBJECTION. THAT REALLY
10 OVERSTATES FOR PURPOSES OF --

11 THE COURT: THIS IS AN ARGUMENT BY THE
12 PROSECUTION.

13 MS. ABRAMSON: WELL, HE SHOULD BE MORE
14 RESPONSIBLE IN ARGUING SO SENSITIVE AN AREA, YOUR
15 HONOR.

16 THE COURT: THAT IS SOMETHING THAT ALL
17 LAWYERS SHOULD KEEP IN MIND. AT THIS POINT I'M
18 ADDRESSING THE PROSECUTION.

19 MR. CONN: IT SEEMS TO ME THAT THAT IS THE
20 BASIC INCONSISTENCY HERE; THAT IF HIS FATHER WAS
21 TRULY ABUSING HIM, I THINK WE SHOULD FOCUS ON THE
22 REACTIONS, THE CLAIMED REACTION OF THE DEFENDANT,
23 AND HOW HE FELT AS A RESULT OF THESE EXPERIENCES,
24 AND WHAT HIS EXPERT SAID CONCERNING THESE
25 EXPERIENCES; THAT IF IT HAD SUCH A HORRENDOUS
26 EFFECT UPON HIM, WHY WOULD HE BE ENGAGING IN THIS
27 TYPE OF BEHAVIOR, AND HOW HE WAS DISGUSTED WITH
28 HIMSELF EVERY TIME HIS FATHER WOULD APPROACH HIM IN

54458

1 SOME SEXUAL WAY. IF HE WAS HAVING THE SAME SEXUAL
2 CONDUCT WITH OTHER YOUNG MEN, WOULD HE REALLY BE AS
3 HORRIFIED AS HE CLAIMED HERE IN COURT?

4 I MEAN, COUNSEL WANTS TO FOCUS ON THE
5 FACT THAT ONE IS CONSENSUAL AND ONE IS NOT. I THINK
6 WHAT THE JURY IS LEFT WITH IS THE IMPRESSION THAT HE
7 WAS TRULY HORRIFIED BECAUSE THE WHOLE HOMOSEXUAL

8 EXPERIENCE WAS SOMETHING THAT HE FOUND SO DEGRADING
9 AND OFFENSIVE, AND SOMETHING WHICH AFFECTED HIM
10 PERSONALLY AND AFFECTED HIS RELATIONSHIPS. IF HE
11 WAS HAVING HOMOSEXUAL EXPERIENCES, IT PUTS THE WHOLE
12 THING IN A WHOLE NEW PERSPECTIVE.

13 MS. ABRAMSON: JUDGE --

14 MR. LEVIN: LET ME RESPOND.

15 MS. ABRAMSON: ALL RIGHT.

16 MR. LEVIN: I THOUGHT WE KIND OF LOST THAT
17 THINKING WHEN THE LEGISLATURE ACKNOWLEDGED THAT EVEN
18 THE PRIOR SEXUAL HISTORY OF A WOMAN WHO'S CLAIMING
19 SHE'S BEEN RAPED IS IRRELEVANT. IT SEEMS TO ME
20 SOMEWHAT ANALOGOUS.

21 EVEN IF WE WERE TO ADOPT
22 MR. CONN'S THEORY, WHICH IS NOT SUPPORTED BY WHAT
23 THIS WITNESS WOULD SAY, THESE ARE JUST HIS THEORIES
24 AND HIS IDEAS. DR. VICARY CERTAINLY WOULDN'T AGREE
25 WITH MR. CONN, NOR WOULD ANY THEORY BE ACCEPTED BY
26 ANY RATIONAL EXPERT IN THIS CASE.

27 BUT THE POINT IS, ASSUMING ARGUENDO THAT
28 THERE EVEN WAS CONSENSUAL RELATIONS WITH OTHER MEN,

54459

1 TO SUGGEST THAT THAT WOULD MEAN THAT IT WOULD AFFECT
2 THE WAY HE WOULD ACT OR BEHAVE WHEN HIS FATHER

3 FORCED HIMSELF UPON HIM IS RIDICULOUS. THAT'S THE
4 SAME KIND OF THINKING AND LOGIC THAT WE REJECT, AND
5 WE DO NOT ALLOW COURTS TO HEAR IN TRADITIONAL RAPE
6 CASES.

7 IF IT'S NOT ADMISSIBLE IN A RAPE CASE
8 WHERE A FEMALE IS INVOLVED, IT CERTAINLY SHOULDN'T
9 BE ADMISSIBLE IN THIS TRIAL, AND CERTAINLY SHOULDN'T
10 BE ADMISSIBLE IN A PENALTY TRIAL TO BE USED IN AN
11 IMPROPER WAY TO REBUT OR REFUTE THE CORE OF THE
12 DEFENSE.

13 MS. ABRAMSON: I WOULD ONLY ADD BRIEFLY TO
14 THAT THAT THE CONTEXT -- AND JUST TO CLARIFY, SINCE
15 THE PROSECUTION'S EXAGGERATING WHAT THIS EVIDENCE
16 IS.

17 I MEAN, THE EVIDENCE IS TWO CHILDHOOD
18 CONTACTS WITH OTHER CHILDREN, WHICH IS NORMAL FOR
19 EVERYBODY. THAT'S NOT HOMOSEXUALITY FOR CHILDREN TO
20 EXPERIMENT OR TOUCH EACH OTHER.

21 THE COURT: WHY DO YOU SAY THAT IT'S
22 CHILDHOOD WHEN YOU HAVE SOMEBODY 16, 17 YEARS OLD?

23 MS. ABRAMSON: I'M NOT FINISHED. PLEASE.
24 YOU ALWAYS YELL AT ME NOT TO INTERRUPT YOU. I WOULD
25 ASK THE COURT'S PATIENCE.

26 THERE ARE THREE DIFFERENT THINGS BEING
27 TALKED ABOUT HERE, THREE DIFFERENT PEOPLE WITH WHOM
28 THE DEFENDANT HAD SOME SEXUAL CONTACT. THEY'RE ALL

1 BEING LUMPED TOGETHER.

2 TWO OF THEM ARE ORDINARY, NORMAL,
3 EVERYBODY-DOES-IT-CHILDHOOD TOUCHING AT 10 AND AT
4 11.

5 THE THIRD IS THIS THING AT 16, WHICH IS
6 DESCRIBED AS A SLIGHT RELATIONSHIP. AND WITH
7 RESPECT TO THAT ONE IN PARTICULAR, THE INFORMATION
8 IN THESE NOTES, INDICATE THAT BECAUSE OF THE
9 MOLESTATION BY HIS FATHER OVER ALL THESE YEARS, THE
10 DEFENDANT HAD CONCERNS ABOUT HIS SEXUALITY. AND
11 THIS RELATIONSHIP WAS AN EFFORT ON HIS PART TO FEEL
12 HIS WAY THROUGH, BECAUSE HE WAS VERY CONFLICTED AND
13 DISTURBED BY WONDERING IF HAVING PUT UP WITH HIS
14 FATHER'S ADVANCES, WHETHER HE WAS HOMOSEXUAL OR
15 NOT.

16 THAT WAS THE WHOLE PURPOSE OF THIS
17 RELATIONSHIP. IT IS A PRODUCT -- A PRODUCT OF THE
18 MOLESTATION, AND NOT SOMETHING INCONSISTENT WITH
19 IT. AT LEAST THAT'S THE INFORMATION THAT APPEARS
20 FROM THESE NOTES WHICH IS VERY CRYPTIC.

21 BUT THE FACT OF THE MATTER IS, IF
22 THERE'S ANY PROBATIVE VALUE TO THAT, AND THE PEOPLE
23 HAVE NOT OFFERED A THEORY OR OFFERED EVIDENCE TO
24 SUPPORT THEIR THEORY THAT YOU COULD HATE -- I MEAN,
25 THERE ARE MANY PEOPLE, UNFORTUNATELY, WHO HATE

26 THEMSELVES FOR BEING HOMOSEXUAL.
27 THE COURT: OKAY. LET'S CUT IT OFF.
28 MS. ABRAMSON: THE POINT IS --

54461

1 THE COURT: FINISH IT OFF.
2 MS. ABRAMSON: THE POINT IS, HIS FEELINGS OF
3 SHAME AND EMBARRASSMENT HAD TO DO WITH THE NATURE OF
4 THE CORRUPTING OF THE FATHER/SON RELATIONSHIP AND
5 HIS FEELING HE WAS HIS FATHER'S SLAVE. HE WASN'T
6 TALKING ABOUT --
7 THE COURT: OKAY. YOU'VE BEEN HEARD.
8 MS. ABRAMSON: THANK YOU.
9 THE COURT: WHAT IS YOUR RESPONSE, MR. CONN,
10 AS TO HOW THIS WOULD TIE IN TO THIS CASE AT THIS
11 STAGE OF THE PROCEEDINGS? AGAIN, WE'RE IN THE
12 PENALTY PHASE AND DEALING PRIMARILY WITH THE
13 PEOPLE'S REBUTTAL, REBUTTING THE EVIDENCE PRESENTED
14 BY THE DEFENSE IN THE PENALTY PHASE MORE THAN
15 ANYTHING ELSE.
16 MR. CONN: WELL, I THINK THAT THE KEY IS
17 SIMPLY THAT IT DOES GO TO ERIK MENENDEZ'
18 CREDIBILITY, AND HIS CREDIBILITY REMAINS AN ISSUE
19 VERY MUCH IN THIS PHASE OF THE TRIAL, AS IT DID IN
20 THE GUILT PHASE. THE JURY IS INSTRUCTED TO CONSIDER

21 ALL THE EVIDENCE FROM THE GUILT PHASE, AS WELL AS
22 THE EVIDENCE FROM THE PENALTY PHASE. AND WHEN THEY
23 GO BACK INTO THAT JURY ROOM, THEY WILL BE
24 CONSIDERING PERHAPS AS A FACTOR IN MITIGATION THAT
25 THE DEFENDANT WAS SEXUALLY ABUSED BY HIS FATHER IN
26 SOME VERY HORRIBLE WAY.

27 I'M SURE THE ALLEGATIONS SUGGESTED BY
28 COUNSEL IN THE GUILT PHASE WILL BE REPEATED IN SOME

54462

1 WAY IN THE PENALTY PHASE, THAT HE WAS IN FACT
2 SEXUALLY ABUSED. WE EVEN GOT A HINT OF THAT THROUGH
3 THE TESTIMONY OF DR. VICARY.

4 SO I THINK THAT IT REMAINS AN ISSUE IN
5 THIS PHASE OF THE TRIAL. IT GOES RIGHT TO THE HEART
6 OF THE DEFENSE AND WHETHER THE DEFENDANT IS TO BE
7 GIVEN SOME MITIGATION FOR THESE KILLINGS BECAUSE OF
8 THE FACT THAT HE WAS SEXUALLY ABUSED.

9 SO I THINK THAT IT IS IMPORTANT FOR THIS
10 JURY TO BE ABLE TO SEE THE ALLEGATIONS OF THE
11 DEFENDANT IN CONTEXT, THAT WHILE THE DEFENSE IS FREE
12 TO ARGUE THAT THERE IS ALWAYS A POSSIBILITY THAT HE
13 WAS SEXUALLY ABUSED, WE NOW HAVE NEW INFORMATION
14 THAT HAS JUST COME TO LIFE -- LIGHT -- WHICH BEARS
15 UPON THESE ALLEGATIONS AND PUTS THOSE ALLEGATIONS

16 INTO BETTER PERSPECTIVE. AND I THINK THAT THIS
17 INFORMATION WILL BE OF ASSISTANCE TO THE JURY IN
18 EVALUATING HIS CLAIMS.

19 THE COURT: ALL RIGHT. FIRST OF ALL, LET ME
20 SAY THAT MY INITIAL INQUIRY OF THE PARTIES WAS TO
21 DETERMINE WHETHER OR NOT ANY OF THIS INFORMATION WAS
22 SPECIFICALLY IMPEACHING OF THE DEFENDANT'S
23 TESTIMONY, AND I HAVE BEEN PRESENTED WITH NOTHING IN
24 THAT REGARD THAT WOULD CONSTITUTE IMPEACHMENT
25 REGARDING A SPECIFIC STATEMENT OF THE DEFENDANT
26 DURING HIS TESTIMONY, OR WOULD BE IMPEACHING OF ANY
27 OTHER WITNESS RELATING TO THIS HOMOSEXUAL CONTACT.

28 THE BROADER ARGUMENT OF THE PROSECUTION

54463

1 AS PRESENTED HERE, ARGUING THAT THIS EVIDENCE HAS
2 PROBATIVE VALUE, IF IT DOES, AS PRESENTED HERE --
3 BEARING IN MIND WE'RE IN THE PENALTY PHASE AND
4 ISSUES ARE MORE LIMITED -- IT APPEARS TO ME, BASED
5 UPON THE ARGUMENT OF THE DEFENSE, THAT THE DEFENSE
6 POSITION THAT THIS EVIDENCE IS POTENTIALLY
7 PREJUDICIAL AS THE DEFENSE PERCEIVES IT, THE COURT
8 FINDS THAT, REALLY, THE PROBATIVE VALUE OF THIS
9 EVIDENCE IS OUTWEIGHED BY ITS POTENTIAL PREJUDICE.
10 I JUST DON'T SEE HOW AT THIS STAGE OF THE

11 PROCEEDINGS THAT IT IS PROBATIVE.

12 I WOULD OBSERVE THAT, NUMBER ONE,
13 DR. VICARY'S TESTIMONY ON THE SUBJECT OF SEXUAL
14 MOLESTATION BY THE FATHER HAS BEEN VERY LIMITED IN
15 HIS TESTIMONY HERE. IF THERE IS EXAMINATION OF
16 DR. VICARY ON THIS SUBJECT ON REDIRECT, THIS WHOLE
17 AREA COULD VERY WELL BE OPENED UP IN THE MANNER IN
18 WHICH THE PROSECUTION INDICATES IT WOULD CHOOSE TO
19 EXAMINE DR. VICARY, AND WOULD HAVE DONE SO; AND,
20 THEREFORE, IF THERE IS REFERENCE DURING REDIRECT
21 EXAMINATION OF DR. VICARY TO OPINIONS REGARDING
22 SEXUAL MOLESTATION BY THE FATHER, I COULD VISUALIZE
23 THIS MATERIAL BEING BROUGHT BEFORE THE JURY IN
24 CROSS-EXAMINATION OF
25 DR. VICARY TO ATTACK HIS CREDIBILITY AND HIS
26 OPINIONS.

27 IN REVIEWING THE MATERIAL THAT WAS
28 PRESENTED IN THE FIRST TRIAL, SPECIFICALLY TALKING

54464

1 AT PAGE 33,556, IT DOES APPEAR THAT DURING THAT
2 PROCEEDING THE PROSECUTION WAS UNDULY LIMITED IN ITS
3 OPPORTUNITY TO CROSS-EXAMINE DR. VICARY BY REASON OF
4 THESE DELETIONS AND MODIFICATIONS IN THE NOTES OF
5 DR. VICARY, THAT THE PROSECUTION DIDN'T HAVE THIS

6 INFORMATION AVAILABLE TO IT TO EFFECTIVELY
7 CROSS-EXAMINE DR. VICARY AND CHALLENGE THE
8 TESTIMONY. AND THE TESTIMONY AS HE PRESENTED IT IN
9 THAT HEARING, AT THE VERY LEAST, COULD BE
10 CHARACTERIZED AS INCOMPLETE IN REGARDS TO THIS
11 SUBJECT.

12 THE ISSUE THEN IS WHETHER OR NOT,
13 BECAUSE OF THAT OCCURRING IN THE FIRST TRIAL, THAT
14 GIVES THE PROSECUTION THE OPPORTUNITY TO
15 CROSS-EXAMINE DR. VICARY AND IMPEACH HIS TESTIMONY
16 HERE BY REASON OF HIS INCOMPLETE ANSWERS AND THE
17 NATURE OF HIS TESTIMONY IN THAT PROCEEDING.

18 AGAIN, THERE IS A WEIGHING PROCESS HERE,
19 WEIGHING THE CREDIBILITY OF THE WITNESS AND THE WAY
20 IN WHICH IT IS ATTACKED AND THE OTHER MEANS
21 AVAILABLE TO ATTACK HIS CREDIBILITY, VERSUS THE
22 POTENTIAL PREJUDICE, AND BRINGING IN MATTERS THAT
23 ARE EXTRANEIOUS TO THE ISSUES IN THIS CASE AS THEY
24 ARE NOW FRAMED.

25 THERE IS NOTHING PRESENTED TO ME THAT
26 INDICATES THAT, FROM THE PROSECUTION'S OFFERS OF
27 PROOF, THAT THE SEXUAL ORIENTATION OF THE DEFENDANT
28 PLAYED A ROLE IN THE EVENTS OF THE WEEK OF THE

1 KILLING, THE MURDERS, AND AFFECTED THE RELATIONSHIP
2 OF THE PARENTS AND THE DEFENDANTS DURING THAT WEEK.
3 THERE HAS BEEN NO CONNECTION BETWEEN THOSE
4 ACTIVITIES, OR ANY OTHER MATERIAL EVENT LEADING UP
5 TO THE MURDERS AND THE ALLEGATIONS OF HOMOSEXUAL
6 ACTIVITY BY THE DEFENDANT.

7 SO I DON'T SEE THAT CONNECTION THAT
8 WOULD JUSTIFY THE ADMISSIBILITY OF THE EVIDENCE FROM
9 WHAT HAS BEEN PRESENTED HERE.

10 AND FURTHER, BECAUSE OF THE FACT THAT
11 DR. VICARY IS CERTAINLY SUBJECT TO IMPEACHMENT ON
12 MANY OTHER SUBJECTS AND OTHER AREAS, I DON'T FIND
13 THAT THE FACT THAT HE GAVE TESTIMONY IN THE FIRST
14 TRIAL THAT WAS AT VARIANCE WITH WHAT HE PUT IN HIS
15 NOTES WOULD OPEN THE DOOR TO EXAMINATION OF HIM ON
16 THAT TESTIMONY FROM THE TRIAL, OR ON THIS SUBJECT
17 FOR THE PURPOSE OF IMPEACHMENT.

18 THEREFORE, AT THIS STAGE, PENDING
19 DEVELOPMENTS THAT MIGHT ARISE FROM REDIRECT, I'LL
20 SUSTAIN THE OBJECTION BY THE DEFENSE TO INQUIRE INTO
21 THOSE AREAS.

22 MS. ABRAMSON: YOUR HONOR, ONE THOUGHT THAT I
23 HAVE, BECAUSE IT MAY BE VERY DIFFICULT TO REDIRECT
24 DR. VICARY AT ALL IF ANY REFERENCE WHATSOEVER TO --
25 NOT HIS OPINION -- THERE'S NO INTENTION TO ELICIT
26 HIS OPINIONS CONCERNING SEXUAL MOLESTATION OR ANY
27 ROLE THAT IT PLAYED IN THE EVENTS.

28 BUT HE USES THE REVELATION OF

1 MOLESTATION AS A POINT IN HIS TALKS WITH MY CLIENT
 2 WHERE CERTAIN UNDERSTANDINGS CAME TO HIM,
 3 DR. VICARY. OKAY?

4 THE COURT: I'M NOT GOING TO RULE NOW.

5 MS. ABRAMSON: I KNOW, JUDGE.

6 THE COURT: WAIT. JUST LISTEN TO ME. I'M
 7 NOT GOING TO RULE NOW AND GIVE YOU A PREVIEW OF WHAT
 8 WOULD OR WOULD NOT OPEN THE DOOR --

9 MS. ABRAMSON: I'M NOT ASKING YOU TO.

10 THE COURT: -- IN EXAMINATION ON THIS
 11 SUBJECT.

12 RIGHT NOW, IF YOU'RE TELLING ME HOW YOU
 13 WANT TO GO ABOUT EXAMINING THE WITNESS, IT'S NOT OF
 14 ANY VALUE. IT'S JUST CONSUMING TIME.

15 MS. ABRAMSON: I'M CONCERNED IF THIS
 16 INFORMATION WERE PRESENTED THAT THAT WOULD CHANGE
 17 ANY OPINIONS OF DR. VICARY. WE CAN FIND OUT IN TWO
 18 QUESTIONS OUTSIDE OF THE PRESENCE OF THE JURY.

19 THE COURT: I'M NOT GOING TO DO THAT.

20 MS. ABRAMSON: ALL RIGHT. I THINK THE NOTION --
 21 THERE'S AN ASSUMPTION HERE THAT THIS INFORMATION --
 22 THAT THIS RELATIONSHIP IS CONTRARY OR INCONSISTENT
 23 WITH ANY OPINION ABOUT MOLESTATION. THAT IS A FALSE
 24 ASSUMPTION.

25 THE COURT: YOU ASK THE QUESTIONS OF THE
26 WITNESS, AND WHETHER IT OPENS THE DOOR, THAT'S WHAT
27 WILL BE EVALUATED, AFTER THE QUESTIONS AND ANSWERS.
28 AND I'M NOT GOING TO DO ANYTHING OUTSIDE THE

54467

1 PRESENCE OF THE JURY IN THAT REGARD.

2 I DON'T FIND THIS IS AN AREA OF HIGH
3 PREJUDICE TO THE DEFENSE. I JUST FIND THAT AS IT'S
4 PRESENTED TO ME NOW THERE'S VERY LITTLE PROBATIVE
5 VALUE IN IT. BUT ONCE QUESTIONING BEGINS OF
6 DR. VICARY ON THESE SUBJECTS, THE PROBATIVE VALUE
7 MIGHT VERY WELL INCREASE. AND THAT'S ALL I CAN
8 SAY. I CERTAINLY DON'T VIEW IT AS AN AREA OF HIGH
9 PREJUDICE TO THE DEFENSE. IT JUST DOESN'T HAVE ANY
10 GREAT PROBATIVE VALUE, UNLESS EVENTS MIGHT OCCUR
11 THAT WOULD MAKE IT SO.

12 MS. ABRAMSON: I'D LIKE TO CHANGE THE -- JUST
13 TO MAKE THE RECORD HERE, I THINK THAT THE
14 PROSECUTION SHOULD BE PROHIBITED FROM ELICITING FROM
15 DR. VICARY ANY FURTHER INFORMATION THAT INFORMATION
16 IN HIS NOTES WAS DELETED. THEY HAVE A RIGHT TO GO
17 INTO THOSE AREAS THAT THE COURT HAS RULED THEY CAN
18 GO INTO.

19 BUT THE OBJECTION NOT TO BRING UP THE

20 ISSUE OF DELETIONS HAS TO DO WITH THE FACT THAT IT
21 RAISES THE ASSUMPTION, BASED ON HIS PREVIOUS
22 TESTIMONY, THAT THE MATTERS DELETED WERE
23 EXTRAORDINARILY SIGNIFICANT TO ME, TO THE DEFENSE,
24 AND THAT'S WHY THEY WERE DELETED.
25 AND I THINK THE COURT HAD RIGHTLY
26 INDICATED EARLIER THAT THERE'S A FALSE ASSUMPTION OF
27 WHATEVER THE REALITY IS OF WHY THINGS WERE DELETED.
28 THEY COULD HAVE BEEN DELETED BECAUSE THEY WERE SO

54468

1 VAGUE AS TO NOT BE SIGNIFICANT.
2 THE POINT IS, THE JURY IS GOING TO
3 ASSUME THAT THEY WERE -- THAT THEY WERE
4 EXTRAORDINARILY SIGNIFICANT THINGS, AND THAT'S WHY
5 THEY WERE DELETED. AND BECAUSE THE RECORD HAS IT
6 THAT I TOLD HIM TO DELETE THEM, WHETHER THAT WAS
7 OBJECTED TO BEFORE THE ANSWER, YOUR HONOR, OR NOT,
8 IS NOT REALLY THE ISSUE.
9 THE ISSUE IS THE PREJUDICIAL IMPACT OF
10 THAT INFORMATION AND HOW THE JURY MIGHT USE IT
11 IMPROPERLY TO WEIGH, NOT THE CREDIBILITY OF THE
12 DOCTOR, BUT THE IMPORTANCE OF THE INFORMATION.
13 AND SO I THINK FOR THAT REASON, SINCE
14 IT'S ALREADY BEFORE THE JURY THAT HE IS A PERSON WHO

15 CHANGED NOTES, THAT IT'S UNNECESSARY TO GO THROUGH
16 ANYMORE AND HIGHLIGHT THOSE THINGS WHICH HE DID
17 CHANGE, BECAUSE IT GIVES THEM UNDO SIGNIFICANCE.

18 THE COURT: ALL RIGHT. THE OBJECTION OR THE
19 REQUEST FOR LIMITATION ON THE PROSECUTION'S
20 EXAMINATION IS DENIED. I THINK IT'S A PROPER AREA
21 OF CROSS-EXAMINATION.

22 MS. ABRAMSON: TWO OTHER MATTERS, YOUR HONOR,
23 AND THEN MR. LEVIN, I THINK, HAS A MOTION. TWO
24 OTHER MATTERS IN LIMINE.

25 ONE, I DON'T KNOW IF THE PEOPLE INTEND
26 TO GO INTO IT.

27 THERE'S A VERY CRYPTIC, AS YOU RECALL,
28 REFERENCE TO SCRIPTS THAT APPEAR IN THESE NOTES.

54469

1 AND THERE IS A COUPLE OF PLACES WHERE THERE'S AN
2 EXTREMELY CRYPTIC REFERENCE TO RELATIVES, AND A
3 NUMBER OF DIFFERENT RELATIVES OF THE DEFENDANT,
4 INCLUDING HIS COUSIN HENRY, HIS GRANDMOTHER.

5 AND WE WOULD OBJECT TO ANY OF THOSE
6 MATTERS BEING GONE INTO, SINCE THEY HAVE NO
7 PROBATIVE VALUE WHATSOEVER.

8 THE COURT: DID YOU INTEND TO GO INTO THAT?

9 MR. CONN: THERE'S SOMETHING CONCERNING THESE

10 RELATIVES THAT YES, ARE RELEVANT.

11 THE COURT: I'LL JUST HAVE TO HEAR WHAT THE
12 QUESTIONS ARE. I'M NOT GOING TO RULE.

13 MS. ABRAMSON: THEN THE HARM IS DONE, BECAUSE
14 THE QUESTIONS -- THE QUESTION WILL BE PHRASED
15 CONTAINING THE INFORMATION THE PEOPLE SEEK TO
16 ELICIT. WE'D ASK THAT THE PEOPLE APPROACH AND GIVE
17 THE COURT THE INFORMATION SO THE COURT CAN WEIGH
18 WHETHER OR NOT QUESTIONING ABOUT RELATIVES WHO HAVE
19 BEEN SITTING HERE THROUGH MOST OF THIS TRIAL IS
20 APPROPRIATE, PARTICULARLY IF THEY HAVEN'T TESTIFIED.
21 AND I'M REFERRING TO NON-TESTIFYING RELATIVES.

22 THE COURT: WELL, I'LL ASK THAT THE
23 PROSECUTION -- BEFORE YOU ASK THOSE QUESTIONS, YOU
24 DON'T HAVE TO TELL ME WHAT THE QUESTION IS, JUST
25 FOCUS ME ON THE AREA OF THE NOTES THAT YOU PROPOSE
26 TO INQUIRE ABOUT.

27 MR. CONN: OKAY. I'LL FOCUS THE COURT NOW.

28 PAGE 71.

54470

1 THE COURT: WHAT PART OF THE PAGE?

2 MR. CONN: THE MIDDLE OF THE PAGE.

3 THE COURT: AND THE PURPOSE OF THAT INQUIRY?

4 MR. CONN: THIS IMPEACHES THE DEFENDANT

5 CONCERNING HIS STATEMENTS CONCERNING HIS
6 GRANDMOTHER. HE'S TALKING ABOUT HOW HIS GRANDMOTHER
7 WAS THIS WONDERFUL PERSON WHO HE LOVED, AND HOW HE
8 WANTED TO SET HER UP IN THE CONDOMINIUM, AND SO
9 FORTH. AND HE WAS ALWAYS CONCERNED ABOUT HIS -- HER
10 SAFETY, AND THAT'S WHY HE ATTRIBUTED, I THINK, SOME
11 OF THE SPENDING, THAT IT WAS IN HER -- FOR HER
12 BENEFIT.

13 AND HERE HE GIVES A VERY DIFFERENT VIEW
14 OF HIS GRANDMOTHER.

15 THE COURT: WHAT IS THE DEFENSE RESPONSE,
16 VERY QUICKLY?

17 MS. ABRAMSON: WELL, DESCRIBING
18 CHARACTERISTICS OR -- FIRST OF ALL, IT DESCRIBES A
19 DISPUTE HE HAD WITH HIS GRANDMOTHER OVER VISITATION.
20 AND DESCRIBING CHARACTERISTICS OF YOUR FAMILY
21 MEMBERS DOES NOT MEAN YOU DON'T LOVE THEM AND YOU
22 WOULDN'T TAKE CARE OF THEM AND YOU DON'T FEEL BAD
23 FOR WHAT YOU DID. SO IT'S NOT IMPEACHING.

24 THE COURT: CERTAINLY, THE DEFENSE HAS
25 BROUGHT FORTH DURING THE PENALTY PHASE THE
26 RELATIONSHIP OF THE DEFENDANT WITH HIS GRANDMOTHER.
27 AND HIS ATTITUDE TOWARDS HER IS RELEVANT.

28 WHAT ELSE, MR. CONN? IS THAT IT?

1 MR. CONN: YES. THAT'S IT.

2 THE COURT: OKAY. ANYTHING ELSE?

3 MS. ABRAMSON: THE OTHER THING WAS ABOUT
4 SCRIPTS, PAGE 55.

5 MR. CONN: WE HAVE SOME ADDITIONAL
6 INFORMATION CONCERNING THE COURT'S FIRST INQUIRY
7 REGARDING THE LOCKING OF THE DOORS.

8 THE DEFENDANT WAS QUESTIONED IN REGARD
9 TO THIS MATTER AT THIS TRIAL ON PAGES 45,240 AND
10 -241, AND HERE THE DEFENDANT DID ADMIT HIS BELIEF
11 THAT HIS PARENTS WERE IN FACT LOCKING THEIR DOORS.
12 HE SAYS: "ALTHOUGH I DIDN'T ACTUALLY PHYSICALLY
13 KNOW THEY LOCKED THEIR DOORS, I NEVER TRIED TO GET
14 IN THE DOOR."

15 IN OTHER WORDS, HE SAYS THAT IT WAS HIS
16 BELIEF THAT THEY WERE LOCKING THE DOORS. HOWEVER, I
17 WOULD SUBMIT THAT EVEN THOUGH HIS STATEMENT TO
18 DR. VICARY IS NOT INCONSISTENT ON ITS FACE, I WOULD
19 SUBMIT THAT, NEVERTHELESS, INQUIRY INTO THIS AREA
20 SHOULD BE PERMITTED, BECAUSE THE DEFENDANT GOES ON
21 TO SAY -- HE'S ASKED THE FOLLOWING QUESTION BY
22 MYSELF.

23 "QUESTION: IS IT TRUE,
24 MR. MENENDEZ, THAT YOUR PARENTS WERE
25 LOCKING THEIR DOORS TO THEIR BEDROOM
26 BECAUSE THEY WERE FEARFUL OF YOU
27 BEFORE THEY WERE KILLED?"

54472

1 SPECULATION IS OVERRULED BY THE COURT.

2 THE COURT SAYS: "ARE YOU ASKING

3 HIS OPINION, WHEN HE MADE THIS

4 STATEMENT IN SEPTEMBER, THAT IS, IN

5 THE SEPTEMBER INTERVIEW WITH DETECTIVE

6 ZOELLER?"

7 I SAY, "YES."

8 THE COURT OVERRULES THE OBJECTION, AND

9 THE WITNESS SAYS, "NO."

10 SO THE WITNESS IS SAYING HERE THAT IT

11 WAS NOT HIS OPINION THAT THE PARENTS WERE LOCKING

12 THEIR BEDROOM DOORS BECAUSE THEY WERE FEARFUL OF

13 HIM.

14 I WOULD SUBMIT THAT THAT IS INCONSISTENT

15 WITH THE NOTATION THAT APPEARS ON PAGE 7.

16 THE COURT: OKAY.

17 MS. ABRAMSON: I'D LIKE TO MAKE MY OFFER,

18 WHICH WOULD PUT THIS IN CONTEXT, AS TO WHETHER HE

19 WAS AWARE OF THE INFORMATION AND HOW HE BECAME AWARE

20 OF THE INFORMATION THAT APPEARS ON PAGE 7, AND

21 THAT'S WHAT I'VE BEEN WANTING TO DO FOR THREE DAYS.

22 THE COURT: YOU SAY THAT'S PRIVILEGED

23 INFORMATION. SO WE'LL PERMIT YOU TO MAKE THAT

24 OFFER.

25 BUT IS THERE ANYTHING ELSE, MR. CONN,

26 THAT YOU WANTED TO SAY THAT YOU WERE GOING TO USE TO

27 IMPEACH IN RESPONSE TO THE INQUIRY OF THE DEFENSE?

28 MR. CONN: NO, YOUR HONOR.

54473

1 MS. ABRAMSON: I STILL WANT AN ANSWER TO THE

2 REFERENCE ON PAGE 55 CONCERNING THE SCRIPTS.

3 MR. CONN: I HAVE NOTHING FURTHER.

4 THE COURT: OKAY. ALL RIGHT.

5 MR. LEVIN, YOU HAD SOMETHING?

6 MR. LEVIN: YES, YOUR HONOR.

7 I DON'T BELIEVE THAT THERE'S ANY WAY

8 THAT THE COURT COULD CURE ANY PREJUDICE THAT'S

9 RESULTED FROM DR. VICARY'S PRIOR TESTIMONY

10 CONCERNING REMOVAL OF ITEMS, AND I DON'T THINK THAT

11 THERE'S ANY RELEVANCY TO IT BEING CONDUCTED IN THE

12 FUTURE. AT THIS TIME, ON BEHALF OF ERIK MENENDEZ,

13 WE WOULD ASK FOR A MISTRIAL.

14 MS. ABRAMSON: HE WASN'T PART OF THE GROUP

15 THIS MORNING, YOU KNOW.

16 THE COURT: WOULD YOU GIVE ME ARGUMENT A

17 LITTLE MORE FULLY AS TO WHAT THE BASIS FOR A

18 MISTRIAL IS.

19 MR. LEVIN: YES. ON THE BASIS THAT THE COURT
20 IS GOING TO DENY MS. ABRAMSON'S MOTION TO ONCE AGAIN
21 ASK THE COURT TO PRECLUDE DR. VICARY FROM TESTIFYING
22 ABOUT THE FACT THAT HE DELETED MATERIALS FROM HIS
23 NOTES, BECAUSE IT'S GOING TO CARRY THE OBVIOUS
24 IMPACT THAT MS. ABRAMSON CAUSED THOSE DELETIONS.

25 THE COURT: WELL, I INDICATED YESTERDAY THAT
26 THE FACT OF DELETIONS COULD BE BROUGHT OUT TO
27 IMPEACH THE WITNESS CONCERNING HIS ATTITUDE AND
28 BEHAVIOR, AND MAKING DELETIONS IS RELEVANT.

54474

1 THE WAY HE DELETED THINGS, THE FACT HE
2 MODIFIED PAGES TO MAKE IT LOOK AS THOUGH THINGS
3 WEREN'T DELETED, ALL THAT IS RELEVANT.

4 MS. ABRAMSON: I'M CONCERNED ABOUT THAT
5 BECAUSE I DIDN'T REALIZE THE COURT WAS GOING TO
6 ALLOW THE PROSECUTION TO GO INTO THE FACT THAT HE
7 REWROTE PAGES.

8 THE COURT: I SAID THAT, YES.

9 MS. ABRAMSON: HIS TESTIMONY IS THAT I HAD
10 NOTHING TO DO WITH THAT. AND THEY'RE GOING TO
11 ASSUME THAT I TOLD HIM TO REWRITE PAGES, AND HE
12 ADMITS I NEVER DID THAT. HE TOOK THE NOTES AWAY,

13 REWROTE PAGES ON HIS OWN, THREW AWAY ORIGINALS ON
14 HIS OWN, WHICH I OBVIOUSLY DIDN'T DO.

15 AND I THINK --

16 THE COURT: LISTEN. THE DEFENSE FOR ERIK
17 MENENDEZ HAS VARIOUS MEANS TO RESPOND TO THESE
18 EVENTS. YOU ARE ELECTING NOT TO PRESENT ANY
19 EVIDENCE TO ESTABLISH YOUR VERSION OF THESE EVENTS.
20 THAT'S YOUR DECISION, AND THAT'S THE DEFENDANT'S
21 DECISION. HE HAS A RIGHT TO WAIVE ANY PRIVILEGES HE
22 HAS ON THIS SUBJECT SO THIS EVIDENCE COULD COME
23 BEFORE THE JURY IF YOU FEEL IT'S HELPFUL TO THE
24 DEFENSE. IT'S A DECISION MADE BY THE DEFENDANT,
25 ERIK MENENDEZ, AND HIS COUNSEL.

26 MR. LEVIN: WELL, YOUR HONOR, I WOULD ASK
27 THAT BEFORE WE PROCEED WITH DR. VICARY'S TESTIMONY,
28 THAT CAUTIONARY -- ALTHOUGH I DON'T BELIEVE IT WILL

54475

1 CURE WHAT I BELIEVE TO BE THE PREJUDICE FROM
2 DR. VICARY'S TESTIMONY, I WOULD ASK TO LESSEN THAT
3 IMPACT BY GIVING A CAUTIONARY INSTRUCTION BEFORE
4 DR. VICARY TESTIFIES ANY FURTHER.

5 AND I HAVE PROPOSED --

6 THE COURT: HAVE YOU SHOWN IT TO THE
7 PROSECUTION?

8 MR. LEVIN: NO. I JUST ACTUALLY --

9 THE COURT: WHY DON'T YOU SHOW IT TO THE
10 PROSECUTION. THEY'LL REVIEW IT, AND WE'LL DEAL WITH
11 IT.

12 YOUR MOTION FOR MISTRIAL IS DENIED ON
13 THE GROUNDS PREVIOUSLY STATED YESTERDAY. I DON'T
14 THINK ANYTHING HAS CHANGE FROM WHAT OCCURRED
15 YESTERDAY. IT'S JUST A REHASH OF A MOTION THAT WAS
16 ARGUED YESTERDAY.

17 MR. LEVIN: VERY WELL.

18 THE COURT: ALL RIGHT. HAS THE PROSECUTION
19 RECEIVED THIS? I'LL LET YOU REVIEW IT. WE'LL
20 TAKE -- THIS CLAIM OF PRIVILEGE INFORMATION, IS THAT
21 SOMETHING THAT YOU'RE ASSERTING, A PRIVILEGE THAT
22 RELATES TO -- WHAT PREJUDICE IS THIS?

23 MS. ABRAMSON: PSYCHOTHERAPIST-PATIENT
24 PRIVILEGE BETWEEN ERIK MENENDEZ AND DR. OZIEL.
25 THERE'S OTHER BASES FOR OBJECTING TO THIS, BUT IN
26 ORDER TO EXPLAIN IT I HAVE TO GET INTO PRIVILEGED
27 MATTERS. IT'S ALSO THIRD-PARTY HEARSAY.

28 THE COURT: WE'LL TAKE A RECESS OF 10

54476

1 MINUTES, DURING WHICH TIME I WILL CONFER WITH THE
2 DEFENSE ON THIS CLAIM OF PRIVILEGE, AND THE D.A.

3 WILL REVIEW THIS REQUESTED ADMONITION.

4 SO I WILL RESUME AT 10:00 O'CLOCK. I'LL

5 SEE COUNSEL IN THE HALLWAY IN JUST ONE MOMENT.

6 (PAGES 54477 THROUGH 54778 WERE HELD IN

7 CAMERA IN THE PRESENCE OF MS. ABRAMSON

8 ONLY, AND SEALED BY ORDER OF THE

9 COURT.)

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

4
5 THE COURT: ALL RIGHT. WE'LL PROCEED.

6 AS FAR AS THE FIRST REFERENCE ON PAGE 7,
7 THERE'S INSUFFICIENT SHOWING OF BASIS A FOR THE
8 COURT TO CONCLUDE THAT THIS IS PRIVILEGED MATERIAL.

9 AND FURTHER, THE COURT FINDS THAT BY
10 TENDERING THE TESTIMONY OF THE WITNESS, DR. VICARY,
11 IF THIS MATERIAL WAS AT ANY TIME IN THE PAST
12 PRIVILEGED, THAT THAT PRIVILEGE IS WAIVED BY HIS
13 TESTIMONY HERE.

14 MS. ABRAMSON: MY OTHER OBJECTION, HOWEVER,
15 IS IT'S HEARSAY ON HEARSAY.

16 THE COURT: THAT WOULD HAVE TO BE DEVELOPED
17 THROUGH THE TESTIMONY OF DR. VICARY.

18 MS. ABRAMSON: WELL, I'D ASK --

19 THE COURT: THAT WAS ALSO AN OBJECTION BY
20 COUNSEL.

21 MR. GESSLER: IT'S MY OBJECTION THERE'S
22 MULTIPLE LAYERS OF HEARSAY AS TO LYLE MENENDEZ.

23 THE COURT: THAT WILL HAVE TO BE DEALT WITH,
24 IN REGARD TO THE SOURCE OF ERIK MENENDEZ' KNOWLEDGE
25 OF THIS, THROUGH TESTIMONY OUTSIDE THE PRESENCE OF
26 THE JURY.

27 BUT I WANT TO GET STARTED WITH OTHER

54480

1 THE PROSECUTION TO HOLD OFF ON THAT UNTIL LATER.

2 MR. CONN: OKAY.

3 THE COURT: AS FAR AS THE ADMONITION TO THE

4 JURY AS SUGGESTED BY COUNSEL FOR LYLE MENENDEZ -- OR

5 IS THIS A JOINT REQUEST BY BOTH DEFENDANTS?

6 MS. TOWERY: THERE IS JUST A REQUEST BY LYLE

7 MENENDEZ, YOUR HONOR.

8 MR. GESSLER: WE HAVE A STIPULATION WE HAVE

9 ARRIVED AT WITH THE DISTRICT ATTORNEY, AND THEN WE

10 WOULD ASK THE --

11 THE COURT: DID COUNSEL FOR ERIK MENENDEZ

12 WISH TO BE HEARD AS TO THE PROPOSED LIMITING

13 INSTRUCTION?

14 MS. ABRAMSON: I HAVEN'T SEEN IT. I HAVEN'T

15 SEEN THE ADMONITION. I'VE SEEN THE STIPULATION.

16 THE COURT: LET'S TRY TO SPEED THIS ALONG

17 HERE.

18 MS. ABRAMSON: I HAVE TO OBJECT AT THIS POINT

19 TO A ONE-SIDED ADMONITION AND LIMITING INSTRUCTION,

20 THAT IT DOESN'T INCLUDE PROPER LIMITING INSTRUCTIONS

21 WITH RESPECT TO ERIK MENENDEZ.

22 THE COURT: ALL RIGHT. WELL, AS FAR AS THE

23 USE OF AGGRAVATING AND MITIGATING EVIDENCE, THAT
24 REALLY IS SOMETHING THAT CAN BE ADDRESSED AT THE
25 INSTRUCTIONS TO THE JURY AT THE CLOSE OF THE TRIAL.

26 AT THIS POINT THE CONCERN IS REGARDING
27 CONDUCT OF COUNSEL AND AN INSTRUCTION, THAT WOULD
28 DEAL WITH THAT SPECIFICALLY AT THIS POINT.

54481

1 AND WHAT I WOULD PROPOSE TO DO IS
2 INSTRUCT THE JURY THAT THEY MAY NOT DISCUSS OR
3 CONSIDER CONDUCT OF COUNSEL. WHETHER SUCH CONDUCT
4 OCCURRED INSIDE OR OUTSIDE OF THE COURTROOM, SUCH
5 CONDUCT MUST NOT IN ANY WAY AFFECT THEIR
6 DELIBERATIONS IN THIS CASE; AND THEN FOLLOW UP BY
7 WHATEVER WE CAN AGREE UPON AS FAR AS INSTRUCTIONS
8 REGARDING FACTORS IN AGGRAVATION AND MITIGATION AT
9 THE APPROPRIATE TIME WHEN THE JURY IS INSTRUCTED IN
10 THAT AREA.

11 MS. ABRAMSON: OKAY.

12 MR. LEVIN: WITH RESPECT --

13 THE COURT: LET ME INQUIRE OF COUNSEL FOR
14 LYLE MENENDEZ.

15 HOW DO YOU REACT TO THAT?

16 MS. TOWERY: WELL, YOUR HONOR, I THINK THAT
17 GIVEN THE COURT'S COMMENTS YESTERDAY, THAT IT IS

18 APPROPRIATE TO INSTRUCT THE JURY WITH RESPECT TO
19 LYLE MENENDEZ SPECIFICALLY PRIOR TO THE TIME THAT
20 DR. VICARY RECOMMENCES HIS TESTIMONY IN FRONT OF THE
21 JURY, AND I THINK THAT THE INSTRUCTION THAT I HAVE
22 SUBMITTED TO THE COURT IS AN ACCURATE STATEMENT OF
23 THE LAW AND OF THE FACTS.

24 THE LATTER PORTION OF THE INSTRUCTION, I
25 THINK, PROBABLY COULD BE DELETED; THAT IS, THE
26 SECOND PARAGRAPH REGARDING IMPROPRIETY OR
27 MISCONDUCT, BECAUSE THE DISTRICT ATTORNEY, AS
28 OFFERED BY MR. CONN YESTERDAY AND APPARENTLY

54482

1 ACCEPTED BY THE COURT, IS WILLING TO STIPULATE THAT
2 THE ATTORNEYS FOR LYLE MENENDEZ HAD NO AWARENESS OF
3 THE CHANGES IN DR. VICARY'S NOTES PRIOR TO HIS
4 REVELATION OF THAT.

5 THE COURT: YOU'RE PROPOSING TO REMOVE THAT
6 LAST PORTION OF THIS?

7 MS. TOWERY: YES. WE CAN DO THAT, ASSUMING
8 THAT THE COURT PERMITS THE STIPULATION THAT WE HAVE
9 AGREED UPON WITH THE DISTRICT ATTORNEYS, AND PERHAPS
10 YOU'D LIKE MS. NAJERA OR MR. CONN TO READ THAT
11 STIPULATION TO THE COURT. I THINK THAT PART IS
12 ADEQUATELY COVERED.

13 BUT I DO BELIEVE THAT AT THIS JUNCTURE
14 OF THE TRIAL IT'S VERY IMPORTANT THAT THE JURY NOT
15 MISUNDERSTAND THE MEANING OF HIS TESTIMONY.
16 THE COURT: ALL RIGHT. WHAT IS THE DEFENSE
17 REACTION TO REMOVING THAT SECOND PARAGRAPH -- OR OF
18 ERIK MENENDEZ?
19 MR. LEVIN: WELL, YOUR HONOR, I THINK IT
20 DEPENDS ON THE PROPOSED STIPULATION THAT THE COURT
21 WOULD GIVE. AND I WOULD ASK FOR MODIFICATION ON
22 THAT.
23 THE COURT: I'M NOT PROPOSING TO GIVE ANY
24 STIPULATION. THE STIPULATION WOULD BE GIVEN BY
25 COUNSEL.
26 MR. LEVIN: I AGREE. BUT I WOULD DEFER
27 RESPONDING TO THAT UNTIL I HEAR WHAT --
28 THE COURT: WHAT IS THE -- OKAY. ARE YOU IN

54483

1 NEGOTIATIONS OR WHAT?
2 MR. LEVIN: YES.
3 MS. NAJERA: ACTUALLY, WE'RE NOT.
4 MS. TOWERY: WE'VE AGREED ON A STIPULATION.
5 MS. NAJERA: YES, WE HAVE. COUNSEL FOR LYLE
6 MENENDEZ AND THE PROSECUTION -- ACTUALLY, THEY
7 SUBMITTED A STIPULATION WITH US AND WE HAVE ACCEPTED

8 IT.

9 THE COURT: WHAT IS YOUR PROBLEM WITH THAT,
10 MR. LEVIN?

11 MR. LEVIN: WELL, THE STIPULATION -- IF I MAY
12 READ IT, IT SAYS:

13 "THE PROSECUTION STIPULATES THAT
14 THE ATTORNEYS FOR LYLE MENENDEZ HAD
15 NEVER BEEN PROVIDED WITH COPIES OF NOR
16 HAD ANY KNOWLEDGE OF DR. VICARY'S
17 ORIGINAL UNCHARGED (SIC) NOTES.

18 "THE PROSECUTION FURTHER
19 STIPULATES THAT NEITHER THE
20 PROSECUTION, OR THE ATTORNEYS FOR LYLE
21 MENENDEZ, WERE AWARE OF THE EXISTENCE
22 OF ANY MODIFICATIONS TO DR. VICARY'S
23 NOTES UNTIL DR. VICARY REVEALED SUCH
24 MODIFICATIONS IN HIS TESTIMONY" -- I
25 GUESS "IN IN THE PENALTY PHASE OF THIS
26 TRIAL."

27 I WOULD ASK THAT THE PROSECUTION FURTHER --
28 OR AT LEAST MODIFY THE STIPULATION, INSTEAD OF

54484

1 MAKING IT ONE-SIDED TO LYLE MENENDEZ, AND MENTIONING
2 "NOR THE ATTORNEYS FOR LYLE MENENDEZ," IT SHOULD

3 READ THIS WAY:

4 "THE PROSECUTION FURTHER
5 STIPULATES THAT NEITHER THE
6 PROSECUTION, NOR ATTORNEYS BARRY
7 LEVIN, TERRI TOWERY, OR CHARLES
8 GESSLER, WERE AWARE OF THE EXISTENCE
9 OF ANY MODIFICATION TO DR. VICARY'S
10 NOTES UNTIL DR. VICARY REVEALED SUCH
11 MODIFICATION IN HIS TESTIMONY IN THE
12 PENALTY PHASE OF THIS TRIAL."

13 THE COURT: I THINK THE PROSECUTION INDICATED
14 THEY WOULD BE WILLING TO DO THAT YESTERDAY.

15 MR. CONN: YES, YOUR HONOR.

16 MR. GESSLER: WE ACCEPT THE MODIFICATION,
17 YOUR HONOR.

18 MS. TOWERY: THAT'S FINE.

19 THE COURT: ALL RIGHT.

20 MR. LEVIN: I ALSO WOULD ASK IN THE TOP
21 PARAGRAPH, THAT THE PROSECUTION STIPULATES -- THAT
22 SAME PART OF THE STIPULATION THAT IT MENTIONED --
23 STIPULATES:

24 "THAT ATTORNEYS BARRY LEVIN,
25 TERRI TOWERY, AND CHARLES GESSLER HAD
26 NEVER BEEN PROVIDED WITH COPIES OF,
27 NOR HAD ANY KNOWLEDGE OF DR. VICARY'S
28 ORIGINAL UNCHANGED NOTES."

1 MR. GESSLER: WE ACCEPT THAT MODIFICATION
2 ALSO.

3 MS. ABE: WE WOULD ALSO PROPOSE A
4 STIPULATION, HOWEVER, THAT BOTH DR. DIETZ AND
5 DR. WILSON DID HAVE DR. VICARY'S ORIGINAL NOTES.
6 THE PROSECUTION CAN'T POSSIBLY OBJECT TO THE
7 DR. DIETZ PORTION, BECAUSE THAT'S HOW THEY GOT
8 THEM,, AND THEY'VE BEEN ON THE RECORD SAYING THAT.

9 I THINK IT'S IMPORTANT FOR THE JURY TO
10 KNOW THAT THE EXPERTS THEY HEARD FROM HAD BOTH SETS
11 OF NOTES.

12 THE COURT: WELL, I'LL DEAL WITH THAT LATER.
13 I DON'T THINK THAT'S AN ISSUE THAT HAS TO BE DEALT
14 WITH AT THIS POINT.

15 ALL RIGHT. AS FAR AS THE LIMITING
16 INSTRUCTION PROPOSED BY LYLE MENENDEZ, WITH THE
17 DELETION OF THAT LAST PARAGRAPH, DO THE PEOPLE HAVE
18 ANY OBJECTION TO THAT?

19 MR. CONN: NO, YOUR HONOR.

20 THE COURT: ALL RIGHT. THEN THE COURT WILL
21 GIVE THAT INSTRUCTION TO THE JURY.

22 AND ALSO COUNSEL MAY PROPOSE A
23 STIPULATION.

24 ANYTHING BEFORE THE JURY COMES OUT?

25 MS. ABRAMSON: I DO THINK IT'S IMPORTANT THAT
26 THE JURY KNOW DR. DIETZ AT LEAST GOT THE ORIGINAL

27 NOTES --

28 THE COURT: AT SOME POINT WE'LL TALK ABOUT

54486

1 IT --

2 MS. ABRAMSON: -- FROM ME.

3 MS. TOWERY: I WOULD ASK THAT THE COURT GIVE
4 ONLY THE LIMITING INSTRUCTION AND STIPULATION TO THE
5 JURY BEFORE THE RECOMMENCEMENT OF THE DR. VICARY'S
6 TESTIMONY.

7 THE COURT: YES. WE'LL DO THAT AS SOON AS
8 THEY COME OUT.

9 MS. TOWERY: I'M SORRY.

10 THE COURT: LET'S GET THE JURY OUT.

11 MR. LEVIN: I HAD ASKED THE COURT TO CONSIDER
12 TWO PROPOSED INSTRUCTIONS. I HAD SHOWN THEM TO THE
13 PROSECUTION, AND I WOULD JUST ASK THAT THE COURT
14 CONSIDER THEM BEFORE DR. VICARY TESTIFIES.

15 THE COURT: WHAT ARE THEY?

16 MR. LEVIN: THEY WOULD BE FIRST:

17 "YOU HAVE HEARD TESTIMONY BY
18 DR. VICARY THAT MS. ABRAMSON TOLD THE
19 WITNESS TO CHANGE CERTAIN PARTS OF HIS
20 NOTES. YOU ARE INSTRUCTED THAT THERE
21 WAS NO MISCONDUCT ON MS. ABRAMSON'S

22 PART."
23 THE COURT: I CAN'T GIVE THAT INSTRUCTION.
24 MR. LEVIN:
25 "NOR ARE YOU TO INFER ANYTHING
26 IMPROPER WAS DONE BY HER."
27 THE COURT: I CAN'T GIVE THAT INSTRUCTION.
28 THE REASON I CAN'T GIVE IT IS I DON'T KNOW THAT TO

54487

1 BE THE FACTS.
2 MR. LEVIN: THE SECOND INSTRUCTION I'M ASKING
3 THE COURT TO -- I'M PROPOSING THE COURT TO INSTRUCT
4 THE JURY IS:
5 "YOU ARE INSTRUCTED THAT FURTHER
6 EVIDENCE WILL BE OFFERED BY DR. VICARY
7 THAT CERTAIN PORTIONS OF HIS NOTES
8 WERE CHANGED. YOU MAY ONLY CONSIDER
9 SUCH EVIDENCE AS IT BEARS ON THE
10 CREDIBILITY OF DR. VICARY. YOU ARE
11 NOT TO INFER THAT MS. ABRAMSON TOOK
12 ANY PART IN THE DECISION BY DR. VICARY
13 TO CHANGE HIS NOTES."
14 THE COURT: I WON'T GIVE THAT INSTRUCTION
15 EITHER. THE INSTRUCTION -- AN APPROPRIATE
16 INSTRUCTION WOULD BE THAT ANY EXAMINATION OF

17 DR. VICARY REGARDING REDACTIONS OR MODIFICATIONS OF
18 NOTES SHOULD BE CONSIDERED ONLY FOR THE PURPOSE OF
19 EVALUATING THE CREDIBILITY OF DR. VICARY.

20 MR. LEVIN: I WOULD ALSO ASK THAT THE COURT
21 INSTRUCT THAT, FURTHER, IN LIGHT OF THAT:

22 "YOU SHALL NOT INFER FROM
23 DR. VICARY'S TESTIMONY THAT ERIK
24 MENENDEZ PLAYED ANY PART IN THE
25 EXCLUSION OF INFORMATION FROM
26 DR. VICARY'S NOTES, AND YOU SHALL NOT
27 INFER THAT ERIK MENENDEZ DID ANYTHING
28 IMPROPER IN REGARD TO DR. VICARY'S

54488

1 NOTES OR TESTIMONY."

2 THE COURT: OKAY. THAT'S AN -- DID THE
3 PEOPLE WISH TO BE HEARD ON THAT?

4 MS. NAJERA: WE NEVER GOT A COPY OF THIS,
5 THOUGH.

6 THE COURT: I'M GOING TO DEFER RULING ON
7 THOSE MATTERS UNTIL THE PROSECUTION HAS A CHANCE TO
8 EVALUATE THEM.

9 WE'LL HAVE THE WITNESS COME IN, PLEASE.
10 IS SOMEONE GETTING HIM?

11 MR. FITZGERALD: HE'S RIGHT OUTSIDE, YOUR

12 HONOR.

13 THE COURT: IS SOMEONE GETTING HIM?

14 MR. LEVIN: ARE YOU GOING TO GIVE THAT

15 CAUTIONARY INSTRUCTION BEFORE DR. VICARY TESTIFIES?

16 THE COURT: WHICH ONE?

17 MR. LEVIN: THE ONE THAT I HAVE -- THE ONE

18 THE COURT INDICATED IT MIGHT GIVE, AND THE ONE THAT

19 I HAVE JUST PROVIDED TO THE PROSECUTION.

20 THE COURT: YOU HAVEN'T GIVEN IT TO ME. I

21 SAID I WOULD INSTRUCT THE JURY THAT IT MAY CONSIDER

22 EVIDENCE REGARDING MODIFICATIONS OF NOTES ONLY FOR

23 THE PURPOSE OF EVALUATING THE CREDIBILITY OF THIS

24 WITNESS.

25 MR. LEVIN: WE BELIEVE THAT THAT'S

26 INSUFFICIENT. BUT IF THAT'S ALL WE'RE GOING TO GET,

27 OF COURSE, WE'RE NOT OBJECTING TO IT.

28 THE COURT: I DON'T KNOW WHAT ELSE YOU HAVE

54489

1 TO OFFER. YOU GIVE THINGS IN WRITING TO THE

2 PROSECUTION AND YOU DON'T GIVE IT TO ME. WE'RE

3 HERE. WE'RE READY TO GO. IF YOU HAVE SOMETHING

4 FURTHER, CLEARLY, THESE MATTERS WE CAN DISCUSS

5 BEFORE THE JURY IS FINALLY INSTRUCTED.

6 MR. LEVIN: WHAT I'M ASKING, YOUR HONOR --

7 AND I'LL WRITE IT OUT -- IS FOR THE COURT TO

8 INSTRUCT THE JURY THAT:

9 "YOU ARE INSTRUCTED THAT FURTHER

10 EVIDENCE WILL BE OFFERED BY DR. VICARY

11 THAT CERTAIN PORTIONS OF HIS NOTES

12 WERE CHANGED. YOU MAY ONLY CONSIDER

13 SUCH EVIDENCE AS IT BEARS ON THE

14 CREDIBILITY OF DR. VICARY."

15 THE COURT: MY INSTRUCTION COVERS THAT AREA.

16 MR. LEVIN: AND AGAIN, I'M ASKING FOR THE

17 COURT TO INSTRUCT THE JURY THAT THEY ARE NOT TO

18 INFER FROM DR. VICARY'S TESTIMONY THAT ERIK MENENDEZ

19 PLAYED ANY PART IN THE EXCLUSION OF INFORMATION FROM

20 DR. VICARY'S NOTES. "AND YOU SHALL NOT INFER THAT

21 ERIK MENENDEZ DID ANYTHING IMPROPER IN REGARD TO

22 DR. VICARY'S NOTES AND TESTIMONY."

23 THE COURT: DID THE PEOPLE WISH TO BE HEARD

24 ON THAT ONE?

25 MR. CONN: YES.

26 MS. NAJERA: WE OBJECT TO THAT LATTER PART.

27 THE RECORD IS SILENT ON THAT. THEY WANT THE COURT

28 TO MAKE A FINDING OF FACT BASED ON NOTHING ON THE

2 WE DON'T KNOW WHAT'S GOING TO COME OUT.

3 THE COURT: I'M NOT GOING TO GIVE THAT

4 INSTRUCTION, AS I SAID. MUCH OF THIS COULD BE DEALT

5 WITH DURING CLOSING INSTRUCTIONS TO THE JURY AT THE

6 APPROPRIATE TIME.

7 ALL RIGHT. BEFORE YOU DO THAT,

8 DR. VICARY, YOU'RE ON THE WITNESS STAND.

9 IN REGARD TO TESTIMONY OR QUESTIONS

10 ASKED OF YOU RELATING TO CONVERSATIONS YOU HAD WITH

11 LYLE MENENDEZ, OR STATEMENTS ATTRIBUTED TO LYLE

12 MENENDEZ BY OTHER PERSONS, SUCH AS THE DEFENDANT OR

13 OTHER PEOPLE YOU SPOKE WITH, YOU ARE NOT TO ANSWER

14 ANY SUCH QUESTIONS UNLESS THERE'S A HEARING FIRST.

15 DO YOU UNDERSTAND THAT? IF YOU DON'T,

16 TELL ME WHAT YOU DON'T UNDERSTAND, OR HOW YOU

17 UNDERSTAND WHAT I'VE SAID.

18 DR. VICARY: STATEMENTS BY LYLE OR STATEMENTS

19 BY OTHERS ABOUT LYLE?

20 THE COURT: NO. LET'S PUT IT THIS WAY:

21 ANY QUESTION ASKED OF YOU THAT WOULD

22 REQUIRE YOU TO ANSWER A QUESTION IN A WAY THAT WOULD

23 DISCLOSE A COMMUNICATION FROM LYLE MENENDEZ TO YOU,

24 YOU ARE NOT TO ANSWER SUCH A QUESTION UNTIL THERE'S

25 A HEARING.

26 DR. VICARY: YES.

27 THE COURT: OKAY. AND YOU ARE NOT TO

28 DISCLOSE TO THE JURY OR MAKE REFERENCE TO THE JURY

1 THAT THERE ARE ANY LIMITATIONS ON YOUR TESTIMONY
 2 HERE, IN ANY REGARD, BECAUSE OF THESE RULINGS THAT
 3 ARE BEING MADE OR HAVE BEEN MADE. I DON'T WANT YOU
 4 TO VOLUNTEER SOMETHING TO THE JURY SUCH AS, WELL, I
 5 CAN'T ANSWER THAT QUESTION BECAUSE OF A RULING OR
 6 SOMETHING OF THAT NATURE.

7 DO YOU UNDERSTAND THAT?

8 DR. VICARY: YES, I DO.

9 THE COURT: AND ALSO, THE COURT HAS RULED
 10 THAT YOU ARE NOT TO REFER -- UNLESS THERE'S A
 11 HEARING -- TO ANY CONVERSATIONS YOU HAD WITH
 12 MS. ABRAMSON AS FAR AS REASONS FOR MODIFICATIONS OR
 13 DELETIONS.

14 DR. VICARY: YES.

15 MS. TOWERY: YOUR HONOR, I THINK THE COURT
 16 ALSO INDICATED THAT DR. VICARY IS NOT TO REFER TO
 17 ANY STATEMENTS ATTRIBUTED BY ANYONE ELSE TO HAVING
 18 BEEN MADE BY LYLE MENENDEZ. I DON'T KNOW THAT THE
 19 COURT'S SECOND --

20 THE COURT: THAT COVERS --

21 MS. TOWERY: -- EXPLANATION --

22 THE COURT: UNFORTUNATELY, THERE'S SOME
 23 EVIDENCE THAT RELATES TO A CONVERSATION BETWEEN THE
 24 DEFENDANT, ERIK MENENDEZ, AND HIS BROTHER THAT THE

25 COURT HAS RULED ADMISSIBLE. SO I CAN'T GIVE IT IN
26 THE BROAD SENSE THAT YOU'RE ASKING, BECAUSE THERE
27 ARE CERTAIN AREAS.
28 MS. TOWERY: I UNDERSTAND THE COURT HAS RULED

54492

1 THAT PARTICULAR ITEM ADMISSIBLE, BUT I THOUGHT WHAT
2 THE COURT INITIALLY INDICATED TO DR. VICARY IS THAT
3 HE WAS NOT TO DISCLOSE STATEMENTS MADE DIRECTLY BY
4 LYLE MENENDEZ TO HIM OR STATEMENTS ATTRIBUTED TO
5 LYLE MENENDEZ MADE BY OTHERS TO HIM.

6 AND I THINK -- UNLESS I MISUNDERSTOOD
7 THE COURT WHEN THE COURT CLARIFIED -- THE SECOND
8 PART WAS LEFT OUT.

9 THE COURT: WELL, BY "OTHERS," I DIDN'T
10 INTEND TO INCLUDE THE CODEFENDANT IN THAT, BECAUSE
11 THERE ARE CERTAIN PORTIONS THAT ARE ADMISSIBLE.

12 MS. TOWERY: I UNDERSTAND THAT. BUT I
13 THOUGHT THE COURT ALSO WANTED A HEARING WITH RESPECT
14 TO ANY FURTHER --

15 THE COURT: IF YOU HAD SPOKEN TO SOME THIRD
16 PARTY WHO GAVE YOU INFORMATION ABOUT WHAT LYLE
17 MENENDEZ SAID, AGAIN, YOU ARE NOT TO DISCLOSE THAT
18 WITHOUT A HEARING.

19 DR. VICARY: YES.

20 THE COURT: ALL RIGHT. LET'S GET THE JURY
21 OUT.
22 (THE JURY ENTERED THE COURTROOM
23 AND THE FOLLOWING PROCEEDINGS
24 WERE HELD:)
25
26 THE COURT: WE THOUGHT YOU WOULDN'T BE ABLE
27 FIND YOUR WAY IN THE COURTROOM.
28 GOOD MORNING. I DO APOLOGIZE FOR ALL

54493

1 THESE DELAYS. THINGS JUST WERE IN SUCH A STATE
2 WHERE HEARINGS HAD TO BE CONDUCTED, AND THERE WAS
3 JUST NO WAY OF KNOWING HOW LONG THEY WOULD TAKE.
4 AND I WAS ALWAYS OPTIMISTIC THAT WE WOULD BE ABLE TO
5 GET YOU HERE SO WE COULD GET YOU IN THE JURY BOX,
6 BUT THINGS JUST DON'T WORK THAT WAY. I APOLOGIZE
7 FOR IT.
8 WE'RE NOW READY TO PROCEED, AND WE WILL
9 PROCEED IN A MOMENT WITH FURTHER EXAMINATION OF THE
10 WITNESS.
11 BEFORE THAT I THINK THE PARTIES HAVE A
12 STIPULATION THAT THEY WANTED TO READ TO THE JURY.
13 AGAIN, A STIPULATION IS AN AGREEMENT
14 BETWEEN THE PARTIES AS TO CERTAIN MATTERS THAT ARE

15 NOT IN DISPUTE.

16 MS. NAJERA: MAY I, YOUR HONOR?

17 THE COURT: YES.

18 MS. NAJERA:

19 "LADIES AND GENTLEMEN, THE

20 PROSECUTION STIPULATES THAT ATTORNEYS

21 BARRY LEVIN, CHARLIE GESSLER, AND

22 TERRI TOWERY, HAVE NEVER BEEN PROVIDED

23 WITH COPIES OF, NOR HAD ANY KNOWLEDGE

24 OF, DR. VICARY'S ORIGINAL UNCHANGED

25 NOTES.

26 "THE PROSECUTION FURTHER

27 STIPULATES THAT NEITHER THE

28 PROSECUTION, NOR ATTORNEYS BARRY

54494

1 LEVIN, TERRI TOWERY, AND CHARLIE

2 GESSLER, WERE AWARE OF THE EXISTENCE

3 OF ANY MODIFICATIONS TO DR. VICARY'S

4 NOTES UNTIL DR. VICARY REVEALED SUCH

5 MODIFICATIONS IN HIS TESTIMONY IN

6 THIS, THE PENALTY PHASE OF THE TRIAL."

7 MR. GESSLER: SO STIPULATE, YOUR HONOR.

8 MR. LEVIN: SO STIPULATED, YOUR HONOR.

9 THE COURT: ALL RIGHT. THAT STIPULATION IS

10 NOTED.

11 FURTHER, IN REGARD TO MODIFICATIONS TO
12 THE NOTES OF DR. VICARY, AS THEY HAVE BEEN
13 DESCRIBED, OR WILL BE COVERED IN FURTHER QUESTIONING
14 OF THE WITNESS, SUCH MODIFICATIONS OR DELETIONS ARE
15 TO BE CONSIDERED BY THE JURY ONLY IN RELATIONSHIP TO
16 EVALUATING THE CREDIBILITY OF THE WITNESS,
17 DR. VICARY, AND FOR NO OTHER PURPOSE. THEY ARE TO
18 BE USED ONLY FOR THE PURPOSE OF EVALUATING THE
19 CREDIBILITY OF THE WITNESS.

20 ALSO, YOU ARE INSTRUCTED THAT DR. VICARY
21 IS A WITNESS CALLED ON BEHALF OF THE DEFENDANT, ERIK
22 MENENDEZ ONLY. WITH REGARD TO THE DEFENDANT, LYLE
23 MENENDEZ, YOU SHALL ONLY CONSIDER TESTIMONY OR
24 EVIDENCE GIVEN BY DR. VICARY WHICH YOU FIND
25 CONSTITUTES AN AGGRAVATION OR A MITIGATION RELATING
26 TO LYLE MENENDEZ.

27 I SHALL DEFINE WHAT AGGRAVATING AND
28 MITIGATING FACTORS YOU MAY CONSIDER AT THE END OF

54495

1 THIS PHASE OF THE TRIAL.

2 MISCONDUCT OF COUNSEL, IF YOU BELIEVE IT
3 EXISTS, IS NOT A FACTOR WHICH YOU MAY CONSIDER IN
4 AGGRAVATION.

5 ALL RIGHT. WE'LL NOW PROCEED WITH
6 FURTHER CROSS-EXAMINATION OF THE WITNESS.

7

8

9 WILLIAM VICARY,
10 HAVING BEEN PREVIOUSLY SWORN, RESUMED THE STAND, AND
11 TESTIFIED FURTHER AS FOLLOWS:

12 THE COURT: STATE YOUR NAME AGAIN FOR THE
13 RECORD, PLEASE.

14 THE WITNESS: WILLIAM VICARY.

15 THE COURT: I'LL REMIND YOU YOU'RE STILL
16 UNDER OATH.

17

18 CROSS-EXAMINATION (RESUMED)

19 BY MR. CONN:

20 Q DR. VICARY, I'D LIKE TO DIRECT YOUR
21 ATTENTION TO PAGE 7 OF YOUR NOTES.

22 DID YOU REWRITE PAGE 7 OF YOUR ORIGINAL
23 NOTES?

24 A YES, I DID.

25 Q WHEN YOU REWROTE PAGE 7 OF YOUR NOTES,
26 DID YOU DELETE FROM YOUR REWRITTEN PAGE ONE OR MORE
27 STATEMENTS MADE TO YOU BY ERIK MENENDEZ THAT HAD
28 BEEN CONTAINED IN YOUR ORIGINAL PAGE 7 NOTES?

1 A YES.

2 Q AFTER YOU REWROTE PAGE 7, DID YOU
3 DESTROY THE ORIGINAL COPY?

4 A YES.

5 Q DID YOU ALSO REWRITE OTHER PAGES IN YOUR
6 NOTES AND DESTROY ORIGINAL NOTES?

7 A YES.

8 Q WAS YOUR PURPOSE IN REWRITING NOTES TO
9 CONCEAL OR DESTROY STATEMENTS OF ERIK MENENDEZ THAT
10 WERE CONTAINED IN YOUR ORIGINAL NOTES?

11 A YES.

12 MR. LEVIN: OBJECTION, YOUR HONOR, BASED ON
13 PRIOR RULINGS.

14 THE COURT: OVERRULED.

15 Q BY MR. CONN: THE ANSWER TO THAT IS YES?

16 A YES.

17 Q WAS IT ALSO YOUR PURPOSE WHEN YOU
18 REWROTE YOUR NOTES TO CONCEAL THE FACT THAT YOUR
19 ORIGINAL NOTES HAD BEEN REWRITTEN?

20 A YES.

21 Q IS THAT WHY YOU REWROTE YOUR NOTES,
22 RATHER THAN SIMPLY WHITING OUT THE STATEMENTS
23 CONTAINED IN THE ORIGINAL NOTES?

24 A YES.

25 Q WERE YOU AWARE THAT WHEN YOU REWROTE
26 YOUR NOTES, THAT YOUR REVISED NOTES WOULD BE USED IN
27 COURT AS IF THEY WERE THE ORIGINAL?

28 A YES.

1 Q IN ALL OF YOUR YEARS OF PRACTICE, HAVE
2 YOU EVER ENGAGED IN SUCH PRACTICE BEFORE?

3 MR. LEVIN: OBJECTION. IRRELEVANT.

4 THE COURT: OVERRULED.

5 THE WITNESS: NO.

6 Q BY MR. CONN: DID YOU HAVE ETHICAL
7 CONCERNS REGARDING REWRITING YOUR NOTES?

8 MR. LEVIN: OBJECTION. IT'S IRRELEVANT.
9 IT'S VAGUE AND AN IMPROPER QUESTION.

10 THE COURT: OVERRULED.

11 THE WITNESS: YES.

12 Q BY MR. CONN: AND DO YOU CONCEDE TODAY
13 THAT YOUR ACTIONS WERE WRONG?

14 A YES.

15 Q ALL RIGHT. I'D LIKE TO TURN TO THE
16 SUBSTANCE OF THE MATERIAL THAT WAS DELETED FROM YOUR
17 NOTES.

18 DIRECTING YOUR ATTENTION TO PAGE 7, TO
19 THE BOTTOM OF THE PAGE, DID ERIK MENENDEZ MAKE A
20 STATEMENT TO YOU THAT HE WANTED TO GO ON TOUR, AND
21 THAT HIS FATHER SAID THAT HE COULD NOT?

22 MR. LEVIN: OBJECTION. IT'S LEADING.

23 THE COURT: OVERRULED.

24 THE WITNESS: IT'S NOT CLEAR WHETHER THAT WAS
25 A SPECIFIC STATEMENT THAT HE MADE TO ME, OR THAT WAS
26 MY CONCLUSION BASED UPON THE CONVERSATION THAT WAS
27 GOING ON IN THE GENERAL AREA.

28 Q BY MR. CONN: DID YOU WRITE DOWN IN YOUR

54498

1 NOTES THAT THE DEFENDANT WANTED TO GO ON TOUR,
2 "FATHER DASH NO"?

3 A YES, I DID.

4 Q AND WHEN YOU REWROTE PAGE 7, DID YOU
5 DELETE THAT STATEMENT FROM YOUR REWRITTEN PAGES?

6 A YES, I DID.

7 Q AND YOU DESTROYED THE ORIGINAL PAGE 7;
8 IS THAT CORRECT?

9 A YES.

10 Q DIRECTING YOUR ATTENTION TO PAGE 18 --

11 MR. LEVIN: YOUR HONOR, I WOULD -- STRIKE
12 THAT.

13 Q BY MR. CONN: DIRECTING YOUR ATTENTION
14 TO PAGE 18, DID ERIK MENENDEZ SAY TO YOU -- I BELIEVE
15 YOU ALREADY TESTIFIED THAT ERIK MENENDEZ TOLD YOU
16 THAT ONE WEEK PRIOR TO THE KILLINGS HE HAD
17 CONVERSATIONS ABOUT WHAT IT WOULD BE LIKE WITHOUT
18 HIS PARENTS; IS THAT CORRECT?

19 A YES.

20 Q AND DID HE INDICATE TO YOU WHO HE HAD
21 THOSE CONVERSATIONS WITH?

22 A YES.

23 Q AND WHO DID HE TELL YOU HE HAD
24 CONVERSATIONS WITH ONE WEEK PRIOR TO KILLING HIS
25 PARENTS?

26 A HIS BROTHER.

27 Q AND DID YOU REWRITE PAGE 18?

28 A YES.

54499

1 Q AND DID YOU DELETE THAT NOTATION FROM
2 YOUR REWRITTEN PAGE?

3 A YES.

4 MR. LEVIN: OBJECTION. IT'S MISLEADING,
5 REFERRING TO THE NOTATION. IT ASSUMES FACTS NOT IN
6 EVIDENCE. IT DOESN'T SAY ANYTHING ABOUT A KILLING.

7 THE COURT: WHY DON'T YOU REPHRASE THE
8 QUESTION.

9 MR. CONN: YES.

10 Q YOU REWROTE PAGE 18; IS THAT CORRECT?

11 A YES.

12 Q WHEN YOU REWROTE PAGE 18, DID YOU
13 INCLUDE IN YOUR REWRITTEN PAGE THE NOTATION THAT WAS

14 CONTAINED IN YOUR ORIGINAL PAGE 18, THAT ONE WEEK
15 PRIOR ERIK MENENDEZ WAS TALKING WITH LYLE MENENDEZ
16 ABOUT WHAT IT WOULD BE LIKE WITHOUT PARENTS?

17 A YES.

18 Q SO YOU DELETED THAT?

19 A YES.

20 Q AND DID YOU DESTROY THE ORIGINAL PAGE
21 18?

22 A YES.

23 Q I'D LIKE TO DIRECT YOUR ATTENTION TO
24 PAGE 20.

25 DID ERIK MENENDEZ TELL YOU THAT HIS
26 BROTHER SAID: "WAIT A WEEK" AND THE DEFENDANT SAID;
27 THAT IS, ERIK MENENDEZ SAID: "I CAN'T TAKE ANOTHER
28 WEEK"?

54500

1 A YES.

2 Q AND DID YOU REWRITE PAGE 20?

3 A YES.

4 Q AND WHEN YOU REWROTE PAGE 20, DID YOU
5 ELIMINATE THAT NOTATION FROM YOUR REWRITTEN PAGE?

6 A YES.

7 Q DID YOU ALSO MAKE A NOTATION IN YOUR
8 ORIGINAL PAGE 20 REGARDING ERIK MENENDEZ HATING HIS

9 MOTHER?

10 A YES.

11 Q AND CAN YOU TELL US WHAT IT WAS THAT
12 ERIK MENENDEZ TOLD YOU REGARDING THAT WHICH CAUSED
13 YOU TO MAKE A NOTATION OF THAT IN YOUR ORIGINAL PAGE
14 20?

15 A IT WAS A CONVERSATION ABOUT AN ARGUMENT
16 THAT ERIK HAD WITH HIS FATHER. FATHER WOULDN'T
17 LISTEN TO ERIK AND MOTHER TOOK FATHER'S SIDE. AND
18 THEN IN MY NOTES IT SAYS: "KNEW I HATED MOTHER."
19 IT'S NOT CLEAR WHETHER THAT MEANS FATHER
20 KNEW, BASED UPON THE ARGUMENT AND WHAT WAS GOING ON,
21 THAT ERIK HATED HIS MOTHER; OR ERIK HAS A
22 REALIZATION AT THAT POINT THAT -- I NOW KNOW I HATE
23 MY MOTHER.

24 OKAY. DOESN'T SAY. IT'S NOT CLEAR IN
25 MY MEMORY. DOESN'T ANSWER THAT.

26 Q WHEN YOU REWROTE PAGE 20, DID YOU
27 ELIMINATE THE ENTIRE REFERENCE TO THIS INCIDENT, OR
28 DID YOU ONLY SELECT A PORTION OF THIS INCIDENT TO

54501

1 DELETE FROM PAGE 20?

2 A THE ONLY THING THAT'S DELETED IS THE
3 PHRASE: "KNEW I HATED MOTHER."

4 Q AND AFTER YOU REWROTE PAGE 20 AND YOU
5 DELETED THAT, DID YOU DESTROY YOUR ORIGINAL PAGE 20?

6 A YES.

7 Q I'D LIKE TO DIRECT YOUR ATTENTION TO
8 PAGE 22.

9 AND DIRECTING YOUR ATTENTION TO THE TOP
10 OF THE PAGE, WHICH BEGINS WITH THE REFERENCE: "ONE
11 WEEK PRIOR," CAN YOU TELL US WHAT ERIK MENENDEZ TOLD
12 YOU THAT CAUSED YOU TO MAKE THAT NOTATION AT THE TOP
13 OF THE PAGE?

14 A READING MY NOTE IT SAYS: "HATE THIS MAN
15 AND THIS WOMAN. NOT MY PARENTS. WANT THEM OUT OF
16 MY LIFE. HATED BEING AROUND THEM."

17 Q SO ERIK MENENDEZ TOLD YOU THAT ONE WEEK
18 PRIOR TO KILLING HIS PARENTS HE HATED HIS MOTHER AND
19 HIS FATHER, AND HE WANTED THEM OUT OF HIS LIFE; IS
20 THAT CORRECT?

21 A YES.

22 Q AND DID YOU REWRITE PAGE 22?

23 A YES.

24 Q AND WHEN YOU REWROTE PAGE 22, DID YOU
25 ELIMINATE THAT STATEMENT FROM YOUR REWRITTEN PAGE?

26 A YES.

27 Q AND DID YOU THEN DESTROY YOUR ORIGINAL
28 PAGE 22?

1 A YES.

2 Q DIRECTING YOUR ATTENTION TO PAGE 28, DID

3 YOU REWRITE PAGE 28?

4 MR. LEVIN: MAY I HAVE A MOMENT? THANK YOU.

5 THE WITNESS: YES.

6 Q BY MR. CONN: DID YOU DESTROY THE

7 ORIGINAL PAGE?

8 A YES.

9 Q DIRECTING YOUR ATTENTION TO PAGE 29, DID

10 YOU REWRITE PAGE 29?

11 A YES.

12 Q DID YOU DESTROY THE ORIGINAL PAGE?

13 A YES.

14 Q DIRECTING YOUR ATTENTION TO PAGE 62, DID

15 YOU REWRITE PAGE 62?

16 A YES.

17 Q DID YOU DESTROY THE ORIGINAL PAGE?

18 A YES.

19 Q AND ON EACH OF THOSE PAGES, BEING PAGES

20 28, 29, AND 62, DID YOU DELETE ANY MATERIAL IN YOUR

21 REWRITTEN PAGES THAT WERE CONTAINED IN THE ORIGINAL

22 PAGES?

23 A YES.

24 Q DIRECTING YOUR ATTENTION NOW TO PAGE 74,

25 YOU ALREADY TESTIFIED THAT ERIK MENENDEZ TOLD YOU

26 ABOUT, OR MADE A CLAIM TO YOU THAT HIS FATHER HAD A

27 HOMOSEXUAL LOVER WHO CAME TO THE HOME ON AUGUST THE
28 18TH AND TOLD THE DEFENDANT THAT HIS MOTHER AND HIS

54503

1 FATHER WERE GOING TO KILL THEM; IS THAT CORRECT?

2 A YES.

3 Q AND DID YOU MAKE A NOTATION OF THAT ON
4 PAGE 74 OF YOUR ORIGINAL NOTES?

5 A YES, I DID.

6 Q AND DID YOU REWRITE PAGE 74?

7 A YES.

8 Q AND WHEN YOU REWROTE PAGE 74, DID YOU
9 DELETE THAT STORY FROM YOUR REWRITTEN PAGE?

10 A YES.

11 Q AND DID YOU DESTROY YOUR ORIGINAL PAGE
12 74?

13 A YES.

14 Q DIRECTING YOUR ATTENTION TO PAGE 95, DID
15 YOU REWRITE PAGE 95?

16 A YES.

17 Q IN YOUR REWRITTEN PAGE DID YOU DELETE
18 STATEMENTS MADE TO YOU BY ERIK MENENDEZ WHICH ARE
19 CONTAINED ON PAGE 95?

20 A YES.

21 Q AND DID YOU DESTROY YOUR ORIGINAL PAGE

22 95?

23 A YES.

24 Q DIRECTING YOUR ATTENTION TO PAGE 96, DID

25 YOU REWRITE PAGE 96?

26 A YES.

27 Q AND IN YOUR REWRITTEN PAGE DID YOU

28 DELETE FROM PAGE 96 STATEMENTS MADE TO YOU BY ERIK

54504

1 MENENDEZ THAT WERE CONTAINED IN YOUR ORIGINAL NOTES?

2 A YES.

3 Q AND DID YOU DESTROY YOUR ORIGINAL PAGE

4 96?

5 A YES.

6 Q NOW, DID YOU HAVE CONVERSATIONS WITH

7 ERIK MENENDEZ CONCERNING HIS GRANDMOTHER?

8 A YES.

9 Q AND I'D LIKE TO DIRECT YOUR ATTENTION TO

10 PAGE 71, IF YOU HAVE THAT AVAILABLE.

11 A YES.

12 Q DID ERIK MENENDEZ INDICATE TO YOU DURING

13 YOUR INTERVIEWS WITH HIM THAT THERE WAS A REALLY

14 EVIL SIDE TO HIS GRANDMOTHER?

15 A YES.

16 Q WHAT DID HE SAY IN THAT REGARD?

17 A THAT AT TIMES SHE COULD BE
18 OVERWHELMING. IF SHE DIDN'T WANT TO HEAR SOMETHING,
19 SHE WOULDN'T LISTEN. SHE WOULD IGNORE IT. SHE
20 COULD BE MANIPULATIVE.

21 HE GAVE ME AN EXAMPLE OF, I GUESS, A
22 GIRLFRIEND OF HIS THAT CAME TO VISIT HIM. AND I
23 GUESS THE -- THE GRANDMOTHER KNEW THAT THE
24 GIRLFRIEND WAS GOING TO GO VISIT ERIK THAT EVENING,
25 SO WHAT THE GRANDMOTHER DOES IS SHE WENT DOWN IN THE
26 AFTERNOON TO VISIT ERIK.

27 AND THEN THE JAIL RULE IS YOU CAN ONLY
28 HAVE ONE VISIT PER DAY. SO SHE KNEW WHEN THE

54505

1 GIRLFRIEND WENT DOWN THERE THAT SHE WOULD BE TURNED
2 DOWN.

3 I GUESS SHE WAS UPSET WITH THE
4 GIRLFRIEND FOR SOME REASON.

5 Q DID HE INDICATE TO YOU WHETHER HE
6 REFUSED TO ACCEPT VISITS FROM HIS GRANDMOTHER?

7 A IN RESPONSE TO THAT ERIK WAS ANGRY, AND
8 THEN THE NEXT TIME GRANDMA CAME TO SEE HIM HE
9 REFUSED TO GO DOWN AND VISIT HER, AND HE WOULDN'T
10 TALK TO HER FOR FOUR OR FIVE DAYS.

11 Q AND DID HE ALSO INDICATE TO YOU THAT HIS

12 FATHER, JOSE MENENDEZ, LEARNED FROM HIS GRANDMOTHER?

13 A YES.

14 Q DID HE INDICATE TO YOU WHAT HE MEANT BY

15 THAT?

16 A I GUESS WHEN SHE WOULD BE ANGRY, AND SHE

17 WOULD RETALIATE AGAINST SOMEBODY, THAT THAT'S WHAT

18 HE MEANT ABOUT THE FATHER, THAT THE FATHER LEARNED

19 THAT TECHNIQUE FROM GRANDMA, FROM HIS MOM.

20 MR. CONN: OKAY.

21 I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

22 THE COURT: REDIRECT?

23 MR. LEVIN: YES, YOUR HONOR.

24

25 REDIRECT EXAMINATION

26 BY MR. LEVIN:

27 Q DR. VICARY, YOU HAVE HAD A LONGSTANDING

28 RELATIONSHIP WITH ERIK MENENDEZ?

54506

1 A YES. IT'S ABOUT FIVE AND A HALF YEARS

2 NOW.

3 Q AND WOULD YOU CLASSIFY YOURSELF AS A

4 TREATING PSYCHIATRIST, A PERSON WHO WAS TRYING TO

5 HELP ERIK MENENDEZ?

6 A YES, I AM HIS TREATING PSYCHIATRIST, AND

7 HAVE BEEN SO SINCE THE BEGINNING.

8 Q AND YOU'VE ADMITTED TO COMMITTING SOME
9 WRONGS WITH RESPECT TO REWRITING SOME PAGES OF YOUR
10 NOTES IN FRONT OF THIS JURY IN THE PENALTY PHASE?

11 A YES, I HAVE.

12 Q IS THAT PAINFUL TO YOU IN SOME WAY?

13 A MY JOB ON THE WITNESS STAND HAS ALWAYS
14 BEEN THE SAME; TELL THE TRUTH, THE WHOLE TRUTH, AND
15 NOTHING BUT THE TRUTH, NO MATTER WHAT.

16 Q IS IT PAINFUL TO YOU TO COME AND TESTIFY
17 IN A PENALTY PHASE WHERE ERIK MENENDEZ' LIFE IS ON
18 THE LINE, AND YOU MAY BE OFFERING OPINIONS WHERE
19 YOUR CREDIBILITY IS AT STAKE?

20 A WELL, IT'S NO FUN TO HAVE YOUR
21 CREDIBILITY ATTACKED AND UNDERMIND. BUT MY JOB IS
22 SIMPLE. REGARDLESS OF WHICH WAY THE CHIPS FALL,
23 WHETHER I'M HELPFUL TO THE DEFENSE OR HURTFUL TO THE
24 DEFENSE; WHETHER I'M HELPFUL TO THE PROSECUTION OR
25 I'M HURTFUL TO THE PROSECUTION, IT DOESN'T MATTER.
26 I JUST TELL THE TRUTH.

27 Q DO YOU FEEL THAT NOTWITHSTANDING THE
28 FACT THAT YOU HAVE ADMITTED CHANGING PAGES OF YOUR

54507

1 NOTES, THAT YOU STILL ARE OFFERING TRUTHFUL

2 TESTIMONY TO THIS JURY?

3 A I DON'T THINK THERE'S ANY QUESTION IN MY
4 MIND THAT MY TESTIMONY IN FRONT OF THIS JURY AT THE
5 FIRST PHASE OF THIS CASE, AND NOW IN THE SECOND
6 PHASE, JUST LIKE MY TESTIMONY AT THE FIRST TRIAL,
7 HAS BEEN COMPLETELY HONEST AND TRUTHFUL.

8 YOU TAKE THESE CHANGES THAT WERE MADE IN
9 MY NOTES, AND YOU PUT THEM BACK IN MY NOTES, AND IT
10 DOESN'T MAKE A DAMN BIT OF DIFFERENCE.

11 Q WHAT DO YOU MEAN BY IT DOESN'T MAKE A
12 DAMN BIT OF DIFFERENCE?

13 A DOESN'T MAKE A DAMN BIT OF DIFFERENCE IN
14 TERMS OF THE DIAGNOSIS. IT DOESN'T MAKE A DAMN BIT
15 OF DIFFERENCE IN TERMS OF THE MENTAL DISINTEGRATION
16 THAT THIS DEFENDANT SUFFERED OVER A PERIOD OF YEARS
17 BECAUSE OF WHAT WAS GOING ON IN THE FAMILY.

18 AND IT DOESN'T MAKE A DAMN BIT OF
19 DIFFERENCE IN TERMS OF HOW MUCH HE HAS IMPROVED
20 BECAUSE OF MEDICATION AND THE COUNSELING THAT HE'S
21 HAD AT THE JAIL.

22 AND IT DOESN'T MAKE A DAMN BIT OF
23 DIFFERENCE IN TERMS OF HIS CHANCE TO DO SOMETHING
24 POSITIVE AND TO GIVE BACK SOMETHING WHILE HE'S IN
25 PRISON.

26 Q WAS IT EVER YOUR INTENTION TO HARM ERIK
27 MENENDEZ IN ANY WAY OUT OF YOUR TREATMENT FOR HIM OR
28 YOUR INVOLVEMENT IN THIS CASE?

1 A NO.

2 Q WHEN YOU CHANGED THESE PAGES IN YOUR
3 NOTES, DID YOU DO SO AT THE REQUEST OF ERIK
4 MENENDEZ?

5 A NO.

6 Q DID YOU ASK ERIK MENENDEZ FOR HIS
7 PERMISSION TO CHANGE YOUR NOTES?

8 A NO, I DID NOT.

9 Q DID YOU TELL HIM AT ANY TIME,
10 DR. VICARY, THAT YOU HAD CHANGED YOUR NOTES?

11 A NO.

12 Q WHEN YOU MET ERIK MENENDEZ, WAS HE SICK --

13 A VERY SICK.

14 Q -- PSYCHOLOGICALLY?

15 A HE WAS VERY SICK. HE WAS TO THE POINT
16 THAT IT WAS ALMOST TIME TO TAKE HIM UPSTAIRS AND PUT
17 HIM IN A RUBBER ROOM.

18 Q AND DID YOU CONTINUE OVER THE COURSE OF
19 THE TIME TO SEE HIM TO TRY TO GET HIM BETTER?

20 A OF COURSE.

21 Q AND YOU BELIEVE THAT FROM YOUR COURSE OF
22 TREATMENT YOU HAVE MADE HIM BETTER; IS THAT CORRECT?

23 A IT'S NOT JUST ME. THERE'S BEEN A LOT OF
24 PEOPLE WORKING WITH HIM. HIS PRIEST, FRIENDS,
25 FAMILY MEMBERS, OTHER COUNSELORS AND EXPERTS THAT

26 HAVE TALKED TO HIM, THE CHIEF PSYCHIATRIST AT THE
27 JAIL WHO HAS TAKEN HIM UNDER HIS WING AND HAS HELPED
28 HIM, HIS ATTORNEYS THAT HAVE WORKED ALONGSIDE OF HIM

54509

1 AND SUPPORTED HIM AND OFFERED HIM RESPECT AND
2 APPRECIATION OVER A PERIOD OF MANY YEARS.

3 Q DR. VICARY, YOU ARE -- YOU POSSESS A
4 MEDICAL LICENSE, DO YOU NOT?

5 A YOU HAVE TO BE TO BE A PRACTICING
6 DOCTOR, YES.

7 Q AND YOU ALSO ARE, I TAKE IT, ON A --
8 STRIKE THAT.

9 IF IT IS SHOWN THAT YOU HAVE DONE
10 ANYTHING WRONG WITH RESPECT TO YOUR ETHICAL OR YOUR
11 PROFESSIONAL RESPONSIBILITIES, YOU COULD -- IT COULD
12 AFFECT YOUR LICENSE, YOUR ABILITY TO PRACTICE
13 MEDICINE IN THE FUTURE; IS THAT CORRECT?

14 A YES, IT COULD.

15 Q AND IF DOWN THE ROAD SOME EXAMINING
16 AUTHORITY, SOME PROSECUTOR'S OFFICE, BE IT THIS ONE
17 OR SOME OTHER, DETERMINES THAT YOU HAVE DONE
18 ANYTHING WRONG WITH RESPECT TO THE MATTERS THAT
19 YOU'VE TESTIFIED TO IN FRONT OF THIS JURY, YOU COULD
20 BE PROSECUTED FOR SOME TYPE OF POTENTIAL CRIME.

21 YOU UNDERSTAND THAT; IS THAT CORRECT?

22 A IF I WOULD COMMIT PERJURY IN ANY CASE,
23 IF I WOULD LIE ON THE WITNESS STAND IN ANY CASE,
24 THAT'S A FELONY, AND I COULD GET MYSELF IN REAL BIG
25 TROUBLE. LIKE STATE PRISON.

26 Q AND I TAKE IT THAT NO ONE HAS APPROACHED
27 YOU IN ANY MANNER TO OFFER YOU ANY KIND OF IMMUNITY
28 OR PROTECTION FROM ANY KIND OF FUTURE PROSECUTION

54510

1 THAT MIGHT OCCUR OR COULD OCCUR?

2 A NO.

3 Q NOR HAVE ANY DEALS BEEN MADE FOR YOU TO
4 PROTECT YOUR PROFESSIONAL LICENSE THAT YOU HOLD OR
5 SOMEHOW SHIELD YOU FROM ANY DISCIPLINE THAT COULD
6 OCCUR OUT OF YOUR INVOLVEMENT IN THE MATTERS THAT
7 YOU'VE TESTIFIED TO IN THIS CASE?

8 A NO.

9 Q SO YOU ARE TESTIFYING BASICALLY WITHOUT
10 ANY PROTECTION OR IMMUNITIES OR PROMISES THAT WOULD
11 SHIELD YOU FROM ANY POTENTIAL HARM FROM THIS
12 TESTIMONY IN THE FUTURE, CORRECT?

13 A THAT'S CORRECT.

14 Q AND IS IT YOUR INTENTION TO TESTIFY
15 TRUTHFULLY?

16 A IT HAS BEEN FROM DAY ONE WHEN I STARTED
17 DOING THIS WORK, AND IT GOES ON WEEK AFTER WEEK,
18 YEAR AFTER YEAR, RIGHT UP TO THE PRESENT DAY.

19 Q YOU TESTIFIED IN THE TRIAL OF THIS
20 MATTER UNDER OATH, DID YOU NOT?

21 A YES, I DID.

22 Q AND YOU TESTIFIED IN THIS TRIAL IN THE
23 GUILT PHASE, DID YOU NOT?

24 A YES, I DID.

25 Q AND YOU UNDERSTAND THE OATH THAT YOU
26 TOOK?

27 A YOU BET I DO.

28 Q HAVE YOU EVER LIED IN THIS MATTER TO ANY

54511

1 QUESTIONS THAT WERE POSED TO YOU BY THE PROSECUTION
2 OR THE DEFENSE IN THE TRIAL -- IN THIS TRIAL OR IN
3 THE LAST TRIAL?

4 A NOT IN THIS CASE, IN THIS TRIAL, IN THE
5 PREVIOUS TRIAL, OR IN ANY TRIAL OVER THE PAST 15
6 YEARS.

7 Q WHEN -- NOW, YOU WROTE A HUNDRED AND TEN
8 PAGES OF NOTES FROM 1990 TO THE PRESENT TIME?

9 A ACTUALLY, NOW THERE'S A HUNDRED AND
10 ELEVEN, BECAUSE THERE'S -- A COUPLE OF WEEKS AGO I

11 MADE SOME MORE NOTES MAINLY ABOUT THE MEDICATIONS.

12 Q NOW, I TAKE IT THAT THOSE NOTES WERE
13 SOMEWHAT DONE IN A CHRONOLOGY FASHION, WHERE YOU
14 WOULD JUST KEEP ADDING TO THEM EVERY TIME YOU TALKED
15 TO ERIK MENENDEZ?

16 A YES.

17 Q WOULD THEY DELINEATE WHEN A DATE -- OR A
18 DATE THAT THE CONVERSATION TOOK PLACE?

19 A I THINK THERE ARE DATES ON SOME OF THE
20 NOTES, BUT ON MOST OF THEM THERE AREN'T ANY DATES.

21 Q IT WAS NOT YOUR INTENTION TO CREATE AN
22 EXTENSIVE DIARY DAY BY DAY OR VISIT BY VISIT OF ERIK
23 MENENDEZ AND SOMEHOW USE THESE NOTES IN SOMEWHAT OF
24 A DIARY FASHION?

25 A THAT WAS NEVER A PLAN OR A CUSTOM OF
26 MINE, NO.

27 Q NOW, ALSO, I TAKE IT THAT THERE ARE
28 THOUSANDS AND THOUSANDS OF WORDS CONTAINED ON THESE

54512

1 NOTES, CORRECT?

2 A YEAH. I HAVEN'T ADDED THEM ALL UP. I
3 PRESUME THAT PROBABLY IS TRUE. I MEAN, THERE'S
4 DOZENS AND DOZENS OF WORDS ON EACH AND EVERY PAGE.

5 Q AND LIKEWISE, YOU HAVE VISITED ERIK

6 MENENDEZ FOR SIX YEARS. DO YOU HAVE AN ESTIMATE

7 ABOUT HOW MANY TIMES YOU'VE SEEN HIM?

8 A OH, I DON'T KNOW. MAYBE A HUNDRED AND

9 TWENTY TIMES, A HUNDRED AND THIRTY TIMES.

10 Q ARE YOU GETTING PAID FOR YOUR SERVICES

11 IN CONNECTION WITH TREATING ERIK MENENDEZ?

12 A I HAVEN'T BEEN PAID ANYTHING FOR THE

13 PAST YEAR, YEAR AND A HALF.

14 Q AND BEFORE A YEAR OR YEAR AND A HALF,

15 WERE YOU ON SOME KIND OF A RETAINER, OR HOW WAS IT

16 THAT YOU WERE PAID?

17 A INITIALLY I WAS PAID BY THE FAMILY AT

18 THE BEGINNING, A PRIVATE FEE OF \$200 AN HOUR.

19 THEN THE FAMILY RAN OUT OF MONEY, AND

20 THEN THE COURT PAID ME AT THE COURT RATE, WHICH IS A

21 HUNDRED DOLLARS AN HOUR.

22 THEN WE HIT THE WALL, AND THE RULING WAS

23 THAT THERE WAS NO MORE MONEY FOR ANY EXPERTS. AND

24 AT THAT POINT IT WAS ZERO DOLLARS PER HOUR.

25 Q THAT WAS ABOUT A YEAR AND A HALF AGO?

26 A I THINK THAT'S MY MEMORY, ROUGHLY, YES.

27 Q NOW, WHEN YOU FOUND OUT THAT YOU WOULD

28 NO LONGER BE PAID, DID YOU STOP TREATING ERIK

1 MENENDEZ?

2 A NO, I DID NOT.

3 Q YOU CONTINUED TO TREAT HIM?

4 A YES. I'VE SEEN HIM EVERY COUPLE OF
5 WEEKS SINCE THEN.

6 Q I WANT TO TALK TO YOU FOR A MOMENT ABOUT
7 SOMETHING YOU SAID BEFORE, THAT EVEN IF THESE
8 CHANGES HAD NOT BEEN REMOVED FROM YOUR NOTES, IT
9 WOULDN'T CHANGE YOUR OPINION.

10 DID YOU RECEIVE A STORY FROM ERIK
11 MENENDEZ WHERE HE BEGAN TO VERY COHERENTLY DICTATE,
12 STATE TO YOU, THE EVENTS OF HIS LIFE IN A FASHION
13 WHERE HE STARTED HIS EARLIEST REMEMBRANCE AND CAME
14 FORWARD? IS THAT THE WAY IT CAME OUT?

15 A NO.

16 Q HOW WOULD YOU DESCRIBE, IN GENERAL
17 TERMS, THE MANNER IN WHICH THESE EVENTS UNFOLDED TO
18 YOU THROUGHOUT THE COURSE OF YOUR CONVERSATIONS WITH
19 ERIK MENENDEZ?

20 Q IT WAS SOMEWHAT CHAOTIC. I MEAN,
21 SOMETIMES I VIRTUALLY COULD GET NO INFORMATION OUT
22 OF HIM, BECAUSE HE WOULD BE SO UPSET AND DISTRAUGHT
23 AND CRYING AND -- I MEAN, HE WASN'T BEING REAL
24 COHERENT AT TIMES. I WAS JUST TRYING TO BE
25 SUPPORTIVE AND LISTEN AND MONITOR HIM SO I COULD
26 ADJUST HIS MEDICATION.

27 WHAT I DID OVER TIME WAS, AS HE GOT
28 BETTER, IS THAT HE WAS CAPABLE OF GIVING ME A LITTLE

1 BIT MORE. I'VE LEARNED I COULDN'T REALLY PRESS HIM,
2 AND I COULDN'T ASK HIM SPECIFIC QUESTIONS, BECAUSE
3 THEN HE WOULD SEEM TO WITHDRAW.

4 SO I WOULD JUST GO IN AND SIT DOWN, AND
5 I WOULD SAY, "HOW ARE YOU?" YOU KNOW, AND THEN I
6 WOULD LET HIM TALK. AND THEN I WOULD GENERALLY TRY
7 AND -- OBVIOUSLY, I WAS INTERESTED IN CERTAIN THINGS
8 RELATED TO THE CRIMES AND WHAT WAS GOING ON IN THIS
9 FAMILY BEFORE THE CRIMES. THAT'S MY CHIEF CONCERN,
10 OTHER THAN TREATING HIS MENTAL DISORDER.

11 BUT I WASN'T ABLE TO STRUCTURE HIM IN
12 THAT WAY. SO THE STORY CAME OUT OF HIS LIFE IN
13 LITTLE BITS AND PIECES, IN A KIND OF UNORGANIZED,
14 ILLOGICAL RAMBLING OVER A PERIOD OF MANY MONTHS AND
15 YEARS.

16 Q IT DID NOT COME OUT IN SOME KIND OF
17 CHRONOLOGICAL SEQUENCE?

18 A NO. IF I SEE YOU AT THE JAIL, OR YOU
19 SAW ME AT THE JAIL AND TOOK A HISTORY FROM ME,
20 OBVIOUSLY, YOU'D ASK ME SPECIFIC QUESTIONS.

21 TELL ME ABOUT YOUR FAMILY. WHAT KIND OF
22 WORK DID YOUR DAD DO, YOUR MOM?

23 HOW MANY BROTHERS AND SISTERS YOU HAD.

24 WHAT DID THEY DO?
25 ANY HISTORY OF MENTAL ILLNESS IN THE
26 FAMILY?
27 ANY HEAVY DRINKERS OR INTO DRUGS.
28 THIS IS THE ROUTINE HISTORY THAT WE

54515

1 TAKE.
2 THE AVERAGE PERSON CAN GIVE YOU THAT
3 HISTORY. SOME PEOPLE ARE SO SICK YOU CANNOT GET
4 THAT KIND OF HISTORY FROM THEM.
5 ERIK WAS ONE OF THOSE PEOPLE. YOU
6 WOULDN'T BELIEVE IT NOW, GIVEN HOW WELL HE IS. NOW
7 HE CAN GIVEN YOU A TERRIFIC HISTORY IN ANY WAY YOU
8 WANT IT, AND ANSWER SPECIFIC QUESTIONS IN A VERY
9 INTELLIGENT AND ARTICULATE MANNER.
10 HE WAS NOT THAT WAY AT THE BEGINNING,
11 AND HE WAS NO WHERE NEAR THAT WAY FOR MANY, MANY
12 MONTHS.
13 Q WERE THERE THINGS THAT HE SAID TO YOU
14 THAT YOU DIDN'T UNDERSTAND?
15 MR. CONN: OBJECTION. BEYOND THE SCOPE.
16 THE COURT: OVERRULED.
17 THE WITNESS: YES. OFTEN HE WOULD SAY THINGS
18 THAT I DIDN'T UNDERSTAND.

19 Q BY MR. LEVIN: WERE THERE THINGS THAT HE
20 SAID TO YOU THAT YOU DIDN'T UNDERSTAND WHEN HE SAID
21 THEM, BUT LATER ON PROVIDED YOU WITH INFORMATION
22 THAT CAUSED YOU TO UNDERSTAND THINGS YOU DIDN'T KNOW
23 WHAT HE MEANT EARLIER?

24 A YES.

25 Q WHEN YOU SAW HIM, DR. VICARY, AND YOU
26 KNEW THAT HE WAS SICK, COULD YOU TELL -- OR DID YOU
27 HAVE AN OPINION THAT HE WAS SICK AT THE MOMENT, FROM
28 THE MOMENT YOU SAW HIM, OR COULD YOU TELL THAT HE

54516

1 HAD BEEN SICK FOR TIME BEFORE YOU HAD SAW HIM?

2 A I DIDN'T KNOW. I COULDN'T GET THAT KIND
3 OF INFORMATION OUT OF HIM. ALL I KNEW WAS WHAT I
4 SAW IN FRONT OF ME. SO I DEALT WITH WHAT I HAD.

5 AND THEN I TRIED MY BEST, AS YOU DO IN
6 EVERY CASE, TO GET MORE INFORMATION ABOUT THE
7 HISTORY, BECAUSE YOU WANT TO KNOW WHY. WHY IS THIS
8 PERSON SICK? IS THIS SOMETHING GENETIC? IS THIS
9 SOMETHING THAT IS RELATED TO DRUGS? IS THIS BECAUSE
10 OF A SITUATIONAL STRESS? IS THIS BECAUSE OF SOME
11 KIND OF TRAUMATIC ABUSIVE EXPERIENCES IN THE
12 PERSON'S PAST?

13 YOU DON'T KNOW. INQUIRING MINDS WANT TO

14 KNOW, SO YOU ASK SPECIFIC QUESTIONS. SOMETIMES THE
15 PATIENT'S TOO SICK, AND YOU CAN'T GET THIS KIND OF
16 INFORMATION, SO YOU HAVE TO MEDICATE, SUPPORT,
17 REASSURE, AND BE PATIENT AND WAIT UNTIL THE PERSON
18 GETS BETTER.

19 Q WAS ERIK MENENDEZ' CONDITION CONSISTENT
20 WITH PEOPLE YOU TREAT THAT HAVE SIMILAR-TYPE
21 AFFLICTIONS? WAS THERE ANYTHING -- STRIKE THAT.

22 WAS HE ACTING APPROPRIATELY, OR WAS HE
23 BEHAVING APPROPRIATELY, IN THE MANNER IN WHICH YOU
24 DETERMINED HIM TO BE SICK?

25 A WELL, I THINK THE SIMPLE ANSWER TO THAT
26 IS I DON'T KNOW IF THERE'S ANY APPROPRIATE WAY TO BE
27 SICK. ERIK WAS VERY, VERY SICK.

28 Q DID YOU THINK HE WAS FAKING?

54517

1 A NO, I DID NOT. AND I CONSIDERED THAT,
2 AS I DO IN EVERY CASE, BECAUSE AS A FORENSIC DOCTOR,
3 I ASSUME YOU'RE A LIAR UNTIL YOU PROVE ME
4 OTHERWISE.

5 SO I WAS VERY SUSPICIOUS AND SKEPTICAL
6 AND CAUTIOUS. BUT HIS SYMPTOMS WERE EXTREMELY
7 CONSISTENT, AND THEY WAXED AND WANED, BUT BASICALLY
8 THEY TOOK THE COURSE OF INDIVIDUALS THAT WERE ALSO

9 SUFFERING FROM SEVERE SYMPTOMS OF ANXIETY AND
10 DEPRESSION.

11 Q THOSE SYMPTOMS OF ANXIETY AND
12 DEPRESSION, DID THEY PERSIST FROM THE TIME YOU FIRST
13 SAW ERIK MENENDEZ AT 19 YEARS OLD, TO THE PRESENT
14 TIME, WHERE HE IS NOW 25 YEARS OLD?

15 A YES, THEY DID.

16 THE COURT: HOW MUCH LONGER ARE YOU GOING TO
17 BE?

18 WE'RE GOING TO TAKE A BREAK THIS
19 MORNING.

20 MR. LEVIN: THAT WOULD BE APPROPRIATE.

21 THE COURT: OKAY. IT'S JUST GOING TO BE A
22 10-MINUTE BREAK, AND WE'LL RESUME AT 10 MINUTES
23 AFTER THE HOUR.

24 DON'T DISCUSS THE MATTER WITH ANYONE,
25 AND DON'T FORM ANY FINAL OPINIONS ABOUT IT, AND
26 WE'LL RESUME AT 10 MINUTES AFTER THE HOUR.

27

28 (A RECESS WAS TAKEN FROM

-11017

1 THE COURT: ALL RIGHT. LET'S GET THE JURY OUT,
2 PLEASE.

3 (THE JURY ENTERS THE COURTROOM

4 AND THE FOLLOWING PROCEEDINGS

5 WERE HELD:)

6

7 THE COURT: THE JURY IS BACK. YOU MAY CONTINUE
8 YOUR REDIRECT EXAMINATION.

9 MR. LEVIN: THANK YOU.

10 Q. DR. VICARY, DID ERIK MENENDEZ TELL YOU THAT
11 HE LOVED HIS GRANDMOTHER?

12 A. HE DID.

13 Q. DID HE TELL YOU OVER THE YEARS THAT HE
14 LOVED HIS MOTHER?

15 A. YES, HE DID.

16 Q. DID HE TELL YOU THAT HE LOVED HIS FATHER?

17 A. AND THAT HE ADMIRER HIS FATHER AND HAD
18 TREMENDOUS RESPECT FOR HIM.

19 Q. NOW, DID YOU FIND THAT HE WAS TRYING TO
20 SORT OUT HIS FEELINGS TOWARDS HIS MOTHER AND FATHER?

21 MR. CONN: OBJECTION. LEADING.

22 THE COURT: SUSTAINED.

23 Q. BY MR. LEVIN: HE TOLD YOU THAT HE LOVED
24 HIS MOTHER AND FATHER, AND HE ALSO TOLD YOU AT TIMES
25 THAT HE HATED HIS MOTHER AND FATHER, CORRECT?

26 A. YES.

27 Q. HOW IS THAT CONSISTENT OR -- FIRST OF ALL,
28 IS THAT CONSISTENT WITH SOMEONE WHO HAS HAD A TRAUMATIC

1 FAMILY BACKGROUND?

2 A. THOSE KIND OF OPPOSITE AND DIVIDED FEELINGS

3 ARE FREQUENT IN SOMEBODY THAT COMES FROM A VERY CHAOTIC,

4 TRAUMATIC FAMILY SITUATION. YOU LOVE YOUR PARENTS, BUT

5 THEY DO THINGS, AND YOU HATE THEM FOR SOME OF THE BAD

6 THINGS THAT THEY DO.

7 ON THE OTHER HAND, THEY'RE THE ONLY PARENTS

8 YOU'VE GOT. THEY'RE YOUR GENETIC ANCESTORS. THEY'VE

9 CARED FOR YOU WHEN YOU WERE COMPLETELY HELPLESS AS AN

10 INFANT, AND YOU FEEL BONDED TO THEM AND CLOSE, AND YOU

11 HAVE AFFECTION AND LOVE FOR THEM NO MATTER HOW BAD THEY

12 TREAT YOU.

13 IT'S VERY COMMON IN SITUATIONS -- IN THESE

14 CHAOTIC FAMILIES FOR THE CHILDREN TO HAVE THESE

15 AMBIVALENT FEELINGS.

16 MR. LEVIN: THANK YOU, DOCTOR.

17 I HAVE NOTHING FURTHER.

18 THE COURT: ANY EXAMINATION ON BEHALF OF LYLE

19 MENENDEZ.

20 MR. GESSLER: NO, YOUR HONOR.

21 THE COURT: ANY RECROSS?

22 MR. CONN: YES.

23

24 RECROSS-EXAMINATION

25 BY MR. CONN:

26 Q. DOCTOR, THE PROSECUTION HAS NOT OFFERED YOU

27 IMMUNITY FROM CRIMINAL PROSECUTION, HAVE WE?

28 A. NO.

1 Q. AND DID YOU RECOGNIZE WHEN YOU WERE
2 DELETING SOME MATERIAL FROM YOUR REVISED NOTES THAT SOME
3 OF THE STATEMENTS OF ERIK MENENDEZ WERE INDICATIVE OF --
4 OR COULD BE INTERPRETED AS EVIDENCE OF PREMEDITATION?

5 MR. LEVIN: OBJECTION. IT'S IRRELEVANT. CALLS
6 FOR SPECULATION. CALLS FOR THE WITNESS TO FORM A
7 CONCLUSION.

8 THE COURT: OVERRULED.

9 THE WITNESS: YES, I DID.

10 Q. BY MR. CONN: AND YOU TESTIFIED IN THE
11 FIRST TRIAL BEFORE A DIFFERENT JURY; IS THAT CORRECT?

12 A. YES.

13 Q. AND WHEN YOU TESTIFIED BEFORE THAT JURY,
14 DID YOU HAVE YOUR ORIGINAL NOTES WITH YOU, OR DID YOU
15 ONLY HAVE THE REVISED NOTES WITH YOU AFTER YOU HAD
16 DESTROYED THE ORIGINALS?

17 A. ONLY THE REVISED NOTES.

18 Q. OKAY. AND YOU WERE CREATING THE IMPRESSION
19 THAT THOSE NOTES IN FRONT OF YOU, IN FRONT OF THAT FIRST
20 JURY, WERE THE ORIGINAL NOTES; IS THAT CORRECT?

21 A. YES.

22 MR. LEVIN: OBJECTION, YOUR HONOR. CALLS FOR A
23 CONCLUSION.

24 THE COURT: SUSTAINED TO THE FORM OF THE
25 QUESTION. THE ANSWER IS STRICKEN.

26 YOU'RE ASKING HIS PURPOSE, OR OF THE END

27 RESULT?

28 MR. CONN: YES.

-11014

1 Q. IT WAS YOUR PURPOSE, DOCTOR, TO CREATE THE
2 IMPRESSION IN FRONT OF THE JURY THAT THE NOTES YOU WERE
3 TESTIFYING TO AT THAT TIME WERE, IN FACT, YOUR ORIGINAL
4 NOTES?

5 A. YES.

6 Q. AND YOU WERE DECEIVING THAT JURY; IS THAT
7 CORRECT, DOCTOR?

8 A. IN THAT REGARD, YES.

9 Q. AND ARE YOU CONCERNED THAT, ASIDE FROM
10 COMMITTING PERJURY HEREAFTER, THAT WHAT YOU HAVE ALREADY
11 DONE POTENTIALLY SUBJECTS YOU TO CRIMINAL PROSECUTION?

12 A. YOUR QUESTION IS -- ASSUMES THAT I HAVE
13 COMMITTED PERJURY. I DON'T BELIEVE I HAVE AT THE FIRST
14 TRIAL OR THE SECOND TRIAL.

15 Q. I AM NOT ASKING YOU ABOUT THE CRIME OF
16 PERJURY.

17 IS THERE A QUESTION IN YOUR MIND AT THIS
18 TIME THAT TOTALLY ASIDE FROM THE CRIME OF PERJURY, THAT
19 THE DESTRUCTION OF NOTES AND REPRESENTING IN THE COURT
20 THAT YOUR ORIGINAL -- OR YOUR REVISED NOTES ARE, IN
21 FACT, YOUR ORIGINAL NOTES, HAS ALREADY SUBJECTED YOU TO

22 THE POTENTIAL OF CRIMINAL PROSECUTION?

23 A. I THINK THAT'S POSSIBLE, YES.

24 Q. AND YOU SAID THAT IT MAKES NO DIFFERENCE TO

25 YOUR ULTIMATE OPINION IN THIS CASE THAT YOU HAVE REMOVED

26 CERTAIN ITEMS OF INFORMATION THAT ERIK MENENDEZ GAVE

27 YOU; IS THAT CORRECT?

28 A. BOTTOM LINE, YES.

-11013

1 Q. DO YOU THINK IT IS YOUR JOB, DOCTOR, TO BE

2 THE ULTIMATE DETERMINER OF WHETHER OR NOT THERE WAS

3 PREMEDITATION IN THIS CASE?

4 A. ABSOLUTELY NOT. THAT'S UP TO THE JURY.

5 Q. AND YOU KNEW AT THE TIME WHEN YOU TESTIFIED

6 IN THE FIRST TRIAL THAT THE PROSECUTION DID NOT HAVE A

7 SET OF YOUR ORIGINAL NOTES; IS THAT CORRECT?

8 A. THAT'S CORRECT.

9 MR. CONN: ALL RIGHT. THANK YOU.

10 I HAVE NOTHING FURTHER.

11 THE COURT: ANYTHING ELSE?

12 MR. LEVIN: NO, YOUR HONOR.

13 MR. GESSLER: NO.

14 THE COURT: OKAY. THANK YOU. YOU MAY STEP DOWN.

15 ALL RIGHT. THE NEXT WITNESS FOR THE

16 DEFENSE.

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

18 (ATTORNEYS ABRAMSON AND LEVIN

19 CONFER SOTTO VOCE.)

20

21 MR. LEVIN: YOUR HONOR, THE DEFENSE HAS NO

22 FURTHER EVIDENCE AT THIS TIME.

23 MR. GESSLER: DEFENDANT LYLE MENENDEZ RESTS, YOUR

24 HONOR.

25 THE COURT: OKAY. SUBJECT TO RECEIPT OF

26 EXHIBITS, BOTH SIDES REST.

27 THERE ARE SOME MATTERS THAT THE LAWYERS

28 WANTED TO DISCUSS, AND WE'LL DO THAT AT THIS POINT. SO

-11012

1 WE'LL ASK THAT THE JURY GO INTO THE JURY ROOM JUST FOR A

2 FEW MOMENTS HOPEFULLY, AND THEN WE WILL HAVE YOU COME

3 OUT.

4 (THE JURY ENTERS THE JURY ROOM

5 AND FOLLOWING PROCEEDINGS

6 WERE HELD:)

7

8 THE COURT: OKAY. NOW BOTH DEFENDANTS HAVE

9 RESTED IN THE PENALTY PHASE.

10 THE PEOPLE, ARE THEY READY WITH REBUTTAL?

11 MR. CONN: WE ARE, YOUR HONOR. HOWEVER, IT DOES

12 OCCUR TO ME THERE WAS ONE MATTER THAT WAS LINGERING

13 CONCERNING THE TESTIMONY OF DR. VICARY, AND THAT IS IN

14 REGARD TO THE ENTRY AT THE TOP OF PAGE 7.

15 I THINK THAT --

16 MS. ABRAMSON: WE WOULD OBJECT. IT'S TOO LATE,
17 YOUR HONOR.

18 THE COURT: LET'S GET HIM BACK. THIS CAN BE DONE
19 OUTSIDE THE PRESENCE OF THE JURY.

20 MS. ABRAMSON: IT'S INAPPROPRIATE FOR THE PEOPLE
21 TO RAISE THIS AT THIS TIME SO THAT IT HAS IMPACT AS THE
22 LAST THING THEY PUT ON, YOUR HONOR.

23 THE COURT: WELL, THIS WAS SOMETHING THAT WE HAD
24 PUT OFF.

25 MS. ABRAMSON: THEY COULD HAVE ASKED FOR THIS
26 HEARING AFTER THE RECESS.

27 THE COURT: THIS IS HARDLY A MATTER OF GREAT
28 MOMENT.

-11011

1

2 WILLIAM VICARY,

3 HAVING BEEN PREVIOUSLY SWORN, RESUMED THE STAND AND
4 TESTIFIED FURTHER AS FOLLOWS:

5

6 THE COURT: OKAY. DID YOU WISH TO INQUIRE,
7 MR. CONN?

8 MS. ABRAMSON: I THINK I SHOULD CONDUCT INQUIRY,
9 YOUR HONOR.

10 THE COURT: I THINK, FIRST OF ALL, MR. CONN.
11 MS. ABRAMSON: BUT HE DOESN'T KNOW WHAT THE ISSUE
12 IS.

13 THE COURT: WELL, YOU CAN PURSUE IT, BUT LET'S
14 FIRST GET HIS VERSION OF IT.

15

16 CROSS-EXAMINATION (CONTINUED)

17 MR. CONN:

18 Q. DR. VICARY, I'D LIKE TO DIRECT YOUR
19 ATTENTION TO THE TOP OF PAGE 7.

20 WAS THERE A REFERENCE -- IS THERE AN ENTRY
21 THERE ON THE TOP OF THAT PAGE CONCERNING STATEMENTS TO
22 YOU BY ERIK MENENDEZ REGARDING DR. OZIEL?

23 A. YES.

24 Q. AND DID ERIK MENENDEZ INDICATE TO YOU THAT
25 DR. OZIEL SAW HIS PARENTS?

26 A. YES.

27 Q. DID HE INDICATE TO YOU THAT DR. OZIEL
28 RELATED CERTAIN INFORMATION TO HIS PARENTS?

-11010

1 A. YES.

2 Q. WHAT INFORMATION DID HE TELL YOU DR. OZIEL
3 RELATED TO HIS PARENTS?

4 MS. ABRAMSON: I'M GOING TO OBJECT TO THAT AS NOT
5 THE PURPOSE OF THIS HEARING, YOUR HONOR.

6 THE COURT: OVERRULED.

7 THE WITNESS: DR. OZIEL TOLD THEM THAT THE
8 CHILDREN WERE A DANGER TO THE PARENTS.

9 Q. BY MR. CONN: THAT IS, THAT ERIK AND LYLE
10 MENENDEZ WERE A DANGER TO KITTY AND JOSE MENENDEZ?

11 A. YES.

12 Q. AND WHAT ELSE DID HE SAY CONCERNING THE
13 RESPONSE OF HIS PARENTS TO THAT COMMUNICATION?

14 A. THAT HIS FATHER DID NOT BELIEVE DR. OZIEL.

15 Q. AND WHAT ELSE DID HE SAY?

16 A. NEVERTHELESS, THE PARENTS STARTED LOCKING
17 THEIR DOORS.

18 Q. OKAY.

19 A. AS A MATTER OF FACT, I THINK IT WASN'T JUST
20 THE PARENTS, IT WAS EVERYBODY THAT WAS LOCKING THEIR
21 DOORS.

22 Q. AND HE INDICATED TO YOU THAT THAT LOCKING
23 OF THE DOORS WAS IN RESPONSE TO THAT COMMUNICATION; IS
24 THAT CORRECT?

25 A. IT WAS RELATED IN TIME, YES.

26 Q. AND DID HE INDICATE TO YOU WHAT HIS SOURCE
27 OF INFORMATION WAS CONCERNING THIS?

28 A. NOT SPECIFICALLY, NO.

-11009

1 MR. CONN: THANK YOU.

2 I HAVE NO FURTHER QUESTIONS.

3 THE COURT: DID HE SAY WHETHER HE GOT IT FROM
4 DR. OZIEL, FROM HIS PARENTS, OR FROM SOME OTHER SOURCE?

5 THE WITNESS: NO.

6 THE COURT: DID HE SAY WHEN HE KNEW THIS, WHAT
7 TIME HE BECAME AWARE -- FIRST BECAME AWARE OF THIS
8 INFORMATION THAT YOU HAVE JUST TESTIFIED ABOUT?

9 THE WITNESS: NOT SPECIFICALLY, NO.

10 THE COURT: WAS IT BEFORE OR AFTER HIS
11 INCARCERATION?

12 THE WITNESS: IT DOESN'T SAY IN MY NOTES, AND I
13 DON'T HAVE A RECOLLECTION OF THAT.

14 THE COURT: DID HE SAY WHETHER IT WAS BEFORE OR
15 AFTER THE CRIMES?

16 THE WITNESS: IT'S NOT CLEAR WHEN HE LEARNED
17 THAT.

18 THE COURT: YOU WROTE IN THE -- ON THAT PAGE,
19 10-89 THROUGH 2-90, AND 9-88 THROUGH 6-89.

20 THE WITNESS: YES.

21 THE COURT: WHAT DOES THAT ALL MEAN?

22 THE WITNESS: I THINK THAT'S THE TIME PERIOD THAT
23 ERIK WAS SEEING DR. OZIEL.

24 THE COURT: AND WHAT DOES THAT 1988 REFER TO --
25 OR '88?

26 THE WITNESS: I THINK THAT MEANS WHEN THE FAMILY
27 FIRST STARTED SEEING DR. OZIEL.

28 THE COURT: THERE IS REFERENCE TO HIS BEING SENT

1 TO THE -- TO OZIEL BECAUSE OF THE BURGLARIES; IS THAT

2 CORRECT?

3 THE WITNESS: YES.

4 THE COURT: WHO TOLD YOU THAT?

5 THE WITNESS: ERIK.

6 THE COURT: OKAY. AND WAS ALL OF THIS MATERIAL

7 GIVEN TO YOU IN THE SAME CONVERSATION IN THE JAIL?

8 THE WITNESS: THAT'S A GOOD QUESTION. SOMETIMES

9 I GO BACK, IF THERE IS A SUBJECT I KNOW THAT'S EARLIER

10 IN MY NOTES, AND ADD THINGS TO IT.

11 SO I -- I MAY HAVE DONE THAT IN THIS CASE

12 TO BE MORE SPECIFIC ABOUT THE DATES, YOU SEE. I DON'T

13 KNOW THAT.

14 THE COURT: YOU HAVE NO WAY OF --

15 THE WITNESS: NORMALLY ALL OF THIS WOULD BE

16 CONTEMPORANEOUS, AT THE TIME OF THE INITIAL NOTE.

17 THE COURT: AND YOU HAVE NO WAY OF KNOWING THAT

18 YOU DIDN'T DO THAT?

19 THE WITNESS: NO, I DON'T.

20 THE COURT: YOU REFERRED TO A "TERRIBLE

21 PSYCHOLOGIST."

22 WHO GAVE YOU THAT INFORMATION?

23 THE WITNESS: ERIK.

24 THE COURT: WAS THAT DURING THE SAME

25 CONVERSATION?

26 THE WITNESS: YES.

27 THE COURT: DID HE GIVE YOU ANY MORE INFORMATION
28 ABOUT THIS OTHER THAN THAT?

-11007

1 THE WITNESS: I'M SURE HE MADE OTHER STATEMENTS,
2 BUT I DIDN'T WRITE THEM DOWN.

3 THE COURT: AND WHY DID YOU REMOVE THIS ENTIRELY
4 FROM THE NOTES?

5 THE WITNESS: BECAUSE I WAS TOLD THAT IT WAS
6 CONFIDENTIAL AND PRIVILEGED, AND THAT THERE HAD BEEN A
7 RULING ABOUT THIS, THAT LEGALLY THIS WAS NOT ADMISSIBLE.

8 THE COURT: AND DID YOU -- DO YOU REMEMBER
9 ANYTHING FURTHER SAID ON THAT SUBJECT OTHER THAN THOSE
10 GENERAL STATEMENTS ABOUT THE PRIVILEGE?

11 THE WITNESS: NO.

12 THE COURT: OR WHY IT IS PRIVILEGED, WHAT THE
13 NATURE OF THE RULING WAS, WHEN THE RULING WAS MADE?

14 THE WITNESS: IT HAD TO DO WITH A SERIES OF
15 RULINGS THAT HAD BEEN MADE IN PRIOR LEGAL PROCEEDINGS
16 ABOUT THE TAPES OF DR. OZIEL.

17 THE COURT: ALL RIGHT.

18 DID THE DEFENSE WISH TO INQUIRE?

19

20 REDIRECT EXAMINATION

21 BY MS. ABRAMSON:

22 Q. DR. VICARY, DO YOU HAVE ANY RECOLLECTION OF

23 ERIK MENENDEZ DISCUSSING WITH YOU THINGS THAT HE HAD
24 FOUND OUT THAT DR. OZIEL HAD DONE OR SAID AFTER ERIK
25 MENENDEZ BECAME AWARE OF THE TAPES OF DR. OZIEL?
26 A. YES.
27 Q. AND DO YOU REMEMBER WHETHER OR NOT THIS
28 PARTICULAR CONVERSATION THAT YOU'VE NOTED ON PAGE 7 HAD

-11006

1 ANYTHING TO DO WITH ERIK MENENDEZ TELLING YOU WHAT HE
2 LEARNED ABOUT THINGS THAT DR. OZIEL EITHER WROTE IN HIS
3 NOTES, OR ACTUALLY DID IN THE PAST?
4 A. NO, I DON'T KNOW THAT.
5 Q. SO YOU DON'T KNOW WHETHER THIS IS A
6 CONVERSATION WHERE ERIK MENENDEZ IS SAYING: "I FOUND
7 OUT BY READING A NOTE OF DR. OZIEL THAT HE TOLD MY
8 PARENTS THUS AND SUCH"?
9 A. NO, I DO NOT KNOW THAT.
10 Q. AND YOU DON'T KNOW THAT IT WASN'T THAT
11 EITHER?
12 A. CORRECT.
13 MS. ABRAMSON: I HAVE NOTHING FURTHER.
14 THE COURT: IF HE HAD TOLD YOU THAT THIS WAS
15 SOMETHING HE LEARNED FROM NOTES OF OZIEL AFTER HE WAS
16 INCARCERATED, WOULD YOU HAVE PUT THAT IN THERE?
17 THE WITNESS: I THINK I WOULD HAVE.
18 THE COURT: WOULDN'T THAT BE SIGNIFICANT THAT HE

19 WOULD BE LEARNING IT -- OR THAT HE WOULD LEARN IT FROM
20 SOME OTHER SOURCE RATHER THAN FROM OZIEL OR FROM HIS
21 PARENTS?

22 THE WITNESS: IF HE HAD MENTIONED THAT TO ME, I
23 THINK I WOULD HAVE WRITTEN IT DOWN.

24 MS. ABRAMSON: WELL, I DO HAVE ANOTHER QUESTION.

25 Q. IF HE HAD LEARNED THIS FROM HIS PARENTS
26 DIRECTLY, WOULD YOU HAVE WRITTEN THAT DOWN: "MY PARENTS
27 TOLD ME OZIEL TOLD THEM"?

28 A. I MAY OR MAY NOT. I THINK I PROBABLY WOULD

-11005

1 HAVE.

2 Q. DOES IT APPEAR TO YOU FROM READING IT THAT
3 THIS -- FROM READING WHAT YOU DID WRITE, I REALIZE
4 YOU'RE SPECULATING NOW SOMEWHAT, BUT WHAT YOU WOULD OR
5 WOULDN'T HAVE PUT IN YOUR NOTES?

6 A. YES.

7 Q. OKAY. DOES THE WAY THIS NOTE READS, DOES
8 IT APPEAR TO YOU THAT THE SOURCE OF ERIK MENENDEZ'
9 INFORMATION WAS DR. OZIEL?

10 A. THAT'S POSSIBLE.

11 Q. AND FROM THE WAY IT WAS WRITTEN AND YOUR
12 RECOLLECTION, IS IT EQUALLY POSSIBLE THAT ERIK MENENDEZ
13 DIDN'T LEARN ABOUT WHAT DR. OZIEL HAD DONE OR SAID IN
14 THIS REGARD UNTIL AFTER HE WAS ARRESTED?

15 MR. CONN: OBJECTION. CALLS FOR SPECULATION.

16 THE COURT: SUSTAINED.

17 Q. BY MS. ABRAMSON: IS THERE ANYTHING IN THIS

18 NOTE THAT RULES OUT THE LIKELIHOOD THAT ERIK MENENDEZ

19 LEARNED THAT DR. OZIEL HAD DONE THIS AFTER HE WAS

20 ARRESTED AND HAD ACCESS TO DR. OZIEL'S NOTES?

21 MR. CONN: OBJECTION. THE DOCUMENT SPEAKS FOR

22 ITSELF.

23 THE COURT: OVERRULED.

24 THE WITNESS: NO. I THINK THAT'S POSSIBLE.

25 Q. BY MS. ABRAMSON: IS THERE ANYTHING IN THIS

26 NOTE INDICATING THAT ERIK MENENDEZ DISCUSSED THIS ISSUE

27 WITH HIS PARENTS?

28 MR. CONN: OBJECTION. THE DOCUMENT SPEAKS FOR

-11004

1 ITSELF.

2 THE COURT: OVERRULED.

3 Q. BY MS. ABRAMSON: IT DOESN'T?

4 A. NO.

5 Q. WOULD YOU HAVE FOUND THAT REMARKABLE, GIVEN

6 THE FAMILY HISTORY, THAT IT WOULD BE REMARKABLE FOR HIM

7 TO HAVE DISCUSSED AN ISSUE LIKE THIS DIRECTLY WITH HIS

8 PARENTS?

9 MR. CONN: OBJECTION. IMPROPER OPINION. CALLS

10 FOR SPECULATION.

11 THE COURT: SUSTAINED.

12 MS. ABRAMSON: I HAVE NOTHING FURTHER.

13 BEFORE THE COURT -- IF THE COURT IS LIKELY
14 TO RULE ADVERSELY TO THE DEFENSE, I WANT AN OPPORTUNITY
15 TO PULL OUT WHAT I BELIEVE IS THE SOURCE OF THIS.

16 THE COURT: OKAY. I AM NOT GOING TO GIVE YOU ANY
17 ADVISORY RULING, BUT IF YOU HAVE ANY MORE INFORMATION ON
18 THIS SUBJECT, I WILL CONSIDER IT.

19 ALL RIGHT. YOU MAY STEP DOWN. YOU'RE NOT
20 EXCUSED. AND WE WILL HOLD THIS AS POTENTIAL FURTHER
21 EVIDENCE BY THE PROSECUTION IN ITS REBUTTAL.

22 BUT WHAT OTHER EVIDENCE DO YOU HAVE TO
23 OFFER AT THIS POINT, MR. CONN?

24 MR. CONN: WE HAVE BRIAN ANDERSEN AND WE HAVE
25 MILTON ANDERSEN TO TESTIFY.

26 WE ALSO INDICATED THAT WE WILL BE CALLING
27 DETECTIVE ZOELLER BRIEFLY CONCERNING PRIOR EFFORTS TO
28 PERSUADE TWO WITNESSES, TERRY BARALT AND FAITH

-11003

1 GOLDSMITH, TO SPEAK TO THE PROSECUTION.

2 THE COURT: IS THERE ANY LITIGATION IN REGARDS TO
3 THE ANDERSEN BROTHERS BEFORE THEY TESTIFY?

4 MR. LEVIN: YES, YOUR HONOR. YES. WE WOULD LIKE
5 TO HEAR UNDER 402 WHAT IT IS THEY'RE SEEKING TO OFFER.

6 WE UNDERSTAND THAT THERE'S ALREADY BEEN AN

7 INDICATION THAT IT WOULD BE LIMITED TO SOME COMMENTS OF
8 VICTIM IMPACT CONCERNING KITTY MENENDEZ, BUT NO OPINION
9 CONCERNING WHAT SHOULD HAPPEN TO ERIK OR LYLE MENENDEZ
10 IN THIS PENALTY PHASE WOULD BE ALLOWED.

11 MR. CONN: WELL, WE ARE OPPOSED TO A 402 HEARING
12 AT THIS TIME. I THINK THAT THE WITNESSES -- WE DID NOT
13 HAVE A 402 HEARING ON EVERY PENALTY PHASE WITNESS WHO
14 TOOK THE STAND AND SPOKE ABOUT THEIR RELATIONSHIP TO
15 ERIK AND LYLE MENENDEZ, AND THE DEFENDANTS ARE NOT
16 ENTITLED TO A 402 HEARING EITHER.

17 BOTH WITNESSES ARE GOING TO BE TESTIFYING
18 SIMPLY TO THEIR RELATIONSHIP WITH KITTY MENENDEZ, TO
19 THE -- TO THEIR EARLY RELATIONSHIP, TO THEIR
20 RELATIONSHIP LATER IN LIFE, TO THE LOVE FOR THEIR SISTER
21 AND THE IMPACT OF HER DEATH UPON THEM.

22 THAT'S GOING TO BE THE NATURE OF THE
23 TESTIMONY.

24 THE COURT: ALL RIGHT. THAT'S, AS I INDICATED,
25 APPROPRIATE TESTIMONY IN REBUTTAL TO WHAT HAS BEEN
26 PRESENTED IN THE PENALTY PHASE BY THE DEFENSE.

27 THERE IS ALSO REFERENCE TO THE VIDEOTAPE.

28 DID YOU INTEND TO PURSUE THAT?

-11002

1 MR. CONN: YES. WE ARE BRINGING DOWN THE
2 TELEVISION NOW. BRIAN ANDERSEN WILL BE LAYING THE

3 FOUNDATION FOR THAT, AND I ANTICIPATE THAT THAT SHOULD
4 BE AFTER THE NOON HOUR. I AM SURE THAT WE CAN USE THE
5 REST OF THE MORNING WITH THE OTHER TWO WITNESSES.

6 THE COURT: OKAY. DID YOU WANT TO PURSUE YOUR
7 OBJECTION TO THAT, MR. LEVIN?

8 MR. LEVIN: YES, YOUR HONOR. I HAVE VIEWED THE
9 VIDEOTAPE, AND I WOULD OBJECT TO ITS BEING USED IN THE
10 PENALTY PHASE. IT DOES NOT REBUT ANYTHING THAT'S BEEN
11 OFFERED BY THE DEFENSE OF ERIK MENENDEZ IN ITS
12 RECITATION OF EVIDENCE.

13 THIS VIDEOTAPE, MOST OF WHICH IS OF AN
14 AIRPLANE FLIGHT WITH A VIDEO CAMERA DIRECTED OUT THE
15 WINDOW, ALSO CONTAINS SOMEWHAT INAUDIBLE PORTIONS TO IT,
16 WHICH APPARENTLY YOU CAN'T DISCERN THE VOICES TALKING,
17 OR WHEN YOU TRY TO, IT SOUNDS LIKE THE ENGINES OF THE
18 AIRPLANE ARE TOO LOUD.

19 BUT MY FIRST OBJECTION IS THAT IT'S
20 IRRELEVANT, THAT IT DOES NOT REBUT OR REFUTE ANYTHING
21 OFFERED BY ERIK MENENDEZ.

22 AND THEN SECONDLY, IF IT IS TO BE
23 ADMISSIBLE, WE ASK THAT IT BE REDACTED TO LIMIT THE
24 PLAYING OF IT TO THE -- WHATEVER THE COURT DEEMS TO BE
25 THE RELEVANT PORTIONS.

26 CERTAINLY 19 MINUTES OF AIRPLANE FLIGHT OUT
27 THE WINDOW FROM ILLINOIS TO KALAMAZOO, OR WHEREVER THEY
28 WERE GOING, IS NOT ANY RELEVANT EVIDENCE TO BE OFFERED

1 IN THIS TRIAL.

2 THE COURT: OKAY. WELL, I AGREE THAT THE PORTION
3 THAT JUST SHOWS VIEWS OUT THE WINDOW, LOOKING OUT THE
4 WINDOW ARE NOT RELEVANT, AND CAN BE REDACTED OR
5 FAST-FORWARDED SO THAT WE GET TO THE APPROPRIATE AREAS,
6 WHICH ARE AT THE BEGINNING AND THE END OF THE TAPE
7 SHOWING THE VICTIMS AND ERIK MENENDEZ.

8 AND I FIND THAT THIS IS PROPER REBUTTAL IN
9 THE PENALTY PHASE. THE DEFENSE HAS PORTRAYED BOTH
10 VICTIMS; SPECIFICALLY THE MOTHER, IN A FASHION THAT IS
11 REFUTED BY HOW SHE APPEARS ON THIS TAPE. THE OPPRESSIVE
12 NATURE OF THE RELATIONSHIP AS DESCRIBED BY ERIK MENENDEZ
13 AND THE WITNESSES ON HIS BEHALF IS REFUTED BY THIS
14 VIDEOTAPE. IT CLEARLY IS APPROPRIATE REBUTTAL TO WHAT
15 HAS BEEN PRESENTED IN THE PENALTY PHASE.

16 MR. LEVIN: I WOULD ASK THEN, YOUR HONOR, THAT NO
17 AUDIO BE PLAYED ALONG WITH THE VIDEOTAPE.

18 THE COURT: WELL, I THINK THE AUDIO IS
19 APPROPRIATE IN THE BEGINNING AND THE END. IT CERTAINLY
20 IS NOT PREJUDICIAL IN ANY WAY, AND DOES, AGAIN, TEND TO
21 IDENTIFY WHAT WAS OCCURRING DURING THE COURSE OF THE
22 TIME THAT THE TAPE WAS BEING PLAYED OR MADE.

23 MR. GESSLER: YOUR HONOR, WE DO ASK THAT THIS
24 VIDEOTAPE BE LIMITED IN ITS REBUTTAL TO THE DEFENSE OF
25 ERIK MENENDEZ AT PENALTY. IT'S NOT RELEVANT TO THE
26 DEFENSE OF LYLE MENENDEZ AS PRESENTED AT THE PENALTY.

27 THE COURT: IS IT BEING OFFERED ONLY AS TO ERIK

-11000

1 MR. CONN: NO. I THINK IT SHOULD BE OFFERED AS
2 TO BOTH, BECAUSE -- ONLY ERIK MENENDEZ APPEARS IN THE
3 VIDEOTAPE WITH HIS PARENTS.

4 NEVERTHELESS, THE DEFENSE OF LYLE MENENDEZ
5 IS RELYING UPON THE SAME PORTRAYAL OF THE PARENTS AND
6 HOW THEY INTERACTED WITH THEIR SONS. I THINK THAT THE
7 MERE FACT THAT LYLE MENENDEZ IS NOT IN THE VIDEO SHOULD
8 NOT REQUIRE THE COURT TO LIMIT IT ONLY AS TO ERIK
9 MENENDEZ.

10 MR. GESSLER: HOW THEY REACTED OR INTERREACTED
11 WITH ERIK MENENDEZ ON THIS PARTICULAR TRIP TO KALAMAZOO
12 IN WHICH LYLE MENENDEZ WAS NOT PRESENT IS STILL
13 IRRELEVANT TO LYLE MENENDEZ. THE AUDIO PORTION OF THAT
14 IS HEARSAY AS TO LYLE MENENDEZ, WHO WAS NOT PRESENT FOR
15 ANY PART OF IT.

16 SO WE WOULD RENEW OUR OBJECTIONS ON THAT
17 GROUND, AS WELL AS RELEVANCY TO LYLE MENENDEZ' DEFENSE
18 AT PENALTY.

19 THE COURT: THE COURT WILL OVERRULE THE OBJECTION
20 AS TO LYLE MENENDEZ. MY VIEW IS THAT THIS IS EVIDENCE
21 THAT TENDS TO BE VICTIM IMPACT EVIDENCE, AND IS
22 SUPPORTED BY THE RULING IN PEOPLE VERSUS EDWARDS THAT
23 PHOTOGRAPHS OF VICTIMS ARE APPROPRIATE EVIDENCE TO BE

24 RECEIVED DURING THE PENALTY PHASE, AND IT'S PART OF THE
25 REBUTTAL TO WHAT HAS BEEN PRESENTED BY THE DEFENSE.
26 SO THE OBJECTION BY LYLE MENENDEZ IS
27 OVERRULED.

28 ALL RIGHT. SO LET'S GET THE JURY OUT,

-10999

1 PLEASE.

2 (THE JURY ENTERS THE COURTROOM
3 AND THE FOLLOWING PROCEEDINGS
4 WERE HELD:)

5

6 THE COURT: ALL RIGHT. WE'LL PROCEED WITH
7 PROSECUTION REBUTTAL EVIDENCE.

8

9 R E B U T T A L

10

11 LESLIE H. ZOELLER,

12 CALLED AS A WITNESS ON BEHALF OF THE PEOPLE, WAS SWORN
13 AND TESTIFIED AS FOLLOWS:

14

15 THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE
16 TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE
17 THIS COURT WILL BE THE TRUTH, THE WHOLE TRUTH, AND
18 NOTHING BUT THE TRUTH, SO HELP YOU GOD.

19 THE WITNESS: I DO.

20 THE CLERK: PLEASE TAKE THE STAND, AND STATE YOUR
21 NAME FOR THE RECORD.

22 THE WITNESS: LESLIE H. ZOELLER, Z-O-E-L-L-E-R.

23

24 DIRECT EXAMINATION

25 BY MR. CONN:

26 Q. DETECTIVE ZOELLER, SOMETIME IN 1994 DID YOU
27 GO WITH MYSELF AND DEPUTY DISTRICT ATTORNEY CAROL NAJERA
28 TO NEW YORK FOR THE PURPOSE OF INTERVIEWING WITNESSES ON

-10998

1 THE EAST COAST?

2 A. YES, I DID.

3 Q. WHILE YOU WERE THERE, DID YOU CONTACT TERRY
4 BARALT?

5 A. YES, I DID.

6 Q. AND WHAT WAS YOUR PURPOSE FOR CONTACTING
7 HER AT THAT TIME?

8 A. CONTACTING ANYBODY IN REFERENCE TO THE
9 MENENDEZ FAMILY FOR BACKGROUND INFORMATION FOR AN
10 INTERVIEW.

11 Q. AND WERE YOU SUCCESSFUL IN CONTACTING HER
12 OVER THE TELEPHONE?

13 A. YES.

14 Q. WHERE WAS SHE LIVING AT THAT TIME THAT YOU
15 WERE IN NEW YORK WITH THE PROSECUTORS IN THIS CASE?

16 A. IN CRANBURY, NEW JERSEY, OUTSIDE THE
17 PRINCETON AREA.

18 Q. AND CAN YOU TELL US WHAT CONVERSATIONS YOU
19 HAD WITH TERRY BARALT AT THAT TIME CONCERNING MEETING
20 WITH THE PROSECUTION?

21 MR. LEVIN: OBJECTION. IRRELEVANT.

22 THE COURT: OVERRULED.

23 MR. LEVIN: VAGUE.

24 THE COURT: OVERRULED.

25 THE WITNESS: I MADE TELEPHONE CONTACT WITH TERRY
26 BARALT, AND I ADVISED HER THAT WE WERE ON THE EAST
27 COAST -- WE BEING THE PROSECUTION TEAM -- ON THE EAST
28 COAST, AND THAT WE REQUESTED TO MEET WITH HER TO DISCUSS

-10997

1 THE CASE.

2 Q. AND WHAT HAPPENED NEXT?

3 A. SHE -- SHE STATED THAT, FIRST OF ALL, THAT
4 SHE DIDN'T WANT TO MEET WITH US, AND THEN SHE CHANGED
5 HER MIND AND SAID: "WELL, I WOULD LIKE TO MEET THEM,
6 BUT I DON'T WANT TO DISCUSS THE CASE WITH THEM."

7 Q. THEN WHAT HAPPENED?

8 A. THEN SHE INVITED US DOWN. SHE HAD A TIME
9 WHERE SHE COULD MEET WITH US THAT MET WITH OUR SCHEDULE,
10 AND SHE SAID, "WELL, COME DOWN AT THAT TIME."

11 AND I THINK IT WAS THE FOLLOWING DAY IN THE

12 AFTERNOON.

13 Q. AND DID WE, IN FACT, MEET WITH HER?

14 A. NO, WE DID NOT.

15 Q. DID SHE EVER INDICATE AT ANY TIME DURING
16 THAT CONVERSATION TO YOU THAT SHE WAS WILLING TO DISCUSS
17 THE FACTS OF THE CASE WITH YOURSELF OR THE PROSECUTION?

18 MR. LEVIN: OBJECTION. CALLS FOR SPECULATION.

19 THE COURT: REPHRASE THE QUESTION.

20 MR. CONN: YES.

21 Q. AT ANY TIME DURING YOUR CONVERSATIONS WITH
22 HER ON THAT TRIP, DID SHE EVER INDICATE TO YOU THAT SHE
23 WOULD BE WILLING TO MEET WITH YOU, OR US, TO DISCUSS THE
24 FACTS OF THE CASE?

25 A. SHE DID NOT.

26 Q. OKAY.

27 DID YOU ALSO CONTACT FAITH GOLDSMITH DURING
28 THAT TRIP TO NEW YORK?

-10996

1 A. YES.

2 Q. AND WHERE WAS FAITH GOLDSMITH LIVING AT THE
3 TIME OF THAT TRIP?

4 A. IN FREEHOLD, NEW JERSEY.

5 Q. AND WERE YOU SUCCESSFUL IN CONTACTING HER
6 OVER THE TELEPHONE?

7 A. YES. WHEN I TELEPHONED THE PHONE NUMBER

8 THAT I HAD FOR THAT RESIDENCE, I CONTACTED HER HUSBAND,

9 PETER GOLDSMITH, AND I ADVISED HIM --

10 MR. LEVIN: OBJECTION. HEARSAY.

11 MR. GESSLER: OBJECTION. THIS IS HEARSAY.

12 THE COURT: SUSTAINED.

13 MR. CONN: ALL RIGHT.

14 Q. WHEN YOU CALLED A NUMBER TO REACH FAITH

15 GOLDSMITH, DID SHE ANSWER THE PHONE, OR DID ANOTHER

16 PERSON ANSWER THE PHONE?

17 A. ANOTHER PERSON ANSWERED THE PHONE.

18 Q. AND WAS THAT A MALE VOICE OR A FEMALE

19 VOICE?

20 MR. LEVIN: OBJECTION. IRRELEVANT.

21 THE COURT: OVERRULED.

22 THE WITNESS: IT WAS A MALE VOICE.

23 Q. BY MR. CONN: AND DID YOU ASK AT THAT TIME

24 TO SPEAK TO FAITH GOLDSMITH?

25 A. NO, I DID NOT.

26 Q. OKAY. DID YOU HAVE A CONVERSATION WITH

27 THAT PERSON CONCERNING FAITH GOLDSMITH?

28 MR. LEVIN: OBJECTION. IT INFERS HEARSAY, YOUR

-10995

1 HONOR.

2 THE COURT: I'M SORRY?

3 MR. LEVIN: IT INFERS HEARSAY BY IMPLICATION.

4 THE COURT: OVERRULED.

5 MR. GESSLER: IT'S ALSO IRRELEVANT, YOUR HONOR.

6 THE COURT: WELL, SUSTAINED ON THAT GROUND,
7 UNLESS THERE'S SOME FOUNDATION AS TO ITS RELEVANCY.

8 MR. CONN: YES.

9 Q. WAS THERE ANY CONVERSATION BETWEEN YOURSELF
10 AND THAT PERSON REGARDING YOU HAVING A CONVERSATION WITH
11 FAITH GOLDSMITH?

12 MR. GESSLER: IRRELEVANT.

13 THE COURT: ALL RIGHT.

14 THE QUESTION IS: WAS THERE AN EFFORT TO
15 CONTACT FAITH GOLDSMITH THROUGH THIS INDIVIDUAL?

16 MR. CONN: YES, YOUR HONOR.

17 THE COURT: OVERRULED.

18 THE WITNESS: YES.

19 Q. BY MR. CONN: AND WHAT DID YOU DO IN THAT
20 REGARD?

21 A. I EVENTUALLY SPOKE TO FAITH GOLDSMITH ON
22 THE PHONE.

23 Q. OKAY. AND YOU RECOGNIZED HER VOICE?

24 A. SHE IDENTIFIED HERSELF.

25 Q. OKAY. AND DID YOU INDICATE TO HER THAT THE
26 PROSECUTION AND YOURSELF WANTED TO SPEAK WITH HER
27 CONCERNING THE MENENDEZ FAMILY?

28 A. YES.

1 Q. AND WHAT DID SHE INDICATE TO YOU AT THAT
2 TIME?

3 A. SHE STATED THAT SHE WAS NOT INTERESTED IN
4 GETTING INVOLVED WHATSOEVER, AND DID NOT WANT TO SPEAK
5 TO US.

6 Q. OKAY. ALL RIGHT. THANK YOU.

7 I HAVE NO FURTHER QUESTIONS.

8 THE COURT: CROSS-EXAMINATION.

9 MR. GESSLER: NO. I HAVE NO QUESTIONS.

10 MR. LEVIN: I HAVE A COUPLE.

11

12 CROSS-EXAMINATION

13 BY MR. LEVIN:

14 Q. MS. BARALT INDICATED THAT SHE WAS WILLING
15 TO MEET -- YOU SAID WILLING TO MEET WITH YOU?

16 A. WITH THE PROSECUTION TEAM.

17 Q. WELL, SHE WAS WILLING TO MEET WITH YOU,
18 CORRECT?

19 A. CORRECT.

20 Q. AND SHE WAS WILLING TO MEET WITH MR. CONN?

21 A. THAT'S CORRECT.

22 Q. AND SHE WAS WILLING TO MEET WITH
23 MS. NAJERA?

24 A. THAT'S CORRECT.

25 Q. THEY WEREN'T WILLING TO MEET WITH HER?

26 CAN YOU ANSWER THAT YES OR NO?

27 A. I CAN ANSWER THAT YES OR NO.

28 Q. CAN YOU, PLEASE?

1 A. THAT'S CORRECT.

2 MR. LEVIN: THANK YOU.

3 NOTHING FURTHER.

4 THE COURT: ANYTHING ELSE?

5

6 REDIRECT EXAMINATION

7 BY MR. CONN:

8 Q. SHE INDICATED THAT SHE WAS NOT WILLING TO

9 DISCUSS THE FACTS OF THE CASE; IS THAT CORRECT?

10 A. THAT'S CORRECT.

11 Q. AND DID YOU TELL HER THAT THAT WAS WHY WE

12 WERE THERE, TO DISCUSS THE FACTS OF THE CASE?

13 A. YES.

14 MR. CONN: THANK YOU.

15 NOTHING YOUR HONOR.

16 MR. GESSLER: NOTHING FURTHER.

17 MR. LEVIN: NOTHING FURTHER.

18 THE COURT: OKAY. YOU MAY STEP DOWN.

19 YOUR NEXT WITNESS.

20 MR. CONN: THE PEOPLE CALL MILTON ANDERSEN.

21

22 MILTON ANDERSEN,

23 CALLED AS A WITNESS BY THE PEOPLE, WAS SWORN AND

24 TESTIFIED AS FOLLOWS:

25

26 THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE
27 TESTIMONY YOU ARE ABOUT TO GIVE IN THE CAUSE NOW PENDING
28 BEFORE THE COURT WILL BE THE TRUTH, THE WHOLE TRUTH, AND

-10992

1 NOTHING BUT THE TRUTH, SO HELP YOU GOD.

2 THE WITNESS: YES, MA'AM.

3 THE CLERK: PLEASE TAKE THE STAND, AND STATE YOUR
4 NAME FOR THE RECORD.

5 THE WITNESS: MY NAME IS CHARLES MILTON ANDERSEN,
6 JR.

7 THE CLERK: WOULD YOU SPELL YOUR LAST NAME,
8 PLEASE.

9 THE WITNESS: A-N-D-E-R-S-E-N.

10

11 DIRECT EXAMINATION

12 BY MR. CONN:

13 Q. MR. ANDERSEN, ARE YOU THE BROTHER OF KITTY
14 MENENDEZ?

15 A. THAT'S RIGHT.

16 Q. AND I WOULD LIKE TO SHOW YOU A FAMILY TREE
17 THAT IS CURRENTLY BEFORE YOU, WHICH HAS BEEN USED IN
18 THIS TRIAL TO DEPICT THE RELATIVES OF THE MENENDEZ
19 FAMILY, AND WHICH HAS BEEN MARKED AS 106 FOR
20 IDENTIFICATION.

21 WOULD THIS -- THE LEFT SIDE OF THE FAMILY

22 REPRESENTING THE ANDERSEN FAMILY -- DO YOU SEE YOURSELF

23 REPRESENTED ON THAT CHART?

24 A. I DO.

25 Q. AND IF YOU WOULD, PLEASE, SHOW US WHERE YOU

26 ARE ON THE CHART.

27 A. I'M IN THE SECOND LINE DOWN ON THE LEFT

28 HAND SIDE, NAME OF MILTON.

-10991

1 Q. IS THAT OVER HERE (POINTING)?

2 A. YES, SIR.

3 Q. CAN YOU TELL US WHO JOYCE ANDERSEN IS?

4 A. THAT'S MY WIFE.

5 Q. AND YOU HAVE CHILDREN BY THAT RELATIONSHIP?

6 A. FOUR.

7 Q. AND WHAT ARE THE NAMES OF YOUR CHILDREN?

8 A. BETH AND MARK AND WAYNE AND JASON. IT'S

9 THREE OF THEM RIGHT NOW, THOUGH. WAYNE HAS PASSED AWAY.

10 Q. NOW, CAN YOU TELL US WHAT IS THE AGE

11 DIFFERENCE BETWEEN YOURSELF AND KITTY MENENDEZ?

12 A. SEVEN YEARS. I AM SEVEN YEARS OLDER THAN

13 SHE IS.

14 Q. AND CAN YOU TELL ME WHERE WERE YOU LIVING

15 WHEN KITTY MENENDEZ WAS BORN?

16 A. IN OAK LAWN, ILLINOIS.

17 Q. IS -- ARE BRIAN ANDERSEN AND JOAN ANDERSEN

18 ALSO YOUR SIBLINGS?

19 A. YES. MY OLDER SISTER, MY YOUNGER BROTHER.

20 Q. AND WHAT IS THE DIFFERENCE IN AGE BETWEEN

21 BRIAN ANDERSEN AND KITTY MENENDEZ?

22 A. ELEVEN MONTHS.

23 Q. WHICH ONE BEING THE OLDER?

24 A. BRIAN.

25 Q. SO KITTY MENENDEZ IS THE YOUNGEST IN THE

26 FAMILY?

27 A. RIGHT.

28 Q. AND CAN YOU TELL US IF YOU WERE CLOSE TO

-10990

1 YOUR SISTER, KITTY MENENDEZ, DURING YOUR CHILDHOOD

2 YEARS?

3 A. YEAH, I WAS CLOSE TO HER. THAT WAS JUST

4 HER AND I FOR A LONG PART OF THAT TIME AFTER SISTER JOAN

5 WAS MARRIED, AND MY BROTHER BRIAN WENT OFF TO LIVE A FEW

6 BLOCKS AWAY WITH MY FATHER.

7 Q. AT WHAT AGE WAS IT THAT YOUR -- WHAT AGE

8 WERE YOU WHEN YOUR SISTER JOAN GOT MARRIED AND MOVED

9 AWAY FROM THE FAMILY?

10 A. ABOUT 12, I BELIEVE.

11 Q. AND THEN KITTY MENENDEZ WOULD HAVE BEEN

12 APPROXIMATELY FIVE YEARS OLD AT THAT TIME?

13 A. RIGHT.

14 Q. AND YOU SAID THAT THERE WAS A PERIOD OF
15 TIME WHEN YOUR BROTHER, BRIAN ANDERSEN, MOVED AWAY TO
16 LIVE WITH THE FATHER?

17 A. RIGHT. THAT WASN'T VERY FAR AWAY. IT WAS
18 STILL THE SAME TOWN. WE STILL WENT TO THE SAME SCHOOLS,
19 AND THAT WAS STILL A RELATIONSHIP THERE. IT WAS JUST A
20 DIFFERENT -- A DIFFERENT RESIDENCE REALLY.

21 Q. OKAY. DO YOU REMEMBER WHAT AGE IT WAS THAT
22 YOUR BROTHER, BRIAN, MOVED AWAY FROM THE -- OR MOVED A
23 HALF MILE AWAY TO LIVE WITH YOUR FATHER?

24 A. WELL, MY AGE OR --

25 Q. YES. WHAT WAS YOUR AGE, IF YOU RECALL?

26 A. IT WAS RIGHT THERE AROUND 12. I BELIEVE
27 THAT WAS LIKE 1948.

28 Q. SO FROM ABOUT THE AGE OF 12, YOURSELF BEING

-10989

1 12 AND KITTY MENENDEZ BEING APPROXIMATELY FIVE YEARS
2 OLD, IT WAS JUST THE TWO OF YOU LIVING TOGETHER IN THE
3 HOME WITH YOUR MOTHER?

4 A. RIGHT.

5 Q. AND HOW LONG DID YOU AND KITTY REMAIN
6 LIVING TOGETHER WITH YOUR MOTHER, AS THE ONLY CHILDREN
7 LIVING WITH YOUR MOTHER?

8 A. UNTIL 1955, WHEN I MARRIED AND LEFT THE
9 NEST.

10 Q. YES.

11 A. WHICH AGAIN WAS ONLY A SHORT MILE AWAY.

12 Q. AND CAN YOU TELL ME DURING THE -- DURING
13 THOSE EARLY YEARS HOW MUCH CONTACT YOU HAD WITH YOUR
14 SISTER, KITTY MENENDEZ?

15 A. IT WAS A DAY-TO-DAY MAINTENANCE OF HER
16 NEEDS AND THINGS THAT WE HAD TO DO; WHETHER IT WAS
17 ENTERTAINMENT OR HOMEWORK OR WHATEVER IT TOOK. I MEAN,
18 WHATEVER YOU DO IN LIFE, YOU KNOW.

19 Q. CAN YOU TELL US WHAT YOUR RELATIONSHIP AT
20 THAT TIME CONSISTED OF WITH HER? WHAT WAS YOUR
21 RELATIONSHIP LIKE DURING THAT PERIOD OF TIME?

22 A. WE'D BOTH MEET AFTER SCHOOL, AND WHATEVER
23 WAS GOING ON THAT DAY, WHETHER IT WAS DOING SOMETHING
24 WITH HER FRIENDS COMING OVER, OR HER GOING OUT TO VISIT
25 WITH FRIENDS. IT WAS JUST A DAY-TO-DAY OLDER BROTHER
26 LOOKING OVER YOUNGER SISTER ATMOSPHERE.

27 Q. DID THERE COME A TIME WHEN KITTY MENENDEZ
28 WENT OFF TO BOARDING SCHOOL?

-10988

1 A. YES. THERE WAS A SHORT, ONE-YEAR PERIOD
2 WHEN THAT TOOK PLACE. MY MOTHER HAD STARTED TO WORK,
3 AND THERE WAS A LOT OF TIME THAT WAS REQUIRED FOR KITTY
4 THAT WASN'T THERE FOR MY MOTHER THE FIRST FEW YEARS OF
5 HER EMPLOYMENT.

6 Q. AND DO YOU REMEMBER WHAT AGE KITTY MENENDEZ
7 WAS WHEN SHE WENT OFF TO BOARDING SCHOOL?

8 A. OH, BOY. IT MUST HAVE BEEN LIKE TEN.
9 PROBABLY AROUND TEN YEARS, MAYBE A LITTLE EARLIER THAN
10 THAT.

11 Q. AND HOW LONG WAS SHE AT BOARDING SCHOOL?

12 A. ONE YEAR.

13 Q. DID YOU SEE HER DURING THE TIME PERIOD THAT
14 SHE WAS AT BOARDING SCHOOL?

15 A. OH, YEAH. WE WENT DOWN ON THE WEEKEND --
16 MOST WEEKENDS TO VISIT HER, AND HAD VISITATION ON
17 WEEKENDS.

18 Q. AND YOU SAY THAT YOU USED TO VISIT HER.

19 WHO USED TO VISIT HER ALONG WITH YOURSELF?

20 A. MY MOTHER. MY MOTHER AND I WOULD DRIVE
21 DOWN.

22 Q. AND DURING THE TIME PERIOD THAT YOUR
23 BROTHER, BRIAN ANDERSEN, LIVED ABOUT A HALF A MILE AWAY,
24 DID HE ALSO SPEND TIME WITH KITTY MENENDEZ?

25 A. HE DID, PROBABLY MORE THAN -- OR AS MUCH OR
26 MORE THAN I DID. THEY HAD THE SAME FRIENDS AND THE SAME
27 ORGANIZATIONS THAT THEY BELONGED TO, AND THINGS LIKE
28 THAT AROUND TOWN.

1 Q. NOW, AFTER YOU MOVED AWAY FROM THE FAMILY

2 BY GETTING MARRIED, HOW MUCH CONTACT WITH -- DID YOU

3 HAVE WITH KITTY MENENDEZ OVER THE YEARS?

4 MR. LEVIN: I WOULD OBJECT. IT ASSUMES FACTS NOT

5 IN EVIDENCE; THAT THAT'S WHEN HE MOVED AWAY, YOUR HONOR.

6 THE COURT: REPHRASE THE QUESTION.

7 MR. CONN: YES.

8 Q. DID YOU MOVE OUT OF THE HOME WHEN YOU

9 MARRIED?

10 A. YES, SIR.

11 Q. AND AFTER YOU MARRIED, HOW MUCH CONTACT DID

12 YOU HAVE WITH KITTY MENENDEZ OVER THE YEARS?

13 A. THERE WAS CERTAINLY TIME THERE, A LOT OF

14 CONNECTION THERE. THERE WAS LOT OF MAINTENANCE BEING

15 DONE ON THAT HOME AT THAT TIME, AS I GOT A LITTLE OLDER,

16 AND THE HOME WAS GETTING OLDER AS WELL, AND I WAS THE

17 GUY THAT HAD TO DO ALL THAT. SO THAT WAS DONE AT THAT

18 TIME.

19 AND OTHER THAN THAT, THERE WERE NEEDS OF

20 HERS AND MY MOTHER. MY MOTHER WASN'T THE HEALTHIEST

21 PERSON GOING AT THAT TIME, AND THERE WAS A LOT OF -- A

22 LOT OF INTERACTION BETWEEN MY FAMILY AND HERS, AND A LOT

23 OF THINGS THAT HAD TO BE MAINTAINED.

24 AND THERE WAS -- YOU KNOW, A LOT OF SOCIAL

25 BIRTHDAYS AND CHRISTMAS AND PARTIES AND SO ON AT

26 WHICH -- MY MOTHER WAS A CONCERT PIANIST IN HER YOUNGER

27 DAYS, AND SHE PLAYED THE PIANO, AND WE ALL GATHERED

28 AROUND AND SANG SONGS ON THOSE OCCASIONS, AND KITTY WAS

1 ALWAYS THERE WITH HER SINGING AND HER WIT AND HER
2 LAUGHTER.

3 Q. AND THE HOME THAT YOU SAID THAT YOU
4 MAINTAINED IS THE OAKWOOD --

5 A. OAK LAWN.

6 Q. I'M SORRY, THE OAK LAWN HOME?

7 A. YES, SIR.

8 Q. AND AFTER -- AT A CERTAIN POINT DID KITTY
9 MENENDEZ MOVE AWAY FROM THAT HOME?

10 A. NOT UNTIL SHE WENT TO COLLEGE.

11 Q. OKAY. WHERE DID SHE GO TO COLLEGE?

12 A. WHERE OR WHEN?

13 Q. WHERE?

14 A. IN CARBONDALE, ILLINOIS AT THE S.I.U.,
15 SOUTHERN ILLINOIS UNIVERSITY.

16 Q. AND WHEN SHE WENT AWAY TO COLLEGE, WHAT
17 CONTACT DID YOU HAVE WITH KITTY MENENDEZ AFTER THAT?

18 A. OH, SHE WOULD STOP AT MY HOUSE THE TIMES
19 THAT SHE WOULD COME HOME, AND I WAS -- I DIDN'T GET DOWN
20 TO VISIT HER AT SCHOOL. MY MOTHER AND MY BROTHER DID.
21 I WAS BUILDING A BUSINESS AND A FAMILY AT THAT TIME, AND
22 IN AND OUT OF THE MILITARY AT THAT TIME. I THINK THAT
23 WAS AROUND 1960. I WAS STATIONED IN NORTH CAROLINA AT
24 THAT TIME.

25 Q. AND AT SOME POINT DID KITTY MENENDEZ MARRY
26 JOSE MENENDEZ?

27 A. WHILE ATTENDING S.I.U.

28 Q. AND DO YOU REMEMBER WHAT YEAR THAT WAS?

-10985

1 A. I BELIEVE IT WAS '63.

2 Q. AND HOW MUCH CONTACT DID YOU HAVE WITH
3 KITTY MENENDEZ AFTER SHE MARRIED HER HUSBAND, JOSE?

4 A. WELL, IT WAS MORE LIKE FAMILY REUNIONS AND
5 ANNUAL THINGS. THE FOUR CHILDREN -- MY MOTHER'S FOUR
6 CHILDREN AT THAT TIME WERE PRETTY WELL SCATTERED, WITH
7 KITTY BEING UP EAST AND BRIAN AND I BOTH STARTING NEW
8 BUSINESSES AND WORKING WITH OUR FAMILIES, AND JOAN BEING
9 IN ARIZONA.

10 SO THAT WAS WHENEVER WE WOULD GET TOGETHER,
11 OR WHATEVER; OR IF ONE OF US WAS TRAVELING ANYWHERE
12 CLOSE TO THAT AREA THAT THEY LIVED IN, WE'D ALWAYS TAKE
13 ANOTHER DAY OR TWO FOR A SIDE TRACK TO VISIT -- TO SEE
14 THAT PERSON AND DO THAT.

15 Q. AND DID YOU VISIT KITTY MENENDEZ IN SOME OF
16 THE VARIOUS HOMES THAT SHE LIVED IN WITH JOSE MENENDEZ?

17 A. OH, YES.

18 Q. CAN YOU TELL ME WHERE YOU VISITED HER?

19 A. IN PENNINGTON, PRINCETON, AND IN THE ELM
20 STREET HOME IN CALIFORNIA.

21 Q. WHEN WAS THE LAST TIME THAT YOU SAW KITTY
22 MENENDEZ?

23 A. ON THE 3RD OF AUGUST, '89.
24 Q. AND WHAT WAS THE NATURE OF THAT OCCASION?
25 A. SHE WAS IN OAK LAWN ON HER WAY TO THE
26 KALAMAZOO TENNIS TOURNAMENT, AND WE SPENT THE BETTER
27 PART OF A DAY TOGETHER WITH LUNCH, AND BACK TO MY HOUSE
28 AFTERWARDS.

-10984

1 Q. I'D LIKE TO SHOW YOU THE PHOTOGRAPH THAT
2 HAS BEEN MARKED AS 457 FOR IDENTIFICATION.

3 CAN YOU TELL US WHO THAT IS?

4 A. MY SISTER, KITTY.

5 Q. DID YOU LOVE YOUR SISTER?

6 A. YEAH.

7 Q. AND CAN YOU TELL US WHY YOU LOVED HER?

8 A. SHE WAS A BEAUTIFUL PERSON. SHE ALWAYS HAD
9 A SPECIAL CARE FOR PEOPLE, AND THE FAMILY AND MYSELF,
10 AND IT WAS A BEAUTIFUL FRIENDSHIP AND A LOVING, CARING
11 RELATIONSHIP BETWEEN MY SISTER KITTY AND I.

12 Q. AND CAN YOU TELL US WHAT IMPACT HER DEATH
13 HAD ON YOU?

14 A. SAY IT AGAIN.

15 Q. CAN YOU TELL US WHAT IMPACT HER DEATH HAD
16 ON YOU?

17 A. IT WAS DEVASTATING. IT WAS TOTALLY
18 DEVASTATING. I COULDN'T -- I STILL CAN'T BELIEVE IT'S

19 HAPPENED.

20 Q. AND DO YOU MISS HER?

21 A. VERY MUCH.

22 MR. CONN: THANK YOU.

23 I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

24 THE COURT: OKAY.

25 WE'LL BE IN RECESS UNTIL 1:30. DON'T

26 DISCUSS THE MATTER WITH ANYONE. DON'T FORM ANY FINAL

27 OPINIONS ABOUT IT. WE WILL RESUME AT 1:30.

28 (AT 12:05 P.M. PROCEEDINGS WERE

-10983

1 ADJOURNED UNTIL 1:30 P.M. THE
2 SAME DAY.)

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1 VAN NUYS, CALIFORNIA; WEDNESDAY, APRIL 10, 1996
2 1:55 P.M.
3 DEPARTMENT NW "N" HON. STANLEY M. WEISBERG, JUDGE
4 (APPEARANCES AS HERETOFORE NOTED.)
5 (MARILYN A. FADALE, OFFICIAL REPORTER.)
6 (MARY LU MURPHY, OFFICIAL REPORTER.)
7
8 (THE FOLLOWING PROCEEDINGS WERE
9 HELD IN OPEN COURT, OUT OF THE

10 PRESENCE OF THE JURY:)

11

12 THE COURT: IN THE TRIAL, WE'RE BACK IN

13 SESSION WITHOUT THE JURY. EVERYBODY ELSE IS

14 PRESENT.

15 ARE WE READY TO PROCEED?

16 MR. CONN: YES.

17 THE COURT: WHAT DID YOU WANT TO DO?

18 MR. CONN: WE HAVE THE VIDEO HERE THAT WE

19 INTEND TO PLAY FOR THE JURY. BASICALLY, IT HAS BEEN

20 REDACTED TO DELETE SOME OF THE PLANE FLIGHT IT'S NOT

21 NECESSARY TO PLAY FOR THE JURY.

22 IF THE COURT WISHES TO PREVIEW IT, WE

23 CAN PREVIEW IT FOR THE COURT.

24 THE COURT: HAVE DEFENSE COUNSEL SEEN IT?

25 MR. LEVIN: YES, YOUR HONOR. ALTHOUGH WE

26 PREVIOUSLY OBJECTED, UNDERSTANDING THE COURT'S

27 RULING, WE HAVE NO FURTHER OBJECTION TO THIS

28 REDACTED VERSION BEING PLAYED. IT'S ABOUT FIVE OR

54556

1 SIX MINUTES. BUT I DON'T THINK THERE'S A NEED TO

2 SEE IT.

3 MS. ABRAMSON: YOU MEAN NO ADDITIONAL

4 OBJECTION.

5 MR. LEVIN: YES.

6 MR. GESSLER: THE OBJECTION PREVIOUSLY
7 STATED, BUT NO ADDITIONAL OBJECTIONS TO THE WAY IT'S
8 NOW BEEN REDACTED.

9 THE COURT: THEN I AGREE, THERE'S NO NEED FOR
10 ME TO SEE IT, SINCE I'VE SEEN THE UNREDACTED
11 VERSION.

12 IS THERE GOING TO BE ANY FURTHER DIRECT
13 EXAMINATION OF THE WITNESS? HAS HE COMPLETED -- IS
14 THERE ANY CROSS-EXAMINATION OF THE WITNESS?

15 MR. LEVIN: NO, YOUR HONOR, NOT FROM ERIK
16 MENENDEZ.

17 MR. GESSLER: NO CROSS FROM LYLE MENENDEZ.

18 THE COURT: OKAY. YOU CAN STATE THAT ON THE
19 RECORD, AND THEN WE'LL HAVE THE NEXT WITNESS, AND
20 WE'LL HAVE THE JURY OUT.

21 MR. CONN: THE ONLY OTHER MATTER I WANTED TO
22 TAKE UP BEFORE WE BRING OUT THE JURY IS IN REGARDS
23 TO THE FINAL RULINGS BY THE COURT CONCERNING
24 DR. VICARY AND WHETHER HE WILL BE ABLE TO TESTIFY TO
25 THAT ONE REMAINING STATEMENT, BECAUSE WE WOULD
26 RATHER CALL HIM AFTER -- AT THIS TIME, RATHER THAN AS
27 OUR LAST WITNESS.

28 THE COURT: I'M WAITING FOR MS. ABRAMSON.

1 SHE WAS LOOKING AT --

2 MS. ABRAMSON: UNFORTUNATELY, I DON'T HAVE
3 THE DOCUMENTS HERE THAT I NEED TO RESPOND TO IT.
4 THE FILE AT THE PUBLIC DEFENDER'S OFFICE, THE LYLE
5 MENENDEZ FILE, IS NOT AS COMPLETE AS MY FILE. BUT I
6 HAVE NO ONE WORKING FOR ME ANY LONGER IN MY OFFICE,
7 SO THERE'S NO ONE WHO COULD RUN THAT MATERIAL OVER
8 TO ME FROM HIS FILE.

9 I'VE LOOKED OVER THE MATERIAL SUBMITTED
10 TO THE COURT AND IT'S NOT COMPLETE. THERE'S ANOTHER
11 SET OF DOCUMENTS THAT I'M AWARE OF. SO IT'S -- I CAN
12 ADDRESS THE COURT FURTHER IN DETAIL IN CAMERA ABOUT
13 THIS, BUT IT'S --

14 THE COURT: THERE'S --

15 MS. ABRAMSON: IT DOESN'T PUT ME IN A
16 POSITION TO -- GIVEN DR. VICARY'S ANSWERS, I HAD
17 ASSUMED THAT HE HAD MORE CONTEXT THAN WHAT HE
18 TESTIFIED TO. I AM VERY CERTAIN WHAT THE SOURCE OF
19 THAT INFORMATION IS, AND I'D LIKE TO BE IN A
20 POSITION TO PROVE IT TO THE COURT TO PREVENT THIS
21 VERY PREJUDICIAL MATERIAL FROM COMING BEFORE THE
22 JURY, WHICH I KNOW MY CLIENT DID NOT KNOW UNTIL
23 AFTER THE HOMICIDES.

24 AND SO I DON'T KNOW WHAT TO TELL THE
25 COURT, EXCEPT I HAVE TO GET TO THE OFFICE TO GET IT,
26 OR I CAN SEND SOMEONE TO BRING ALL THOSE MATERIALS
27 BACK HERE BEFORE THE END OF THE DAY TODAY. THAT'S

54558

1 I'M CERTAIN -- AND MS. TOWERY ALSO HAS A
2 RECOLLECTION OF HAVING READ THAT VERY MATERIAL IN
3 ONE OF THESE DOCUMENTS, AND WE HAVEN'T HAD A CHANCE
4 TO PERSONALLY SEARCH HER OFFICE. THEIR PARALEGAL,
5 WHO'S BEEN ON TOP OF THE LEGAL FILE FOR FIVE YEARS,
6 INSISTS THAT IS EVERYTHING, BUT THAT'S LESS THAN
7 WHAT THE COURT HAS.

8 THE COURT: THIS WAS ALL THAT WAS GIVEN TO ME
9 BY THE DEFENSE IN THE FIRST TRIAL RELATING TO
10 TRANSCRIPTS OF TAPE-RECORDINGS OF SESSIONS MADE OR
11 THE TAPE-RECORDINGS MADE BY DR. OZIEL REFLECTING
12 SESSIONS HE HAD WITH THE DEFENDANT.

13 MS. ABRAMSON: ONLY THOSE SESSIONS THAT
14 SPECIFICALLY HAD TO DO WITH DR. OZIEL AND ERIK
15 MENENDEZ. THAT'S ALL YOU HAVE IN FRONT OF YOU.
16 THERE ARE ADDITIONAL SESSIONS BETWEEN DR. OZIEL AND
17 THE PARENTS, AND THAT'S WHERE I THINK IT IS.

18 THE COURT: I'VE NEVER SEEN THOSE.

19 MS. ABRAMSON: I KNOW. THERE WAS NO REASON
20 FOR YOU TO SEE THEM. THEY WEREN'T PART OF WHAT YOU
21 WERE CONSIDERING FOR THE RULING YOU WERE CONSIDERING
22 MAKING, AND THAT'S WHAT'S MISSING FROM --

23 THE COURT: LET ME HEAR MS. TOWERY.
24 MS. TOWERY: I HAVE A VAGUE RECOLLECTION OF
25 HAVING READ SOMETHING IN DR. OZIEL'S NOTES THAT IS
26 ALONG THE LINES OF WHAT IS IN DR. VICARY'S NOTES. I
27 CAN'T REMEMBER WHERE I READ IT, JUDGE. I'D HAVE TO
28 GO BACK THROUGH OUR FILE OR MS. ABRAMSON'S FILE.

54559

1 LIKE I SAID, IT'S A VAGUE RECOLLECTION.
2 BUT I DO REMEMBER SEEING SOMETHING ALONG THOSE
3 LINES. AND I DID REVIEW THE OZIEL MATERIALS WHEN
4 THE PROSECUTION INDICATED INITIALLY THAT THEY
5 INTENDED TO CALL HIM IN THE PENALTY PHASE.

6 SO IT'S FAIRLY RECENT THAT I'VE LOOKED
7 AT THAT. I JUST CAN'T REMEMBER.

8 THE COURT: YOU DON'T RECALL WHERE THAT WAS
9 IN THE NOTES?

10 MS. TOWERY: NO, I DON'T. I'M INCLINED TO
11 THINK MS. ABRAMSON IS RIGHT. AND IT MAY BE IN A
12 SESSION WITH THE PARENTS, BUT I CAN'T REMEMBER.

13 THE COURT: LET ME LOOK AGAIN AT VICARY'S
14 NOTES.

15 (COURT READING.)

16

17 MS. ABRAMSON: I WOULD INDICATE, YOUR HONOR,

18 THAT WHATEVER THE SOURCE, THE INFORMATION STILL HAS
19 TO DO WITH A HEARSAY CONVERSATION BETWEEN DR. OZIEL
20 AND THE PARENTS.

21 THE COURT: OKAY. WE'LL GET TO THAT. I'M
22 JUST TRYING TO READ VICARY'S NOTES IN CONTEXT, IN
23 LOOKING AT THE PRECEDING PAGES WHICH I HAVE NOT
24 LOOKED AT, THE UNREDACTED, OR THE PAGES THAT WERE
25 NOT ALTERED THAT PRECEDED PAGE 7, WHICH WAS THE
26 FIRST ALTERED PAGE.

27 I WAS TRYING TO SEE WHAT CONTEXT ALL
28 THIS WAS SAID IN.

54560

1 MS. ABRAMSON: IT'S OUT OF CONTEXT, I
2 BELIEVE, LIKE MOST STUFF. IT'S A SEPARATE SESSION.

3 (COURT READING.)

4

5 THE COURT: THE BOTTOM LINE IS, TWO THINGS:

6 ONE, ISN'T THE BURDEN ON THE DEFENSE AT
7 THIS POINT, ESPECIALLY THE DEFENDANT, TO ESTABLISH
8 THAT THIS IS FROM SOME PRIVILEGED SOURCE?

9 MS. ABRAMSON: HE'S PREPARED TO TESTIFY TO
10 THAT OUT OF THE PRESENCE OF THE JURY, YOUR HONOR, SO
11 THE COURT CAN MAKE A 402 RULING ON WHETHER THIS IS
12 APPROPRIATE, SINCE IT'S AMBIGUOUS.

13 I WANTED TO HAVE THE ACTUAL DOCUMENT
14 HERE TO BOLSTER HIS CREDIBILITY TO THE COURT. HE'S
15 PREPARED TO TESTIFY THAT HE DIDN'T KNOW ABOUT THIS
16 UNTIL AFTERWARDS. HE DIDN'T KNOW OZIEL HAD HAD SUCH
17 A CONVERSATION WITH HIS PARENTS UNTIL AFTERWARDS.

18 (COURT READING.)

19

20 MS. ABRAMSON: IT'S STILL -- WHEN YOU GET
21 RIGHT DOWN TO IT --

22 THE COURT: OKAY. LET'S NOT HAVE ARGUMENT.
23 LET ME JUST READ THIS MATERIAL HERE, AND NOT
24 INTERRUPT MY STREAM OF CONSCIOUSNESS.

25 (COURT READING.)

26

27 THE COURT: OKAY. WELL, AS FAR AS THE
28 HEARSAY ASPECT OF IT, IF THE DEFENDANT HAD OBTAINED

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1 THIS INFORMATION FROM OZIEL BEFORE THE MURDERS, IT
2 WOULD AGAIN BE A REFLECTION OF THE DEFENDANTS' STATE
3 OF MIND AS TO HIS AWARENESS AND KNOWLEDGE OF THE
4 SITUATION THAT WEEK.

5 IF HE HAD OBTAINED THIS INFORMATION FROM
6 HIS PARENTS, IT WOULD BE A REFLECTION OF THIS
7 DEFENDANT'S STATE OF KNOWLEDGE OF THE CIRCUMSTANCES

8 THAT WEEK.

9 THE ISSUE THAT YOU'RE TALKING ABOUT IS
10 THIS WAS ALL LEARNED BY THE DEFENDANT AFTER THE
11 MURDERS.

12 MS. ABRAMSON: THAT'S MY POSITION WITH
13 RESPECT TO WHEN.

14 BUT EVEN WITH RESPECT TO WHAT, I DON'T
15 SEE HOW IT'S ADMISSIBLE. EVEN IF THE DEFENDANT KNEW
16 THAT DR. OZIEL HAD TOLD HIS PARENTS THIS THING, THIS
17 IS A WAY OF GETTING IN DR. OZIEL'S OPINION,
18 DR. OZIEL'S HEARSAY, WHICH IS EXTREMELY PREJUDICIAL,
19 FOR WHAT PURPOSE? TO SHOW MY CLIENT KNEW THAT
20 DR. OZIEL HAD SAID SOMETHING BAD ABOUT HIM TO HIS
21 PARENTS?

22 I DON'T SEE THE RELEVANCE OF THAT, AND I
23 DON'T SEE, IF RELEVANT AT ALL, HOW THE RELEVANCE
24 OUTWEIGHS THE PREJUDICE OF GETTING IN DR. OZIEL'S
25 OPINION, WHICH IS ALL THAT IS. THAT'S THE PROBLEM
26 WITH IT, ABOVE AND BEYOND ANYTHING ELSE.

27 I'M STILL GOING THROUGH MORE.

28 THE COURT: DID THE PEOPLE WISH TO BE HEARD

54562

1 ON THAT?

2 MR. CONN: I'M SORRY, YOUR HONOR. I WAS

3 TALKING TO MS. NAJERA.

4 THE COURT: THE ISSUE RELATING TO IF THIS IS
5 HEARSAY, SOMETHING THAT THE DEFENDANT HAD HEARD FROM
6 SOMEONE ELSE BEFORE THE MURDERS, EITHER FROM THE
7 PARENTS OR FROM OZIEL, THE DEFENSE OBJECTION IS IT'S
8 NOT ADMISSIBLE BECAUSE IT'S HEARSAY.

9 MR. CONN: I THINK THAT ERIK MENENDEZ DOESN'T --
10 ACCORDING TO DR. VICARY, IT WAS NOT STATED AS SUCH
11 TO HIM. HE HAD NO RECOLLECTION OF ERIK MENENDEZ
12 STATING IT TO HIM AS HEARSAY.

13 I THINK THAT WE HAVE TO GO BASED ON WHAT
14 IS BEFORE THE COURT AT THIS TIME. AT THIS TIME THE
15 ONLY MATTER BEFORE THE COURT IS THAT ERIK MENENDEZ
16 STATED TO -- THIS TO HIM AS FACT; AND AS SUCH, IT IS
17 AN ADMISSION OF THE DEFENDANT. AND I WOULD ASK IT
18 BE ADMITTED.

19 MS. ABRAMSON: WHAT HE'S STATING IS THAT
20 SOMEONE TOLD SOMEONE ELSE SOMETHING. HE'S STATING A
21 HEARSAY STATEMENT.

22 MR. CONN: HE'S NOT SAYING THAT.

23 MS. ABRAMSON: IT DOES, MR. CONN. READ IT.

24 THE COURT: IT SAYS: "ALSO SAW PARENTS. TOLD
25 THEM HIGH DANGER TO PARENTS. FATHER NOT BELIEVED."

26 MS. ABRAMSON: "TOLD ME KIDS DANGER TO
27 PARENTS," IS WHAT IT SAYS, YES.

28 THE COURT: OKAY. KIDS. OKAY.

1 "KIDS DANGER TO PARENTS. FATHER NOT
2 BELIEVED. STARTED LOCKING THEIR DOORS."

3 MS. ABRAMSON: WHAT THAT'S SAYING IS
4 DR. OZIEL ALSO SAW THE PARENTS. DR. OZIEL TOLD THE
5 PARENTS THIS.

6 THE COURT: YES.

7 MS. ABRAMSON: THAT'S WHAT IT READS, AND MY
8 RECOLLECTION OF THE DOCUMENT IS EXACTLY THAT;
9 DR. OZIEL TOLD THEM SOMETHING. THE FATHER EXPRESSED
10 DISBELIEF TO DR. OZIEL.

11 THE COURT: WELL, OF COURSE, THE PEOPLE ARE
12 IN NO POSITION TO KNOW THIS AND NEITHER AM I.

13 MS. ABRAMSON: NEVERTHELESS, ON THE VERY FACE
14 OF IT, YOUR HONOR, IT'S A HEARSAY OPINION OF
15 DR. OZIEL, HIGHLY DAMAGING, WHOSE PROBATIVE VALUE,
16 SINCE IT CAN'T BE ESTABLISHED THAT MY CLIENT HAD
17 KNOWLEDGE OF IT BEFORE THE HOMICIDES, IS OUTWEIGHED
18 BY THE PREJUDICE.

19 AND MY CLIENT WOULD TESTIFY, AND I OFFER
20 AS AN OFFER OF PROOF, THAT HE DIDN'T KNOW ABOUT THIS
21 TILL AFTER, AND HIS RECOLLECTION IS THAT HE LEARNED
22 OF IT THROUGH A NOTE, THROUGH GOING OVER IT AFTER WE
23 TRANSCRIBED THE NOTES.

24 THE COURT: ALL RIGHT. WELL, AT THIS POINT
25 THEN HE'LL HAVE TO TESTIFY TO THAT, SINCE THAT'S THE
26 ONLY OTHER AVENUE OF APPROACH. IS HE PREPARED TO

27 TESTIFY ON THAT SUBJECT?

28 MS. ABRAMSON: I JUST HAVE TO MAKE SURE

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1 THAT --

2 (ATTORNEY ABRAMSON AND DEFENDANT,

3 ERIK MENENDEZ, CONFER SOTTO VOCE.)

4

5 MS. ABRAMSON: YOUR HONOR, I'D LIKE TO SUBMIT

6 THIS TO THE COURT. PRIVILEGED. COULD WE GO OUT

7 INTO THE HALL, YOUR HONOR?

8 THE COURT: SURE. WITH THE REPORTER.

9 (PAGES 54565 THROUGH 54566 WERE HELD

10 IN CAMERA, AND SEALED BY ORDER OF

11 THE COURT.)

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1 MS. ABRAMSON: CAN WE GO ON WITH THE OTHER
2 WITNESS?

3 HE HAS DYSLEXIA AND HE'S A SLOW READER.

4 THE COURT: NO.

5 ARE THERE ANY OTHER WITNESS OTHER THAN
6 THIS LAST WITNESS?

7 MR. CONN: JUST BRIAN ANDERSEN, AND WE WOULD
8 LIKE TO PUT HIM ON LAST.

9 THE COURT: AS FAR AS THE DEFENSE, IS THERE
10 ANY SURREBUTTAL?

11 MS. ABRAMSON: COULD MY CLIENT GO IN THE
12 LOCKUP?

13 ARE YOU OKAY?

14 THE COURT: WE'RE GOING TO DISCUSS JURY
15 INSTRUCTIONS WHILE THAT IS OCCURRING. SO IF HE
16 DOESN'T WANT TO BE PRESENT FOR THAT, THAT'S FINE. HE

17 CAN DO THAT.

18 THE INSTRUCTIONS SUBMITTED BY THE
19 DEFENSE, MR. CONN, DID YOU RECEIVE THOSE
20 INSTRUCTIONS THAT THE DEFENSE SUBMITTED?

21 MR. CONN: YES, YOUR HONOR.

22 MR. CONN: I BELIEVE THERE WAS A SINGLE
23 INSTRUCTION. WE RECEIVED ONE.

24 THE COURT: THERE'S A MODIFICATION OF 8.88?

25 MR. GESSLER: AND 8.85.

26 THE COURT: HAVE YOU HAD A CHANCE TO REVIEW
27 THE DEFENSE INSTRUCTION?

28 MR. CONN: YES. I HAVE NO OBJECTION TO IT.

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1 THE COURT: NO OBJECTION TO THOSE TWO
2 INSTRUCTIONS AS MODIFIED?

3 MR. CONN: I BELIEVE WE ONLY RECEIVED ONE
4 MODIFIED INSTRUCTION.

5 MR. GESSLER: YOU GOT 8.85 AND 8.88.

6 MR. CONN: I ONLY RECEIVED ONE.

7 MR. GESSLER: I KNOW I GAVE BOTH OF THEM TO
8 YOU. I REMEMBER PUTTING THEM OVER HERE.

9 MS. NAJERA: WE GOT ONE. WE HAVE 8.85.

10 MS. TOWERY: YOUR HONOR, YOU HAVE BOTH SETS,
11 CORRECT?

12 THE COURT: YES.

13 (BRIEF PAUSE IN THE PROCEEDINGS.)

14

15 THE COURT: ARE THERE ANY INSTRUCTIONS YOU'RE

16 SUBMITTING, MR. LEVIN?

17 MR. LEVIN: YES, YOUR HONOR. I HAVE ONE, BUT

18 I DIDN'T HAVE COPIES, SO THE PROSECUTOR IS RUNNING

19 THEM.

20 (BRIEF PAUSE IN THE PROCEEDINGS.)

21

22 MR. LEVIN: JUST THE CIRCLED PORTION, YOUR

23 HONOR. I APOLOGIZE FOR NOT HAVING IT TYPED UP

24 BETTER.

25 (COURT READING.)

26

27 THE COURT: ALL RIGHT.

28 MR. CONN, HAVE YOU HAD A CHANCE TO LOOK

54569

1 AT MR. GESSLER'S?

2 MR. CONN: YES. WE HAVE NO OBJECTION TO

3 8.85, THE MODIFIED INSTRUCTION SUBMITTED BY

4 COUNSEL.

5 BUT I THINK THAT WE DO OBJECT TO 8.88.

6 I THINK THAT THE INSTRUCTION, THE STANDARD

7 INSTRUCTION FOR 8.88 IS SUFFICIENT.

8 THE COURT: WHAT PARTICULAR PORTION DO YOU
9 HAVE OBJECTION TO, THE MODIFICATIONS, ALL OF THE
10 MODIFICATIONS, OR IS THERE SOMETHING THAT YOU --

11 MR. CONN: I DON'T KNOW IF THE COURT'S COPY
12 IS HIGHLIGHTED.

13 THE COURT: YES, IT IS.

14 MR. CONN: OKAY. THE EMPHASIS ON LISTED
15 APPLICABLE FACTORS OF AGGRAVATING AND MITIGATING
16 CIRCUMSTANCES IS UNNECESSARY AND MISLEADING, BECAUSE
17 IT DESCRIBES IN THE VERY NEXT PARAGRAPH AN
18 AGGRAVATING FACTOR IS ANY FACT, CONDITION, OR EVENT
19 ATTENDING THE COMMISSION OF A CRIME WHICH INCREASES
20 ITS GUILT OR ENORMITY.

21 BY INCLUDING THE WORD "LISTED" IT
22 IMPROPERLY SUGGESTS THAT THERE ARE NO AGGRAVATING
23 CIRCUMSTANCES EXCEPT THOSE WHICH ARE SPECIFICALLY
24 LISTED, AND THAT IS INCORRECT.

25 THE DEFINITION OF WHAT IS AN AGGRAVATING
26 FACTOR WARRANTS THE CONTRARY CONCLUSION.

27 SO I WOULD ASK THAT THAT WORD BE
28 REMOVED, OR NOT BE GIVEN, I SHOULD SAY. IT IS NOT

2 I HAVE NO PROBLEM WITH THE LANGUAGE:
3 "EACH OF YOU," RATHER THAN "YOU," IN THE TWO
4 INSTANCES IN WHICH IT IS SUGGESTED BY THE DEFENSE;
5 HOWEVER, I DISAGREE WITH THE INSERTION OF THE
6 SENTENCE: "CONTAINED IN THE FINAL PARAGRAPH."

7 I DON'T KNOW WHAT THE AUTHORITY FOR THAT
8 PROPOSITION IS.

9 THE COURT: OKAY. WE'LL HEAR ARGUMENT ON
10 THAT, BUT I WANT TO STAY ON THE ISSUE OF VICARY'S
11 TESTIMONY.

12 IT SEEMS TO ME THAT ADDITIONAL STANDARD
13 INSTRUCTIONS SHOULD BE GIVEN AS WELL TO SUPPLEMENT
14 THESE INSTRUCTIONS, SINCE THEY'RE TOLD TO DISREGARD
15 THE INSTRUCTIONS GIVEN IN THE PREVIOUS PHASE OF THE
16 TRIAL, AND I'LL GIVE YOU A LIST OF THOSE THAT I
17 THINK ARE APPROPRIATE, AND YOU CAN EVALUATE THE LIST
18 AND SEE IF IT'S COMPLETE, INCOMPLETE, OR YOU OBJECT
19 TO ANY: 1.00, .02, .03; 2.00, .20, .21.1.

20 MR. GESSLER: I'M SORRY. MY EAR IS PLUGGED
21 UP TODAY. I'M HAVING SOME TROUBLE.

22 THE COURT: OKAY. ALL THE REST OF THESE
23 AFTER 1.03 ARE IN THE TWO SERIES.

24 MR. GESSLER: I GOT 1.03. AND THAT'S WHERE --

25 THE COURT: 2.00, .20, .21.1; .21.2, .22,
26 .27, .80, .81, AND .82.

27 I DON'T KNOW IF WE NEED .82, BECAUSE THE
28 TESTIMONY HAS BEEN PRESENTED, BUT AT LEAST UP TO

1 .81.

2 SO I'LL LET YOU REVIEW THAT LIST AND
3 ALSO DETERMINE WHETHER THERE'S ANY ADDITIONAL
4 INSTRUCTIONS YOU THINK ARE APPROPRIATE.

5 HOW ARE WE STANDING NOW WITH THIS
6 ISSUE?

7 MS. ABRAMSON: ALL RIGHT. YOUR HONOR, WELL,
8 WHERE WE'RE STANDING IS I BELIEVE THAT -- MY CLIENT
9 BELIEVES THIS IS THE SOURCE OF THE INFORMATION FOR
10 WHAT HE TOLD DR. VICARY, EXTRAPOLATING FROM THIS.

11 MY IMMEDIATE CONCERN IS THE ISSUE OF HOW
12 MUCH OF THIS NEEDS TO BE MADE AVAILABLE,
13 UNPRIVILEGED, IN ORDER FOR MY CLIENT TO TESTIFY
14 ABOUT IT. WHAT I THINK I NEED IS FOR THE COURT TO
15 LOOK OVER THE WHOLE SESSION NOTES. THIS APPEARS TO
16 BE -- NONE OF THE REST OF THIS IS --

17 THE COURT: WELL, AT THIS STAGE I'M NOT
18 LOOKING FOR MORE MATERIAL TO READ. IF YOUR CLIENT
19 IS --

20 MS. ABRAMSON: I'D LIKE TO JUST XEROX THAT
21 PART.

22 THE COURT: IF THE DEFENDANT IS PREPARED TO
23 TESTIFY, HE SHOULD JUST ANSWER THE QUESTIONS THAT
24 YOU PROPOSE.

25 MS. ABRAMSON: I KNOW, BUT THEN THE PEOPLE
26 ARE GOING TO WANT TO SEE THE DOCUMENT. HE'S RELYING
27 ON THE DOCUMENT. THEY'LL WANT TO SEE THE DOCUMENT,
28 AND THEY HAVE A RIGHT TO SEE THE DOCUMENT AT THAT

54572

1 POINT.

2 I WANT TO GIVE THEM THE RELEVANT PART OF
3 THE DOCUMENT, AND I WANT THE COURT TO DECIDE WHAT
4 THAT IS.

5 THE COURT: OKAY. SO YOU WANT ME TO SEE THE
6 WHOLE DOCUMENT; IS THAT IT?

7 MS. ABRAMSON: YES. I JUST SHOWED IT TO THE
8 COURT BEFORE. BUT IT'S ONLY TWO PAGES.

9 THE COURT: WHY DON'T YOU GIVE IT TO THE
10 CLERK.

11 (COURT READING.)

12

13 THE COURT: ALL RIGHT. ON THIS ISSUE,
14 READING THE MATERIAL, IT OCCURS TO THE COURT THAT
15 ULTIMATELY WHAT IS PRESENTED HERE IS POTENTIALLY
16 OPINION EVIDENCE OF DR. OZIEL, WHO HAS NEVER
17 TESTIFIED IN THESE PROCEEDINGS, AND HIS CREDIBILITY
18 IS NOT BEFORE THE JURY. THAT IS THE CRITICAL ISSUE
19 HERE, AS FAR AS USE OF THIS, EVALUATING ITS

20 PROBATIVE VALUE VERSUS POTENTIAL FOR CONFUSION.

21 AND I'M GOING TO SUSTAIN THE DEFENSE

22 OBJECTION TO ITS USE ON THE THEORY THAT THERE IS THE

23 POTENTIAL THAT THIS MATERIAL WOULD BE USED PRIMARILY

24 AS A STATEMENT OF OPINION OF OZIEL, WHICH THE JURY

25 HAS BEEN PRESENTED WITH NO EVIDENCE TO EVALUATE IN

26 ANY MEANINGFUL WAY.

27 THEREFORE, THE OBJECTION IS SUSTAINED.

28 MS. ABRAMSON: THANK YOU, YOUR HONOR. I'M

54573

1 SORRY TO HAVE TAKEN THIS MUCH TIME TO GET IT

2 TOGETHER.

3 THE COURT: DID YOU SEE THE PROPOSED

4 INSTRUCTION FROM MR. LEVIN?

5 YOU'RE EXCUSED.

6 MR. FITZGERALD: CAN I EXCUSE DR. VICARY?

7 THE COURT: WE CAN DEFER THAT, AS FAR AS

8 EVERYBODY HERE, MR. LEVIN'S INSTRUCTION.

9 MR. CONN, IT CAN BE DISCUSSED AFTER WE

10 FINISH THE TESTIMONY. I THINK PERHAPS WE OUGHT TO

11 JUST GET THE JURY OUT.

12 (THE JURY ENTERS THE COURTROOM,

13 AND THE FOLLOWING PROCEEDINGS

14 WERE HELD:)

15

16 THE COURT: ALL RIGHT. WE HAVE THE JURY

17 BACK.

18 I'M SORRY FOR THE DELAY. WE'VE BEEN

19 DISCUSSING SOME ISSUES, AND WE'RE NOW READY TO

20 RESUME.

21 DID THE DEFENSE HAVE ANY QUESTIONS OF

22 MR. MILTON ANDERSEN, THE WITNESS WHO WAS ON THE

23 WITNESS STAND AT THE BREAK?

24 MR. GESSLER: NO QUESTIONS, YOUR HONOR.

25 MR. LEVIN: NO, YOUR HONOR.

26 THE COURT: OKAY. HE IS EXCUSED.

27 AND YOUR NEXT WITNESS.

28 MR. CONN: YES. PEOPLE CALL BRIAN ANDERSEN.

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1

2

3 BRIAN ANDERSEN,

4 WAS CALLED AS A WITNESS BY THE PEOPLE, WAS DULY

5 SWORN, AND TESTIFIED AS FOLLOWS:

6 THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE

7 TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING

8 BEFORE THIS COURT, SHALL BE THE TRUTH, THE WHOLE

9 TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

10 THE CLERK: I DO.

11 THE CLERK: PLEASE TAKE THE STAND AND STATE

12 YOUR NAME FOR THE RECORD.

13 THE WITNESS: BRIAN ANDERSEN,

14 A-N-D-E-R-S-E-N.

15

16 DIRECT EXAMINATION

17 BY MR. CONN:

18 Q MR. ANDERSEN, ARE YOU THE BROTHER OF

19 KITTY MENENDEZ?

20 A YES, SIR.

21 Q AND CAN YOU TELL US WHERE YOU WERE

22 BORN.

23 A IN OAK LAWN, ILLINOIS.

24 Q AND ARE YOU ONE YEAR OLDER THAN KITTY

25 MENENDEZ?

26 A A LITTLE OVER 11 MONTHS.

27 Q NOW, HOW LONG DID YOU REMAIN LIVING IN

28 OAK LAWN IN THE HOME WITH KITTY MENENDEZ DURING YOUR

54575

1 CHILDHOOD?

2 A UNTIL 19 -- LATE '48 OR '49.

3 Q AND YOU WERE HOW OLD AT THAT TIME?

4 A I WOULD HAVE BEEN EIGHT OR NINE YEARS

5 OLD.

6 THE COURT: WOULD YOU MOVE A LITTLE CLOSER TO
7 THE MIKE.

8 THE WITNESS: YES, SIR. I'M SORRY.

9 Q BY MR. CONN: SO, FOR THE FIRST EIGHT OR
10 NINE YEARS OF YOUR LIFE YOU LIVED IN THE SAME HOME
11 AS KITTY MENENDEZ AFTER HER BIRTH; IS THAT CORRECT?

12 A YES, SIR.

13 Q AND WHEN YOU MOVED AWAY AT AGE EIGHT OR
14 NINE, WHERE DID YOU GO TO LIVE?

15 A WITH MY FATHER.

16 Q AND HOW FAR AWAY WAS THAT FROM THE HOME
17 WHERE YOUR SISTER, KITTY MENENDEZ, WAS LIVING?

18 A THREE OR FOUR BLOCKS.

19 Q AND ALTHOUGH YOU WERE LIVING IN A
20 DIFFERENT HOME, HOW OFTEN DID YOU SEE HER?

21 A ALMOST DAILY.

22 Q DID YOU GO TO THE SAME SCHOOL?

23 A YES, SIR.

24 Q AND DID YOU HAVE THE SAME FRIENDS?

25 A YES, SIR.

26 Q AND HOW LONG DID YOU CONTINUE TO GROW UP
27 IN THE COMPANY OF YOUR SISTER, KITTY MENENDEZ?

28 A WELL, YOU MEAN DIRECT COMPANY? IN THE

1 SAME TOWN?

2 Q YES. YES.

3 A WE LIVED TOGETHER IN OAK LAWN, AS WE
4 SAID, AND I WENT TO LIVE WITH MY FATHER IN
5 1948 OR '49 IN -- IT WAS ABOUT THAT SAME YEAR, I
6 THINK, THAT -- MAYBE 1950, THAT KITTY WENT TO A
7 BOARDING SCHOOL FOR, I THINK, A YEAR, OR MAYBE LESS
8 THAN A YEAR; AND OCCASIONALLY I WOULD VISIT MY
9 SISTER WITH MY MOTHER AND MY OLDER BROTHER, MILTON.

10 SHE CAME BACK FROM THERE, AND WE
11 CONTINUED AN ALMOST DAILY RELATIONSHIP, AS WE WENT
12 TO THE SAME SCHOOLS, AND AS WE STAYED WITH THE SAME
13 SOCIAL FRIENDS THROUGH THE BALANCE OF GRAMMAR
14 SCHOOL, AND INTO HIGH SCHOOL, AND UNTIL SUCH TIME AS
15 KITTY WENT TO SOUTHERN ILLINOIS UNIVERSITY.

16 EVEN WHEN SHE WENT TO SOUTHERN ILLINOIS
17 UNIVERSITY, I WOULD THEN TRAVEL DOWN TO S.I.U. AS
18 OFTEN AS I COULD TO SPEND TIME WITH HER, ULTIMATELY
19 MEETING JOSE THERE.

20 OUR LIVES SORT OF NEVER REALLY
21 SEPARATED, EVEN THOUGH GEOGRAPHICALLY SHE MOVED
22 FURTHER AWAY.

23 Q AND HOW OLD WAS SHE WHEN SHE WENT TO
24 SOUTHERN ILLINOIS UNIVERSITY?

25 A I BELIEVE THAT WAS 1960. SHE WOULD HAVE
26 BEEN 19 YEARS OLD, I BELIEVE.

27 Q SO, FOR THE FIRST 19 YEARS OF HER LIFE
28 DID YOU SPEND MUCH OF YOUR TIME LIVING EITHER UNDER

1 THE SAME ROOF AS HER OR NEARBY?

2 A YES, SIR.

3 Q WHEN SHE WENT TO THE BOARDING SCHOOL FOR
4 ONE YEAR, HOW FAR AWAY WAS THAT?

5 A I DON'T RECALL. IT WAS NOT MUCH OF A
6 DRIVE. I DON'T RECALL.

7 Q AND CAN YOU TELL US HOW MUCH -- WHAT YOUR
8 ACTIVITIES WERE LIKE IN YOUR EARLY YEARS WITH KITTY
9 MENENDEZ AS YOU WERE GROWING UP IN OAK LAWN.

10 A WELL, KITTY AND I WERE SIBLINGS. WE
11 WERE SO CLOSE TOGETHER THAT MANY PEOPLE THAT WOULD
12 MEET US IN THE COMMUNITY THOUGHT WE WERE TWINS AT
13 FIRST WHEN WE WERE YOUNGER.

14 IN FACT, I USED TO REFER TO KITTY WHEN I
15 WAS A YOUNG BOY AS "MY KITTY." FROM THERE THE NAME
16 STUCK, AND SHE BEGAN TO BE CALLED "KITTY," AND SHE
17 LIKED THE NAME AS SHE MATURED AND LET IT STICK WITH
18 HER AS A NICKNAME.

19 WE WOULD -- I MEAN, IT WAS A PLAYMATE
20 RELATIONSHIP BETWEEN MY SISTER AND OTHER FRIENDS IN
21 THE IMMEDIATE NEIGHBORHOOD, AS IT WAS WHEN WE WERE
22 QUITE SMALL, IN THE GRAMMAR SCHOOL YEARS. WE WENT
23 TO THE SAME GRAMMAR SCHOOLS.

24 WE ATTENDED THE SAME SOCIAL FUNCTIONS,
25 SAME DANCES, THE VARIOUS OTHER THINGS, OTHER
26 ACTIVITIES, SPORT ACTIVITIES AND RELATED ACTIVITIES
27 THAT CHILDREN ENGAGE THEMSELVES IN AS WE GREW UP.
28 SHE WAS JUST A GREAT FRIEND FOR ME, AS

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1 WELL AS A SISTER FOR ME; AND I ALSO FELT THAT IT
2 WAS -- I DEVELOPED SOMEWHAT OF A PROTECTIVE ROLE FOR
3 KITTY AS SHE GREW UP. IT WAS JUST A WONDERFUL
4 SIBLING RELATIONSHIP, JUST -- I CAN'T IMAGINE ONE
5 BEING FINER THAN KITTY'S AND MINE.

6 Q AND DID YOU ALSO GO TO THE SAME HIGH
7 SCHOOL?

8 A YES, SIR.

9 Q AND DURING THAT PERIOD OF TIME, DID YOU
10 ALSO ASSOCIATE WITH THE SAME GROUP OF FRIENDS IN
11 YOUR TEEN YEARS?

12 A YES. WHEN PARTIES WERE HELD AT THE
13 HOUSE, THEY WERE PARTIES THAT INCLUDED ALL THE
14 FRIENDS, FRIENDS THAT WERE IMMEDIATELY CLOSE TO
15 KITTY, AND FRIENDS THAT WERE IMMEDIATELY CLOSE TO
16 ME. IT WAS ALWAYS THE SAME FRIENDS.

17 WE ALMOST CAME CLOSE TO BEING IN THE
18 SAME CLASS TOGETHER, ACTUALLY, EVEN THOUGH SHE WAS A

19 YEAR BEHIND ME IN SCHOOL. THAT DIDN'T HAPPEN,

20 HOWEVER.

21 THE MANY FRIENDS OF HERS WOULD BE IN MY

22 CLASS AND VICE-VERSA. SO THERE WAS JUST A TOTAL

23 INTERMIXING OF RELATIONSHIPS BETWEEN KITTY'S SOCIAL

24 LIFE AND ME AND MY SOCIAL LIFE. IT WAS ESSENTIALLY

25 THE SAME.

26 Q YOU SAID AFTER SHE WENT TO SOUTHERN

27 ILLINOIS UNIVERSITY YOU HAD THE OCCASION TO VISIT

28 HER AT TIMES?

54579

1 A AS OFTEN AS I COULD I WOULD DRIVE DOWN

2 THERE AND SPEND WEEKENDS. IF THERE WAS A SPECIAL

3 EVENT OF SOME KIND GOING ON AT SOUTHERN ILLINOIS

4 UNIVERSITY, SHE WOULD CALL ME AND INVITE ME DOWN.

5 IF IT WAS AT ALL POSSIBLE FOR ME TO COME DOWN, THEN

6 I WOULD DRIVE DOWN AND SPEND THE WEEKEND WITH HER,

7 OR WHATEVER IT WOULD BE.

8 IF I COULD -- IF I WAS IN A POSITION TO

9 TRAVEL DURING THE WEEK, I WOULD TRAVEL DURING THE

10 WEEK AND SPEND AS MUCH TIME AS I COULD DOWN THERE.

11 AND IT WAS AT THAT TIME WHEN I MET JOSE,

12 WHEN SHE STARTED TO DATE JOSE.

13 Q ONCE SHE MARRIED JOSE MENENDEZ, DID YOU

14 HAVE OCCASION TO VISIT HER IN SOME OF THE HOMES THAT
15 SHE LIVED IN?
16 A OH, YEAH. ANY TIME -- KITTY AND I JUST
17 TRAVELED TOGETHER.
18 AS SHE MOVED TO NEW YORK -- SHE LIVED IN
19 JAMAICA, IN QUEENS IN NEW YORK. SHE HAD AN
20 APARTMENT THERE, SHE AND JOSE HAD; AND I VISITED HER
21 THERE, AND AGAIN, WOULD SPEND TIME.
22 THE NEW YORK WORLD'S FAIR TOOK PLACE
23 DURING SOME OF THIS TIME, AND WE WENT TO THE WORLD'S
24 FAIR.
25 SHE MOVED FROM THERE, AS I RECALL, TO
26 CEDAR GROVE, NEW JERSEY, AND I VISITED HER AT CEDAR
27 GROVE, NEW JERSEY; AND MUCH TO MY HAPPINESS, AFTER
28 CEDAR GROVE, IF MY MEMORY IS CORRECT, SHE MOVED FROM

54580

1 CEDAR GROVE TO HINSDALE.
2 THEN WHEN THEY WOUND UP IN HINSDALE, I
3 STILL LIVED IN OAK LAWN AT THE TIME, AND HINSDALE
4 FROM OAK LAWN AT THAT TIME WAS ABOUT 15 MINUTES,
5 MAYBE 20 MINUTES, AT THE MOST, TRAVEL TIME
6 DIFFERENCE BETWEEN THE TWO. SO WE WOULD -- SHE
7 HAD -- THE HOME THAT SHE MOVED INTO STILL WASN'T
8 QUITE COMPLETE. MY BROTHER AND I BOTH WORKED WITH

9 HER IN THE COMPLETION OF THAT HOME. IT WAS A PRETTY
10 HOUSE, AND DEER WOULD COME INTO THE YARD, AND SHE
11 WAS QUITE EXCITED ABOUT THAT; AND THE FACT SHE WAS
12 LIVING CLOSE TO A WOODED AREA RIGHT NEAR THE ARAGON
13 NATIONAL LABORATORY. AND OUR LIVES WERE VERY
14 CLOSE.

15 FROM THERE SHE MOVED BACK TO NEW YORK;
16 AND AGAIN, IF MY SEQUENCE OF HOMES IS CORRECT, SHE
17 WENT TO MONSEY, NEW YORK, WHICH IS ACROSS THE RIVER
18 FROM THE WHITE PLAINS AREA, AND SHE LIVED IN A HOME
19 THERE IN A WOODED AREA, AS I RECALL. AND BY THIS
20 TIME I WAS FLYING, AND I WOULD FLY INTO AN AIRPORT
21 THAT WAS CLOSE TO THAT AND VISIT WITH HER THERE.

22 AND I BELIEVE FROM THERE SHE MOVED DOWN
23 TO THE PRINCETON AREA, AND THE FIRST HOME SHE HAD IN
24 THE PRINCETON AREA WAS PRINCETON JUNCTION, WHICH WAS
25 ESSENTIALLY A RENTAL HOME, UNTIL THEY COULD GET INTO
26 A HOME IN PRINCETON PROPER, WHICH THEY DID, WHICH
27 WAS ANOTHER HOME SET SOMEWHAT IN THE WOODS WITH
28 WATER BEHIND THE HOME.

54581

1 AND THEN SHE MOVED TO THE BEAUTIFUL
2 ESTATE THAT THEY HAD IN THE PROPER TOWN OF
3 PRINCETON, ALMOST IN THE DOWNTOWN AREA. JUST AN

4 ISOLATED AREA, WHICH I THINK IS NOW OWNED BY THE
5 CITY OF PRINCETON, BUT I'M NOT SURE.

6 ANYWAY, WE WOULD VISIT THERE, AND MANY
7 OF THE FUNCTIONS THAT TOOK PLACE, SUCH AS LYLE'S
8 GRADUATION FROM PRINCETON DAY SCHOOL. WE WOULD
9 TRAVEL THERE WITH MY MOTHER FOR EASTER. WE WOULD
10 TRAVEL DURING THE HOLIDAYS SO WE COULD CELEBRATE THE
11 HOLIDAYS TOGETHER; AND AS OFTEN AS WE COULD, WE
12 WOULD SPEND TIME TOGETHER AS WE TRAVELED IN VARIOUS
13 AREAS.

14 IF OUR TRAVEL PLANS WERE MOVING AT THE
15 SAME TIME, WE WOULD -- WHICH WE TALKED TO EACH OTHER
16 ON THE PHONE FREQUENTLY -- WE WOULD TRY TO FIND IF
17 THERE WAS SOMEPLACE WE COULD MEET AT, SOME TOWN OR
18 AIRPORT OR SOMETHING, EVEN IF IT JUST MEANT HAVING A
19 CUP OF COFFEE OR A QUICK SOCIALIZING, A COUPLE OF
20 HUGS, OR JUST TOUCHING, AND WE'D GO ON OUR VARIOUS
21 WAYS. SO OUR LIVES CRISSCROSSED.

22 I REMEMBER ONE OF THOSE IN NEW YORK WHEN
23 I WENT TO A THEATRE WEEKEND WITH FRIENDS OF MINE AND
24 JOSE WAS -- I WAS AT THE ALGONQUIN AND SHE WAS AT
25 THE PALACE BEHIND ST. PATRICK'S CATHEDRAL, AND WE
26 ARRANGED TO HAVE BREAKFAST; AND AGAIN SOCIALIZING.

27 AS IT WAS ALSO WHEN THEY WERE PLAYING
28 TENNIS, I VISITED THEM IN DOWN IN LOUISVILLE WHEN

1 TENNIS MATCHES WERE GOING ON; AND, OF COURSE, ON
2 MANY TIMES UP AT KALAMAZOO, MICHIGAN WHEN WE WERE UP
3 THERE. IT WAS OUR DESIRE TO STAY CLOSE. WE JUST
4 NEVER WANTED TO SEPARATE FROM EACH OTHER.

5 SKI TRIPS. I WOULD TAKE A LOT OF SKI
6 TRIPS, AND MY SISTER WOULD JOIN WITH ME. MANY OF
7 THE TRIPS THAT I TOOK WERE PLANNED AROUND HER TIME
8 AND MY TIME. WE WENT TO VAIL, COLORADO, SPENT A
9 WEEK TOGETHER. JOSE AND LYLE AND ERIK, AND MY TWO
10 SONS AND MY WIFE PAT AND MYSELF. AND THE SAME THING
11 TOOK PLACE AT JACKSON HOLE, WYOMING, WHERE AT THAT
12 TIME WE EVEN TOOK SNOWMOBILES UP INTO YELLOWSTONE
13 NATIONAL PARK.

14 A LOT OF INTER-FAMILY ACTIVITIES AND
15 RELATIONSHIPS.

16 AND AGAIN AT PARK CITY, UTAH. I JUST
17 COULDN'T REMEMBER THEM ALL. THERE WERE SO MANY
18 TIMES OUR LIVES WERE TOGETHER.

19 Q AND AMONG YOURSELF AND YOUR BROTHER
20 MILTON AND YOUR SISTER JOAN, WERE YOU THE SIBLING OF
21 KITTY MENENDEZ THAT HAD THE MOST CONTACT WITH HER,
22 BOTH DURING HER CHILDHOOD AND DURING HER ADULT
23 YEARS?

24 A OH, YEAH. SUBSTANTIALLY SO. MY CONTACT
25 WITH KITTY WAS ALMOST CONSTANT. MY SISTER JOAN, I
26 DON'T REMEMBER MUCH CONTACT. MY SISTER JOAN GOT

27 MARRIED. SHE WAS QUITE YOUNG, I THINK 16 OR 17 AT
28 THE TIME, AND SHE WAS INVOLVED IN THAT; AND KITTY

54583

1 AND I WERE BACK AROUND. MY BROTHER WAS WORKING AND
2 KITTY AND I WERE JUST GROWING UP TOGETHER.

3 Q AND ONCE KITTY MENENDEZ MOVED OUT TO
4 CALIFORNIA, HOW MUCH CONTACT DID YOU HAVE WITH HER
5 AFTER THAT?

6 A WE CONTINUED TO HAVE CONTACT WHEN SHE
7 MOVED TO CALIFORNIA. SHE WAS IN A RENTAL HOME IN
8 CALABASAS, AND I WAS OUT THERE ON ONE OCCASION. IT
9 WOULD HAVE BEEN MY FATHER'S 80TH BIRTHDAY. SO IT
10 WOULD HAVE BEEN -- ACTUALLY, JANUARY I WOULD SAY, OF
11 1987, HE WOULD HAVE BEEN 80 -- AND 1986, DECEMBER OF
12 '86. BUT I FLEW MY PLANE DOWN TO ARIZONA WITH ALL
13 SEATS FILLED WITH FAMILY MEMBERS.

14 AND WHEN WE GOT THERE I MET UP WITH MY
15 FATHER, WHO TOOK HIS MOTOR HOME FROM HOUSTON, AND WE
16 HAD HIS 80TH BIRTHDAY THERE IN TEXAS.

17 MY FATHER AND I TOOK OFF AND FLEW TO VAN
18 NUYS, CALIFORNIA, AN AIRPORT CLOSE TO HERE, AND
19 KITTY AND JOSE MET US THERE. AND THEN WE SPENT THE
20 EVENING SOCIALIZING, STAYED THERE OVERNIGHT.

21 I REMEMBER SLEEPING IN A WATER BED THAT

22 DIDN'T HAVE THE HEAT TURNED ON. IT'S A MEMORABLE
23 THING. AND GETTING UP THE NEXT MORNING.
24 AND THEN I FLEW KITTY AND JOSE AND ERIK,
25 ALONG WITH MY FATHER, BACK TO ARIZONA WHERE WE
26 CONTINUED OUR CELEBRATION OF MY FATHER'S 80TH
27 BIRTHDAY.
28 I HAD MADE OTHER TRIPS HERE TO SEE THE

54584

1 HOME, THE PROPERTY THAT THEY BOUGHT UP ON THE
2 MOUNTAIN TOP IN CALABASAS. MY BUSINESS WAS CLOSELY
3 RELATED TO THE CONSTRUCTION BUSINESS, AS WAS MY
4 BROTHER, AND KITTY WOULD CALL ME, AND I'M SURE MY
5 BROTHER MILTON, OF COURSE, SEEKING CONSTRUCTION
6 ADVICE AS SHE WORKED TO COMPLETE THAT HOME.
7 SO IT WAS -- MANY PHONE CONVERSATIONS. I
8 WOULD SPEAK TO HER DURING THAT TIME, SOMETIMES
9 MULTIPLE TIMES A DAY. SHE WOULD HAVE MEETINGS WITH
10 CONTRACTORS IN THE MORNING. SHE WOULD HAVE
11 DISCUSSIONS WITH THEM AFTER OUR CONVERSATION AND
12 REPORT BACK TO ME WHAT HER CONVERSATIONS WERE, AND
13 PERHAPS THE NEXT PROBLEM THAT SHE HAD WITH HER
14 CONSTRUCTION.
15 Q WELL, HOW MUCH TELEPHONE CONTACT DID YOU
16 HAVE WITH KITTY, ASIDE FROM QUESTIONS RELATING TO

17 THE CONSTRUCTION OF THE HOME, THAT IS, DURING THE

18 TIME PERIOD AFTER SHE LIVED IN CALIFORNIA?

19 THE WITNESS: WOULD IT BE POSSIBLE TO GET A

20 GLASS OF WATER?

21 MR. CONN: YES.

22 THE WITNESS: KITTY AND I WOULD CALL EACH

23 OTHER CONSTANTLY.

24 THE CORPORATION I WAS WORKING WITH FOR

25 MANY YEARS -- WE WERE TOGETHER -- SHE WOULD

26 FREQUENTLY CALL ME AT THAT TIME. JOSE WOULD TALK TO

27 ME FREQUENTLY AT THAT TIME. THAT PARTICULAR COMPANY

28 DID BUSINESS WITH JOSE'S COMPANY WHEN HE WAS WITH

54585

1 THE HERTZ RENTAL CAR CORPORATION.

2 JOSE AND I WORKED IN GETTING OUR LEASING

3 CARS. WE HAD QUITE A FLEET OF LEASING CARS TO BE

4 LEASED THROUGH HERTZ AS A RESULT OF JOSE'S

5 INVOLVEMENT; AND SO THERE WAS A LOT OF INTERCHANGE

6 BETWEEN JOSE AND MYSELF, AND ALSO KITTY AND MYSELF,

7 AT THAT TIME.

8 MR. GESSLER: I'LL OBJECT TO THIS AS BEYOND

9 THE SCOPE OF THE QUESTION. NONRESPONSIVE.

10 THE COURT: ASK YOUR NEXT QUESTION, PLEASE.

11 MR. CONN: YES.

12 THE WITNESS: THANK YOU.

13 Q BY MR. CONN: CAN YOU TELL US WHEN WAS

14 THE LAST TIME THAT YOU SAW YOUR SISTER?

15 A I SAW MY SISTER IN AUGUST OF 1989. I

16 FLEW HER FROM KALAMAZOO, MICHIGAN TO O'HARE FIELD ON

17 AUGUST 9TH, 1989.

18 Q THAT WOULD BE APPROXIMATELY 11 DAYS

19 BEFORE HER DEATH?

20 A ELEVEN DAYS BEFORE SHE WAS MURDERED.

21 YES, SIR.

22 Q AND THAT FLIGHT WAS FROM KALAMAZOO TO

23 WHERE?

24 A TO CHICAGO, O'HARE FIELD, WHERE SHE HAD

25 A CONNECTING FLIGHT, A UNITED FLIGHT TO GO BACK TO

26 CALIFORNIA WITH JOSE AND ERIK.

27 Q WHO WAS ON BOARD THAT FLIGHT?

28 A OF COURSE, I WAS. I WAS THE PILOT. MY

54586

1 SISTER, KITTY, JOSE MENENDEZ, AND ERIK MENENDEZ.

2 Q AND THIS WAS AFTER THE COMPLETION OF THE

3 TENNIS MATCH IN KALAMAZOO?

4 A WELL, THE TENNIS MATCHES WEREN'T

5 COMPLETE, BUT IT WAS A COMPLETION OF ERIK'S

6 PARTICIPATION IN THE TENNIS MATCHES.

7 Q AND WAS A VIDEOTAPE MADE OF THAT FLIGHT?

8 A YES. I SHOULD POINT OUT THAT THAT

9 PARTICULAR TRIP WAS SUPPOSED TO INCLUDE A TRIP TO

10 CANADA. KITTY AND I WERE SUPPOSED TO GO -- AND JOSE

11 AND ERIK WERE GOING TO GO TO CANADA, AND KITTY

12 CALLED ME THE DAY BEFORE TO TELL ME THAT BECAUSE OF

13 THE TENNIS MATCH, OR FOR OTHER REASONS, THAT THERE

14 WERE DIFFICULTIES IN THE RELATIONSHIP BETWEEN ERIK

15 AND JOSE, AND SHE THOUGHT IT WAS IMPORTANT THAT THE

16 FAMILY GET BACK TO CALIFORNIA AND WORK ON GETTING

17 THE FAMILY BACK TOGETHER AND HAPPY AGAIN; AND THAT

18 WE WOULD TAKE A RAIN CHECK ON THE TRIP UP THERE.

19 WOULD I MAKE ARRANGEMENTS TO FLY HER

20 BACK TO CHICAGO, AND SHE WORKED ON GETTING A FLIGHT

21 TO CALIFORNIA, UNITED FLIGHT, AND THEY WOULD JUST

22 PLAY THE CLOCK BACKWARDS AS TO WHAT TIME I WOULD

23 HAVE TO LEAVE FROM KALAMAZOO SO WE COULD DEPART

24 KALAMAZOO AND GET HER TO O'HARE ON THAT FLIGHT,

25 WHICH THERE WAS A VIDEOTAPE MADE OF THAT FLIGHT,

26 WHICH I THINK WAS PART OF THAT QUESTION.

27 Q I'D LIKE TO SHOW YOU THE VIDEOTAPE OF

28 THE -- ASK YOU TO WATCH IT AS IT IS BEING PLAYED SO

54587

1 YOU CAN TELL US WHETHER OR NOT YOU RECOGNIZE THAT

2 VIDEOTAPE.

3 A I'LL HAVE TO --

4 Q PERHAPS YOU CAN SIT OVER HERE.

5 THE COURT: YOU CAN SIT AT COUNSEL TABLE.

6 (VIDEOTAPE BEING PLAYED.)

7

8 THE COURT: OKAY. THE TAPE HAS BEEN PLAYED.

9 WE'LL TURN ON THE LIGHTS AND HAVE THE WITNESS BACK

10 ON THE WITNESS STAND.

11 Q BY MR. CONN: WAS THAT A COPY OF THE

12 VIDEOTAPE THAT WAS MADE ON AUGUST THE 9TH OF 1989

13 WITH THE ACTUAL FLYING TIME BETWEEN KALAMAZOO AND

14 CHICAGO EDITED OUT OF THAT TAPE?

15 A YES. WELL, I THINK -- THERE WERE SOME

16 OTHER THINGS EDITED OUT OF THE TAPE, BUT -- AFTER THE

17 INTERPLAY BETWEEN KITTY AND JOSE AND ERIK AND MYSELF

18 AND THE TAXIING OUT AND THE REVVING OF THE ENGINE,

19 WHICH IS CALLED A RUN-UP, PRIOR TO TAKE-OFF AT

20 KALAMAZOO, SO YOU SAW THAT.

21 THERE WAS SOME EXCHANGE. I GUESS MOST

22 OF IT WAS AIR TIME, JUST VIDEO, THAT WAS OUT THE

23 WINDOW AND LANDING AT O'HARE. AND THEN OCCASIONAL

24 COMMENTS THAT WERE TAKEN BECAUSE IT WAS A LONG

25 TIME. O'HARE IS SUCH A LARGE AIRPORT, WHEN YOU LAND

26 THERE IT'S A LONG TIME TAXIING INTO THE GATE. SO

27 THAT WAS ALSO EDITED OUT.

28 SO IT WAS JUST ESSENTIALLY BETWEEN KITTY

1 AND JOSE, ERIK, AND MYSELF IN KALAMAZOO, WITH A LOT
2 OF TIME DELETED.

3 AND THEN THE END OF THE TAPE WHICH WAS,
4 AGAIN, THE FOUR OF US BEFORE THEY TOOK OFF.

5 WHAT I HAD DONE IS I HAD ARRANGED FOR A
6 VAN TO DRIVE THEM FROM THE FIXED BASE OPERATOR TO
7 TAKE THEM OVER TO UNITED AIRLINES.

8 Q SO AFTER YOUR ARRIVAL THERE IN CHICAGO,
9 DID THEY THEN GET ON THE UNITED AIRLINES FLIGHT, AND
10 YOU DEPARTED AT THAT TIME?

11 A YES. THEY GOT INTO A VAN THAT WAS TO
12 TAKE THEM TO THE UNITED TERMINAL, AND THEN I -- MY
13 FLIGHT PLAN WAS OUT OF O'HARE, AND THEN I FLEW OUT
14 OF O'HARE BACK TO MY HOME.

15 Q WAS THAT THE LAST TIME THAT YOU SAW YOUR
16 SISTER ALIVE?

17 A THAT'S THE LAST TIME I SAW MY SISTER, MY
18 BROTHER-IN-LAW, EITHER OF THEM ALIVE, YES.

19 Q AND DID YOU LOVE YOUR SISTER,
20 MR. ANDERSEN?

21 A OH. I CANNOT BELIEVE AS A BOY GROWING
22 UP THAT I LOVED ANYONE MORE THAN I LOVED MY SISTER.
23 WHEN WE WOULD HAVE A CONVERSATION ON THE PHONE WE
24 WOULDN'T -- FREQUENTLY WE WOULDN'T SAY GOOD-BYE. IT
25 WOULD END UP WITH EACH OTHER SAYING "I LOVE YOU" AND

26 "I LOOK FORWARD TO SEEING YOU AGAIN," AND WE WOULD
27 TERMINATE THE CONVERSATION THAT WAY.
28 IT WAS -- I DREAM OF HER ALL THE TIME. I

54589

1 MISS HER NOW. I CAN'T -- I HAVE NIGHTS THAT I DON'T
2 SLEEP. IT'S NOT BEEN EASY, ESPECIALLY KNOWING HOW
3 SHE WAS -- HOW SHE DIED.
4 Q AND WHAT IMPACT HAS HER DEATH HAD ON
5 YOU?
6 A SLEEPLESS NIGHTS. FOR SOME TIME
7 AFTERWARD I WOULD WAKE UP AT NIGHT SCREAMING,
8 WISHING AND HOPING THAT THE VISION OF WHAT SHE MUST
9 HAVE BEEN GOING THROUGH, KNOWING THAT SHE WAS ALIVE
10 FOR PART OF THAT TIME WHEN SHE WAS MURDERED, AND
11 THEN WISHING THAT I WAS THERE TO HELP PROTECT HER.
12 AND I WOULD WAKE IN THE NIGHT SCREAMING. AND I
13 COULDN'T SLEEP AGAIN.
14 I WOULD TRY TO READ OR DO OTHER THINGS
15 TO TRY TO CLEANSE MY MIND SO I COULD GO BACK TO
16 SLEEP, AND I BECAME VERY INEFFECTIVE FOR THE LONGEST
17 TIME. AND WHEN I GET CLOSE TO THESE TRIALS IT
18 HAPPENS TO ME AGAIN.
19 IT JUST ISN'T EASY. IT'S BEEN TERRIBLE.
20 MR. CONN: THANK YOU, SIR.

21 THE COURT: CROSS-EXAMINATION?
22 MR. LEVIN: NO QUESTIONS, YOUR HONOR.
23 MR. GESSLER: NO QUESTIONS.
24 THE COURT: THANK YOU, SIR. YOU MAY STEP
25 DOWN.
26 THE WITNESS: YOU'RE WELCOME.
27 ANY FURTHER EVIDENCE BY THE
28 PROSECUTION?

54590

1 MR. CONN: WE'D ASK THAT THE VIDEOTAPE BE
2 MARKED.
3 THE COURT: IT WILL BE MARKED AS THE NEXT
4 EXHIBIT IN ORDER. I DON'T HAVE MY BOOK HERE,
5 UNFORTUNATELY. 464 (^ INDEX.)
6 MR. CONN: THE PEOPLE REST.
7 THE COURT: PEOPLE REST?
8 ANY REBUTTAL?
9 MR. LEVIN: NO, YOUR HONOR. NO REBUTTAL.
10 MR. GESSLER: NO, YOUR HONOR.
11 THE COURT: OKAY. BOTH SIDES REST. WE'LL
12 TAKE A RECESS, AND WE'LL RESUME IN 20 MINUTES, 20
13 MINUTES AFTER 3:00.
14 DON'T DISCUSS THE MATTER WITH ANYONE.
15 DON'T FORM ANY FINAL OPINIONS ABOUT IT, AND WE'LL

16 SEE YOU BACK HERE AT 20 MINUTES AFTER 3:00.

17 I WOULD ASK, IF YOU HAVE ANYMORE

18 INSTRUCTIONS OTHER THAN THOSE I ENUMERATED, IF YOU

19 CAN LET THE CLERK KNOW. I GAVE YOU A LIST.

20 MR. GESSLER: I HAVEN'T HAD A CHANCE TO CHECK

21 THOSE AGAINST CALJIC.

22 THE COURT: SURE. CALJIC IS HERE IF YOU WANT

23 TO BORROW IT.

24 MR. GESSLER: THANK YOU.

25 THE COURT: WE'LL BE IN RECESS.

26 MR. CONN: DOES THE COURT NEED A COPY OF

27 THEM, OR DO YOU HAVE THEM ALL?

28 THE COURT: I CAN GET THEM.

54591

1 MR. LEVIN: ARE YOU GOING TO POLL THE JURY

2 WITH RESPECT TO EXPOSURE?

3 THE COURT: WE'LL TAKE CARE OF ALL OF THAT,

4 BUT WE'RE IN RECESS UNTIL 3:20.

5 (A RECESS WAS TAKEN FROM

6 3:05 P.M. TO 3:20 P.M.)

7 (PAGES 54592 THROUGH 54612 WERE

8 HELD IN CAMERA AND SEALED BY

9 ORDER OF THE COURT.)

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-11023

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

4

5 THE COURT: ALL RIGHT. LET'S RESUME HERE WITH
6 HEARINGS.

7 THE JURY HAS BEEN EXCUSED FOR THE DAY, WITH
8 INSTRUCTIONS THAT -- TO RETURN TOMORROW MORNING AT 8:30,
9 AT WHICH TIME WE WILL HAVE ARGUMENT IN THIS CASE.

10 WE'VE BEEN DISCUSSING INSTRUCTIONS.

11 MS. ABRAMSON, YOU HAD SOME ISSUE REGARDING
12 EXHIBITS, AS I UNDERSTAND IT?

13 MS. ABRAMSON: WELL, NOT SO MUCH EXHIBITS AS A
14 STIPULATION.

15 THE PROSECUTION HAS INDICATED ON THE RECORD
16 THAT IT ACKNOWLEDGED THAT DR. DIETZ HAD RECEIVED FROM ME
17 A SET OF THE ORIGINAL UNMODIFIED NOTES OF DR. VICARY'S.
18 THAT MUCH I DON'T THINK THE PROSECUTION COULD OBJECT TO,
19 EITHER STIPULATING TO, OR HAVING THE COURT TAKE JUDICIAL
20 NOTICE OF IT, SINCE THEY SAID IT ON THE RECORD.

21 THE OTHER HALF OF THAT, HOWEVER, WHAT I
22 WOULD LIKE TO HAVE A STIPULATION ON, TOO, IS THAT
23 DR. WILSON RECEIVED THE SAME SET OF NOTES. AND I HAVE
24 DR. WILSON'S SET THAT HE RECEIVED HERE. I CAN PROVIDE A
25 DECLARATION UNDER PENALTY OF PERJURY FROM HIM FOR THAT
26 PURPOSE, OR I CAN FLY HIM IN, IF NECESSARY. IT SEEMS
27 RIDICULOUS TO DO THAT, TO FLY HIM IN TO SAY THAT, BUT I
28 WANT THE RECORD CLEAR THAT BOTH OF THE EXPERTS WHO

-11022

1 TESTIFIED IN THIS TRIAL RECEIVED THE UNREDACTED NOTES.

2 THE COURT: PEOPLE WISH TO BE HEARD?

3 MR. CONN: YES. I THINK THAT'S ENTIRELY
4 IRRELEVANT. IT DOESN'T MATTER WHETHER OR NOT THOSE
5 EXPERTS RECEIVED THE NOTES. I THINK THIS IS SIMPLY A
6 WAY OF MS. ABRAMSON TRYING TO CURRY FAVOR TO THE JURY BY
7 TRYING TO MAKE IT APPEAR AS IF SHE HAS NO NEED TO HIDE
8 THESE NOTES.

9 IF WE'RE GOING TO TAKE TESTIMONY CONCERNING
10 WHO RECEIVED THESE REDACTED NOTES, THEN I THINK WE NEED
11 TO PRESENT TESTIMONY FROM THE FORMER PROSECUTOR IN THIS
12 CASE, TO TESTIFY THAT THE ONLY THING THAT SHE EVER
13 RECEIVED FROM MS. ABRAMSON WAS THE REVISED NOTES.

14 SO IF WE'RE GOING TO GET INTO THE TRIAL OF
15 MS. ABRAMSON'S CONDUCT, ALL OF THIS WOULD BE RELEVANT.
16 BUT BARRING THAT, NONE OF THIS IS RELEVANT.

17 MS. ABRAMSON: I THINK THAT IT'S ALREADY BEFORE
18 THEM, THAT AT THE FIRST TRIAL WHAT WAS TURNED OVER, WHAT
19 WAS INTENDED TO BE TURNED OVER, WAS THE REVISED NOTES,
20 AND I DON'T HAVE A PROBLEM STIPULATING TO THAT, IF
21 THAT'S WHAT THE PEOPLE WANT.

22 WHAT I AM INTERESTED IN IS WHAT THESE
23 JURORS HEARD, AND THE OPINIONS THEY HEARD IN THIS TRIAL.
24 AND BOTH OF THE EXPERTS IN THIS TRIAL HAD THE -- SEE,
25 THE DIFFERENCES BETWEEN THE EXPERTS AND WHAT THE
26 PROSECUTORS RECEIVED IN THIS TRIAL, THE EXPERTS RECEIVED
27 THE UNREDACTED NOTES. IN THE FIRST TRIAL, THE EXPERTS,
28 OTHER THAN DR. VICARY, DIDN'T HAVE ANY OF HIS NOTES.

1 SO IT WASN'T AN ISSUE AS TO WHAT ANYBODY
2 ELSE HAD RECEIVED.

3 THE COURT: OKAY.

4 THE ISSUE REALLY IS ONLY HALF-ANSWERED BY
5 YOUR PROPOSAL, BECAUSE THE PROSECUTION DIDN'T HAVE THE
6 NOTES, AND DR. WILSON TESTIFIED. SO HIS TESTIMONY WAS
7 NEVER TESTED WITH THE UNREDACTED NOTES.

8 MS. ABRAMSON: WHAT I AM CONCERNED ABOUT IS THE
9 UNDERMINING OF HIS OPINION, AND THE UNDERMINING OF
10 DR. DIETZ' OPINION BASED ON THE NOTION THAT THEY DIDN'T
11 HAVE THE NOTES, AND THEY DID.

12 THE COURT: ALL RIGHT. WELL, I AM NOT GOING TO
13 DELAY THIS TRIAL FOR ANY PURPOSE SUCH AS WHAT YOU'RE
14 SUGGESTING.

15 MS. ABRAMSON: THERE IS NO NEED TO DELAY WITH
16 RESPECT TO THE FACT THAT DR. DIETZ HAD THE NOTES.
17 THAT'S KNOWN. THE PROSECUTION HAS ALREADY SAID THAT ON
18 THE RECORD. THAT'S HOW THEY GOT THEM.

19 SO AT A MINIMUM I WOULD ASK THE COURT TO
20 TAKE JUDICIAL NOTICE, OR TO INSTRUCT THE JURY THAT
21 DR. DIETZ HAD THE ORIGINAL NOTES, AND HE RECEIVED THEM
22 FROM ME.

23 THE COURT: ALL RIGHT. AS FAR AS DR. DIETZ IS
24 CONCERNED, DO THE PEOPLE WANT TO STIPULATE TO THAT?

25 MR. CONN: NO, ACTUALLY, WE DON'T, BECAUSE I
26 DON'T THINK IT'S RELEVANT. I THINK THAT IF COUNSEL
27 WISHES TO PRESENT EVIDENCE OF THIS, AND WE'RE GOING TO

-11020

1 RECEIVE THE NOTES, THEN THIS SHOULD HAVE BEEN DONE
2 BEFORE BOTH SIDES RESTED.

3 I WILL OPPOSE THAT. I DON'T THINK THE
4 COURT CAN TAKE JUDICIAL NOTICE OF THAT.

5 THE COURT: I AGREE, I CAN'T.

6 MR. CONN: NO. I WOULD OPPOSE IT, YOUR HONOR.

7 THE COURT: THEN THAT'S IT. BOTH SIDES HAVE
8 RESTED, AND THERE IS NOTHING FURTHER THAT THE COURT IS
9 GOING TO RECEIVE INTO EVIDENCE.

10 MS. ABRAMSON: I THINK THAT LEAVES IT OPEN FOR
11 THE JURY TO SPECULATE THAT THROUGH SOME BRILLIANT
12 INVESTIGATION, THE PROSECUTION GOT SOME NOTES THAT HAD
13 OTHERWISE BEEN DESTROYED. I THINK IT IS IMPROPER FOR
14 THEM TO SPECULATE HOW THE PROSECUTION GOT THE NOTES THEY
15 HAVE. I THINK IT'S PERFECTLY APPROPRIATE FOR THEM TO BE
16 TOLD THEY GOT THE NOTES BECAUSE DR. DIETZ WAS GIVEN THE
17 NOTES.

18 THE COURT: THAT'S NOT AN ISSUE FOR THIS JURY TO
19 BE CONCERNED WITH. AND ONCE THAT ISSUE COMES UP, THEN
20 OTHER ISSUES RELATING TO THE NOTES AND WHERE THEY WENT
21 AND WHO HAD THEM, WHO DIDN'T HAVE THEM AT VARIOUS TIMES,
22 WOULD ALSO BE RELEVANT, AND --

23 MR. ABRAMSON: WELL, THE COURT HAS ALLOWED A

24 STIPULATION WITH RESPECT TO COUNSEL GETTING THEM.

25 THE COURT: THAT'S BECAUSE THE PARTIES STIPULATED
26 TO IT. THE PARTIES WANTED TO STIPULATE TO IT. THEY
27 STIPULATED TO IT.

28 MS. ABRAMSON: I OBJECT TO IT.

-11019

1 THE COURT: THIS IS THE STATE OF THE RECORD.

2 MS. ABRAMSON: ALL RIGHT, YOUR HONOR. I WANT --
3 I JUST WANT TO INDICATE I HAVE MADE MY RECORD AS TO WHAT
4 I WANTED TO DO FOR REVIEW.

5 THE COURT: RIGHT. AND THE DEFENSE CERTAINLY HAD
6 AN OPPORTUNITY.

7 MS. ABRAMSON: AND I AM ASKING TO REOPEN TO DO
8 THAT.

9 THE COURT: BY CALLING WHO, DR. WILSON?

10 MS. ABRAMSON: TO CALL DR. WILSON AND DR. DIETZ.

11 THE COURT: OKAY. THE REQUEST IS DENIED.

12 MS. ABRAMSON: GOOD. THANK YOU.

13 THE COURT: YOU'RE WELCOME.

14 OKAY. HAVE YOU SEEN THE INSTRUCTIONS THAT
15 I PROPOSED?

16 MS. TOWERY: YES, YOUR HONOR.

17 THERE IS A COUPLE OF PROBLEMS THAT I SEE,
18 AND ONE OF THEM MAY BE IN MY OWN NOTETAKING.

19 MAY I SIT YOUR HONOR, SINCE I CAN LOOK AT

20 THE COMPUTER?

21 THE COURT: ABSOLUTELY, SURE.

22 MS. TOWERY: I WROTE DOWN THAT THE COURT
23 INDICATED AN INTENTION TO GIVE 1.00, AND I --

24 THE COURT: NO. NO. 1.01.

25 MS. TOWERY: ALL RIGHT. THAT TAKES CARE OF THAT
26 PROBLEM.

27 THE COURT: NO.

28 MS. TOWERY: THAT'S WHAT I WAS GOING TO MENTION.

-11018

1 THE COURT ALSO INDICATED SOME QUESTION AS
2 TO WHETHER OR NOT 2.82 SHOULD BE GIVEN, AND I THINK THAT
3 IT SHOULD, BECAUSE I BELIEVE THAT MS. ABRAMSON DID ASK
4 DR. HART SEVERAL HYPOTHETICAL QUESTIONS. SO I THINK
5 THAT'S APPROPRIATELY GIVEN.

6 THE ONLY ISSUE THAT I SEE WITH RESPECT TO
7 THE REMAINING INSTRUCTIONS THAT THE COURT PROPOSED IS
8 2.20, AND THAT'S THE INSTRUCTION THAT RELATES TO THE
9 CREDIBILITY OF WITNESSES, AND THE FACTORS THAT THE
10 JURORS TAKE INTO CONSIDERATION.

11 AND THE ONLY FACTORS THAT I'M CONCERNED
12 ABOUT -- I ASSUME THE COURT WILL BLACK-BLOCK OUT FELONY
13 CONVICTIONS AND CRIMINAL ACTS?

14 THE COURT: YES.

15 MS. TOWERY: BUT I AM CONCERNED ABOUT THE PORTION

16 THAT READS: "THE EXISTENCE OR NON-EXISTENCE OF A BIAS,
17 INTEREST OR OTHER MOTIVE."
18 AND OBVIOUSLY A NUMBER OF WITNESSES HAVE
19 TESTIFIED IN THE PENALTY PHASE THAT DO HAVE A BIAS OR
20 INTEREST OR MOTIVE, MOST SPECIFICALLY THE WITNESSES WHO
21 TESTIFIED BOTH TO VICTIM IMPACT, AND TO THE IMPACT THAT
22 THE DEATH PENALTY, IF IT WERE GIVEN TO THE DEFENDANTS,
23 WOULD HAVE UPON THOSE INDIVIDUALS.
24 SO I AM NOT QUITE SURE HOW TO DEAL WITH IT.
25 BUT IT SEEMS TO -- IT SEEMS TO BE MISLEADING IN THAT
26 RESPECT, BECAUSE I BELIEVE THAT THE JURY CAN TAKE THOSE
27 BIASES AND INTERESTS INTO CONSIDERATION IN CONNECTION
28 WITH EVALUATING THOSE WITNESSES.

-11017

1 THE COURT: OKAY.
2 DO THE PEOPLE WISH TO BE HEARD ON "THE
3 EXISTENCE OR NONEXISTENCE OF A BIAS, INTEREST OR OTHER
4 MOTIVE," IS THE PHRASE THAT MS. TOWERY IS CONCERNED
5 WITH?
6 MR. CONN: MAY I HAVE JUST A MOMENT?
7 THE COURT: IT'S JUST A FACTOR TO CONSIDER. IT
8 DOESN'T SAY THAT THEY SHOULD DISREGARD IT. IT'S JUST
9 LIKE ANYTHING ELSE, A -- THIS IS A GENERAL INSTRUCTION
10 THAT YOU WOULD FIND IN ANY CASE, NO MATTER WHAT THE
11 ISSUE IS, CIVIL OR CRIMINAL.

12 MS. TOWERY: I UNDERSTAND, YOUR HONOR. BUT THE
13 INFERENCE WHICH I THINK IS REASONABLY DRAWN IS THAT ONE
14 SHOULD OR MAY DISCOUNT THE TESTIMONY OF A WITNESS WHO IS
15 BIASED OR HAS AN INTEREST IN THE PROCEEDINGS, AND I
16 DON'T THINK THAT'S REALLY PROPER IN THIS TYPE OF
17 PROCEEDING.

18 THE COURT: WHY NOT?

19 MS. TOWERY: BECAUSE A BIASED WITNESS, IN THE
20 SENSE THAT THEY'RE BIASED, RUNS TOWARDS A PREFERENCE FOR
21 LIFE IN THE CASE OF FAMILY MEMBERS OF THE DEFENDANTS, OR
22 IN THE CASE OF VICTIM IMPACT, THEIR BIAS AND INTEREST
23 RUNS TOWARDS THE VICTIMS IN THE CASE.

24 AND I THINK ON BOTH OF THOSE THE COURT HAS
25 RULED, AND I THINK THE LAW IS THAT THOSE ARE PROPERLY
26 PRESENTED.

27 THE COURT: WELL, THEY'RE PRESENTED. THAT
28 DOESN'T MEAN THE JURY CAN'T STILL CONSIDER IT IN

-11016

1 EVALUATING THE EVIDENCE.

2 MS. TOWERY: I'M AFRAID THAT THE WAY THE
3 INSTRUCTION READS, IT'S NOT REALLY DESIGNED FOR PENALTY
4 PHASE, AND I AM CONCERNED THAT THE JURY WILL INFER FROM
5 THE STANDARD INSTRUCTION THAT THEY MAY NOT CONSIDER
6 EITHER VICTIM IMPACT OR PREFERENCE ON THE PART OF FAMILY
7 MEMBERS AS TO PENALTY -- FAMILY MEMBERS OF THE

8 DEFENDANT.

9 THE COURT: PEOPLE WISH TO BE HEARD AT ALL?

10 MR. CONN: YES. I JUST THINK THAT THE JURY WILL
11 UNDERSTAND THAT THEY CAN CONSIDER THE TESTIMONY THAT WAS
12 PRESENTED BY THE DEFENSE, AS WELL AS THE VICTIM IMPACT
13 EVIDENCE, AND I THINK THAT COUNSEL'S CONCERN IS JUST NOT
14 WARRANTED.

15 THE COURT: AGAIN, THIS ONLY APPLIES TO HOW THE
16 JURY VIEWS A WITNESS, AND THE WITNESS' TESTIMONY, NOT
17 HOW THE JURY USES THE TESTIMONY.

18 AND I THINK THIS IS A PROPER INSTRUCTION.
19 I DON'T THINK IT CAUSES ANY CONFUSION. SO I AM GOING TO
20 GIVE THAT.

21 ANY OTHER CONCERNS ABOUT THE INSTRUCTIONS?

22 MS. TOWERY: NO, YOUR HONOR.

23 THE COURT: ANY OTHER REQUESTED INSTRUCTIONS?

24 THE REASON I AM GIVING THESE IS THAT THE
25 JURY IS INSTRUCTED TO DISREGARD THE INSTRUCTIONS FROM
26 THE GUILT PHASE, AND THE SUPREME COURT HAS INDICATED
27 THAT EITHER WE SHOULD GO BACK AND PICK OUT AND POINT THE
28 JURY TO THE INSTRUCTIONS FROM THE GUILT PHASE BY NUMBER,

-11015

1 OR SOME OTHER FASHION, OR JUST GIVE THEM OVER AGAIN, AND
2 IT'S MUCH EASIER TO GIVE THEM OVER AGAIN.

3 SO, HOW ABOUT THE PROSECUTION? DO YOU HAVE

4 ANY REQUEST FOR ADDITIONAL INSTRUCTIONS OR REQUESTS, OR

5 OBJECTIONS TO THOSE THAT I SUGGESTED HERE?

6 MR. CONN: NO, YOUR HONOR.

7 THE COURT: THEN THOSE WILL BE GIVEN. 1.01

8 THROUGH 2.82 AS I ANNOUNCED.

9 MS. TOWERY: IS THE COURT ALSO GIVING THE

10 STANDARD CONCLUDING INSTRUCTIONS?

11 THE COURT: NO. THAT'S INCLUDED IN THE PENALTY

12 PHASE INSTRUCTION. THE LAST PENALTY PHASE INSTRUCTION,

13 I BELIEVE.

14 MR. GESSLER: YOUR HONOR --

15 MS. TOWERY: I WAS ASSUMING, YOUR HONOR, THAT THE

16 COURT WOULD BE GIVING 17.30, 17.45.

17 THE COURT: WELL, WE COULD.

18 MS. TOWERY: AND 17.48.

19 THE COURT: THE USE NOTES REALLY SAY GIVE THE

20 INSTRUCTIONS UP TO 2.88 -- OR 8.88, RATHER. THEY DON'T

21 REALLY TALK ABOUT THOSE ADDITIONAL CLOSING INSTRUCTIONS.

22 CERTAINLY INSTRUCTIONS SUCH AS 17.30 ARE APPROPRIATE.

23 AND WHAT OTHER INSTRUCTIONS?

24 MS. TOWERY: I THOUGHT PERHAPS 17.45, AND I WAS

25 THINKING 17.48, BUT I DON'T THINK THAT REALLY MATTERS SO

26 MUCH.

27 THE COURT: WHAT ABOUT 17.40, "INDIVIDUAL OPINION

28 REQUIRED TO DELIBERATE," UNLESS THAT'S INCORPORATED IN

1 THE PENALTY PHASE?

2 MR. GESSLER: I THINK THAT'S INCORPORATED IN

3 8.88.

4 THE COURT: AND 17.41: "HOW JURORS SHOULD

5 APPROACH THEIR TASK. THE ATTITUDE AND CONDUCT OF

6 JURORS," ET CETERA.

7 ANYBODY HAVE ANY FEELINGS ABOUT THAT ONE?

8 MS. ABRAMSON: NO. I DON'T THINK THAT'S

9 NECESSARY. THEY'VE HEARD THAT IN THE PREVIOUS PHASE.

10 THE COURT: BUT THEY'RE NOT GOING TO HAVE IT

11 UNLESS I GIVE IT TO THEM. THEY'RE NOT GOING TO HAVE ANY

12 INSTRUCTIONS UNLESS I GIVE IT TO THEM.

13 MS. TOWERY: WELL, I THINK IF THE COURT GIVES

14 THAT ONE, WE WOULD ALSO ASK THAT THE COURT GIVE 17.40

15 ALONG WITH IT.

16 THE COURT: WELL, EXCEPT THAT IT'S ALREADY

17 INCLUDED, YOU SAID.

18 MS. ABRAMSON: IT'S INCLUDED ON PAGE TWO OF 8.88.

19 MS. TOWERY: IT'S NOT EXACTLY -- I WOULD ASK THAT

20 THE COURT GIVE 17.40 IF THE COURT IS GIVING 17.41, OR

21 ALTERNATIVELY, GIVE NEITHER.

22 THE COURT: OKAY. WHAT IS THE PEOPLE'S POSITION

23 ON GIVING 17.40 AND .41? THE INSTRUCTIONS ARE BASICALLY

24 STANDARD INSTRUCTIONS ON INDIVIDUAL OPINION REQUIRED,

25 AND HOW JURORS SHOULD APPROACH THEIR TASK.

26 MS. NAJERA: YOUR HONOR, WE HAVE NO PROBLEM WITH

27 17.41. I JUST DON'T THINK WE SHOULD DO 17.40, BECAUSE

28 WE ARE REPEATING SOMETHING, AND IT'S GIVING IT UNDUE

1 SIGNIFICANCE.

2 THE COURT: WHERE IS THAT IN THE OTHER
3 INSTRUCTIONS, 17.40?

4 MS. TOWERY: THE CONCEPT IS IN 8.88.

5 MS. ABRAMSON: BUT VERY WATERED DOWN.

6 MS. TOWERY: THE SECOND PAGE, PAGE TWO.

7 THE COURT: WHERE?

8 MS. ABRAMSON: THAT'S ONLY SEPARATELY DECIDING
9 WITH RESPECT TO THE DEFENDANTS. NO, IT'S NOT IN 8.88.

10 I THINK IT'S NECESSARY, YOUR HONOR.

11 MS. NAJERA: I AM LOOKING AT THE PARAGRAPH ON
12 PAGE TWO OF TWO, THE FIRST FULL PARAGRAPH IN THE
13 BRACKETS. "IN THIS CASE YOU MUST DECIDE SEPARATELY THE
14 QUESTION OF PENALTY AS TO EACH OF THE DEFENDANTS -- AS
15 TO EACH OF THE DEFENDANTS."

16 THE COURT: OKAY. THAT'S SEPARATE. 17.40 SAYS:

17 "THE PEOPLE AND THE DEFENDANT ARE
18 ENTITLED TO THE INDIVIDUAL OPINION OF EACH
19 JUROR. EACH OF YOU MUST CONSIDER THE
20 EVIDENCE FOR THE PURPOSE OF REACHING A
21 VERDICT, IF YOU CAN DO SO. . . "

22 ET CETERA. IT'S A STANDARD INSTRUCTION.

23 MS. NAJERA: OKAY, LET'S GIVE IT.

24 THE COURT: SO, 17.40 AND .41. AND 17.45 JUST
25 TELLS THEM ABOUT THE INSTRUCTIONS BEING HANDWRITTEN, ET

26 CETERA.

27 17.47 AS PHRASED DOESN'T REALLY APPLY.

28 17.48, USE OF NOTES, WOULD APPLY TO THE

-11012

1 SAME EXTENT THAT IT DID IN THE GUILT PHASE. SO I'LL

2 GIVE THAT.

3 MS. TOWERY: THAT'S FINE, YOUR HONOR.

4 THE COURT: SO 17.30, .40, .41, .45 AND .48, IN

5 ADDITION TO THOSE OTHERS WE DISCUSSED.

6 MS. TOWERY: OKAY.

7 THE COURT: ALL RIGHT. AS FAR AS EXHIBITS ARE

8 CONCERNED, LET'S TALK ABOUT THEM FOR A MINUTE.

9 MR. LEVIN: IS THE COURT GOING TO GIVE THE

10 PROPOSED INSTRUCTION THAT I SUBMITTED?

11 THE COURT: I'M SORRY, I FORGOT TO DISCUSS THAT

12 ONE. WE DIDN'T HEAR THE PEOPLE'S POSITION ON THAT ONE.

13 MR. LEVIN'S INSTRUCTION, MR. CONN.

14 MR. CONN: YES. WE WOULD OPPOSE THAT

15 INSTRUCTION. I THINK THAT THIS IS MISLEADING. IT

16 SUGGESTS THAT THE JURY SHOULD NOT CONSIDER DR. VICARY'S

17 BEHAVIOR. I THINK CLEARLY THEY CAN.

18 THE COURT: WELL, THEY CAN'T CONSIDER IT AS A

19 FACTOR IN AGGRAVATION. IT'S NOT A FACTOR IN

20 AGGRAVATION, THE FACT THAT HE MODIFIED NOTES.

21 MR. CONN: WELL, THE PROBLEM WITH THIS IS THAT

22 PERHAPS THE -- PRIMARILY WITH THE SECOND SENTENCE, WHICH
23 SUGGESTS THAT IT CANNOT BE CONSIDERED IN THE WEIGHING
24 PROCESS.

25 I THINK IT'S MISLEADING. I JUST THINK
26 IT'S -- IT SUGGESTS TO THE JURY THAT THEY SHOULD
27 DISREGARD HIS BEHAVIOR.

28 MS. ABRAMSON: IT CAN ONLY BE USED TO ASSESS HIS

-11011

1 CREDIBILITY. IT CAN'T BE WEIGHED AS AN AGGRAVATING
2 FACTOR. THAT'S ALL IT SAYS.

3 MS. NAJERA: BUT THEY CAN USE IT TO ASSESS HIS
4 CREDIBILITY, AND THIS GOES TO WHETHER OR NOT THEY'RE
5 GOING TO USE IT -- HOW THEY'RE GOING TO USE IT IN TERMS
6 OF HOW MUCH WEIGHT TO GIVE IT IN AGGRAVATION OR
7 MITIGATION.

8 THE COURT: BUT THAT GOES TO HIS CREDIBILITY, NOT
9 THE FACT THAT HE ALTERED THE NOTES. ONCE THEY CONSIDER
10 THE NOTE ALTERATION AND HIS TESTIMONY ABOUT IT, THAT
11 COULD HAVE AN IMPACT ON HIS CREDIBILITY. AND THEY
12 CERTAINLY CAN CONSIDER THAT.

13 BUT ONCE THEY HAVE EVALUATED HIS
14 CREDIBILITY AND GIVEN WHATEVER WEIGHT THEY WANT TO HIS
15 TESTIMONY, THEN THEY'RE ENTITLED TO CONSIDER THAT
16 TESTIMONY FOR WHATEVER WEIGHT THEY WANT TO GIVE TO IT;
17 EITHER IN AGGRAVATION OR MITIGATION, QUITE FRANKLY.

18 THE TESTIMONY HE GAVE, AS FAR AS SOME OF
19 THE EXAMINATION REGARDING PREMEDITATION AND THINGS THAT
20 COULD BE INTERPRETED IN THAT FASHION, CERTAINLY CAN'T BE
21 CONSIDERED BY THE JURY AS FACTORS IN AGGRAVATION.

22 MS. NAJERA: RIGHT.

23 THE COURT: SO IF YOU COULD REPHRASE THIS IN SOME
24 FASHION TO INCORPORATE THE THOUGHT THAT THE FACT OF HIS
25 ALTERATIONS CANNOT BE CONSIDERED BY THE JURY AS A FACTOR
26 IN AGGRAVATION, BUT IT MAY BE CONSIDERED, AS I
27 INSTRUCTED THE JURY, AS TO HIS CREDIBILITY, WHICH I
28 INSTRUCTED THE JURY THIS MORNING.

-11010

1 BUT ONCE YOU GET BEYOND EVALUATING HIS
2 CREDIBILITY TO THE USE OF WHATEVER USE THEY WANT TO MAKE
3 OF HIS TESTIMONY, IT CAN BE AGGRAVATING OR IT COULD
4 PROVIDE EVIDENCE OF A FACTOR IN AGGRAVATION OR
5 MITIGATION. IT'S NOT BY ITSELF, BUT IT COULD PROVIDE
6 EVIDENCE THAT CAN BE CONSIDERED AS A FACTOR IN
7 AGGRAVATION OR MITIGATION, DEPENDING ON HOW YOU LOOK AT
8 IT.

9 MR. LEVIN: YOUR HONOR, THERE IS ABSOLUTELY
10 NOTHING THAT DR. VICARY TESTIFIED TO THAT WOULD
11 PROPERLY -- OR COULD PROPERLY BE USED AS A FACTOR IN
12 AGGRAVATION. HE WAS CALLED AS A WITNESS FOR THE
13 DEFENSE. ALL THE PROSECUTION DID WAS IMPEACH HIM,

14 IMPEACH HIM WITH THE FACT THAT HE ALTERED HIS NOTES TO
15 ATTACK HIS CREDIBILITY, SO THAT HIS VALUE MIGHT BE
16 REDUCED TO NOTHING. MY CLIENT HAD NOTHING TO DO WITH
17 THE ALTERATION OF THOSE NOTES.

18 THE FACT IS THAT THERE WAS NOTHING THAT
19 THIS WITNESS OFFERED, IN ADDITION TO THE FACT THAT HE
20 HAD TESTIFIED IN THE MANNER THAT MS. ABRAMSON CALLED
21 HIM.

22 THE COURT: EXCEPT YOUR CLIENT'S STATEMENTS TO
23 DR. VICARY. PRIOR INCONSISTENT STATEMENTS TO HIS
24 TESTIMONY CAN BE CONSIDERED BY THE JURY.

25 MR. LEVIN: I DON'T THINK THAT THERE WAS ANYTHING
26 THAT THIS WITNESS TESTIFIED TO THAT WOULD BE PROPER TO
27 CONSIDER IN AGGRAVATION, EXCEPT THAT HIS CREDIBILITY AND
28 HIS BELIEVABILITY AS TO WHAT HE SAID AS A WITNESS FOR

-11009

1 THE DEFENSE MIGHT BE IMPEACHED TO REDUCE HIM TO NOT BE
2 CONSIDERED AT ALL.

3 BUT CERTAINLY THERE WAS NOTHING IN HIS
4 TESTIMONY THAT WOULD BE PROPER -- AT LEAST AS I HEARD
5 HIS TESTIMONY -- THAT COULD BE CONSIDERED AS A FACTOR IN
6 AGGRAVATION.

7 THE COURT: WELL, THINGS SUCH AS HIS HATRED OF
8 HIS PARENTS AND THINGS OF THAT NATURE SHOULDN'T BE
9 CONSIDERED?

10 MR. LEVIN: WELL, THAT'S NOT EXACTLY HOW THE
11 TESTIMONY CAME OUT. MR. CONN TOOK A LINE OUT OF THE
12 NOTES AND SAID: "DID MR. MENENDEZ TELL YOU AT ONE
13 PARTICULAR TIME IN SIX YEARS, OF 110 PAGES OF NOTES,
14 THAT HE HATED HIS PARENTS?"
15 "YES."
16 "WELL, WERE THERE OTHER REFERENCES IN
17 THERE THAT HE LOVED HIS PARENTS?"
18 "YES."
19 "WELL, HOW DO YOU RECONCILE IT?"
20 AND HE EXPLAINED. I CAN'T IMAGINE HOW THAT
21 PARTICULAR POINT COULD BE USED IN AGGRAVATION, WHEN
22 MR. CONN WAS PRESENTING IT TO TRY TO SHOW THAT IT WAS
23 REDACTED OR REMOVED FROM HIS NOTES, AND I -- I DON'T --
24 I DON'T SEE HOW THAT'S A FACTOR IN AGGRAVATION.
25 THE COURT: OKAY.
26 MR. CONN?
27 MR. CONN: I AGREE WITH THE COURT. IT IS
28 EVIDENCE IN AGGRAVATION. ALL THAT MR. LEVIN IS ARGUING

-11008

1 IS THAT THERE IS OTHER EVIDENCE THAT TENDS TO REBUT IT.
2 WHETHER OR NOT THERE IS EVIDENCE THAT TENDS
3 TO REBUT IT, IT IS STILL A CIRCUMSTANCE OR A FACT THAT
4 TENDS TO AGGRAVATE THE CRIME, AND IT CAN BE CONSIDERED
5 IN AGGRAVATION.

6 MS. ABRAMSON: YOUR HONOR, I CAN'T UNDERSTAND HOW
7 YOU CAN AGGRAVATE A FIRST-DEGREE, PREMEDITATED MURDER BY
8 THE NOTION OF HATRED. THAT'S WHAT THE PEOPLE ARGUED IN
9 THE CASE-IN-CHIEF ANYWAY.

10 THE COURT: WELL, THIS IS ADDITIONAL EVIDENCE
11 REGARDING THE CIRCUMSTANCES OF THE CRIME. THAT'S ALL IT
12 WOULD BE CONSIDERED FOR. AS SUCH, THE WEIGHT TO BE
13 GIVEN IS UP TO THE JURY.

14 MS. TOWERY: HOW ABOUT THIS?

15 MR. LEVIN: WAIT. THIS IS MY PROPOSED
16 INSTRUCTION. I WOULD LIKE TO SEE IF I CAN CONVINCE THE
17 JUDGE.

18 MS. ABRAMSON: DO YOU WANT TO LOOK AT TERRI'S
19 VERSION?

20 MR. LEVIN: THE WAY THIS INSTRUCTION WAS
21 DRAFTED, IT SAYS: "YOU SHALL NOT CONSIDER DR. VICARY'S
22 ALTERATION OF HIS NOTES."

23 WHAT I AM REFERRING TO IS THE FACT THAT HE
24 ALTERED HIS NOTES.

25 THE COURT: RIGHT. THAT'S OKAY. THAT FIRST
26 SENTENCE IS OKAY.

27 MR. LEVIN: OR ANY OF HIS REASONS FOR DOING SO,
28 AND WE CAN BE SPECIFIC WITH RESPECT TO THE ONLY --

-11007

1 ACTUALLY, I THINK THAT'S ACCURATE, TOO, OR ANY OF HIS

2 REASONS FOR DOING SO.

3 HE GAVE NO REASONS FOR DOING SO. THE ONLY
4 REASON THAT HE GAVE --

5 THE COURT: HE DID.

6 MR. LEVIN: -- WAS THE ONE TIME THAT IT RELATED
7 TO MS. ABRAMSON.

8 THE COURT: HE DID GIVE REASONS.

9 BUT AGAIN, I AGREE, AND THE PEOPLE ARE NOT
10 DISPUTING IT. THE FACT THAT HE ALTERED THE NOTES IS NOT
11 A FACTOR IN AGGRAVATION.

12 MR. LEVIN: OKAY.

13 THE COURT: THAT PORTION OF THE INSTRUCTION, THE
14 FIRST SENTENCE IS FINE.

15 MR. LEVIN: THE FIRST THREE LINES?

16 THE COURT: RIGHT.

17 MR. LEVIN: WHAT IS THE PROBLEM THEN?

18 THE COURT: THE FIRST THREE LINES ARE FINE.

19 MR. LEVIN: WHAT IS THE PROBLEM AFTER THAT?

20 THE COURT: BECAUSE YOU ARE SAYING THAT: "YOU
21 SHALL NOT USE THIS INFORMATION AT ALL IN THE WEIGHING OF
22 AGGRAVATING AND MITIGATING CIRCUMSTANCES."

23 WHEN YOU'RE TALKING ABOUT INFORMATION -- AS
24 I SAID, ONCE YOU EVALUATE THE CREDIBILITY OF A WITNESS,
25 THEN YOU USE WHATEVER EVIDENCE YOU ACCEPT IN WEIGHING
26 AGGRAVATION AND MITIGATION. I THINK AFTER THOSE FIRST
27 THREE LINES, THEN IT SHOULD STATE THAT "THIS EVIDENCE
28 MAY BE CONSIDERED ONLY FOR THE PURPOSE OF EVALUATING THE

1 CREDIBILITY OF DR. VICARY, AND FOR NO OTHER PURPOSE,"
2 PERIOD.

3 MR. LEVIN: MS. TOWERY JUST HANDED ME A PROPOSAL.
4 I'D LIKE TO LOOK AT IT FOR A MOMENT.

5 MS. ABRAMSON: THE COURT ARTICULATED EARLIER
6 TODAY, I THINK, A LAWYER MISCONDUCT INSTRUCTION IT HAD
7 IN MIND, OR A LAWYER -- AT THAT TIME I THINK IT WAS
8 LAWYER CONDUCT, AND IT GOT TURNED INTO MISCONDUCT.

9 THE COURT: WELL, IT WOULD JUST BE SOMETHING
10 ALONG THESE LINES:

11 "IN YOUR DELIBERATIONS YOU MUST
12 NEITHER CONSIDER NOR DISCUSS THE ACTIONS
13 OR CONDUCT OF COUNSEL, WHETHER SUCH
14 ACTIONS OR CONDUCT OCCURRED IN THE
15 COURTROOM OR OUTSIDE OF THE COURTROOM.
16 THE ACTIONS OR CONDUCT OF COUNSEL MUST NOT
17 AFFECT YOUR VERDICT IN ANY WAY."

18 MS. ABRAMSON: WELL, I THINK THAT WHAT MS. TOWERY
19 IS PROPOSING MIGHT BE A LITTLE MORE DIRECT. I THINK WE
20 WANT TO PINPOINT THAT -- I THINK WE JUST WANT TO
21 PINPOINT THAT THE ACTION OF DR. VICARY OR OF MYSELF MAY
22 NOT BE CONSIDERED FACTORS IN AGGRAVATION. I MEAN,
23 PINPOINT IT TO AGGRAVATION.

24 I WOULD AGREE WITH THE COURT'S INSTRUCTION.
25 I LIKE THAT ONE, AND I THINK THERE SHOULD BE ONE
26 INDICATING THAT ACTION OF COUNSEL, OR OF A WITNESS,

27 CANNOT BE CONSIDERED A FACTOR IN AGGRAVATION.

28 THE COURT: WELL, WHAT MORE DO YOU NEED; THAT, OR

-11005

1 THE MORE PINPOINTED INSTRUCTION PROPOSED BY MR. LEVIN,
2 THE FIRST THREE SENTENCES OF IT?

3 MS. ABRAMSON: WELL, I THINK WE DO WANT TO FOCUS
4 ON THE REALM IN WHICH WE'RE TALKING, OF THE CHANGING OF
5 THE NOTES.

6 THE COURT: WELL, GIVE ME WHAT YOU WANT THEN. I
7 HAVE GIVEN YOU WHAT I THOUGHT.

8 MS. ABRAMSON: PUT ALL THREE TOGETHER.

9 MR. LEVIN: SURE. CAN WE PUT IT IN A LITTLE BIT
10 MORE OF AN ORGANIZED FASHION AND PRESENT IT TO THE COURT
11 FIRST THING IN THE MORNING?

12 THE COURT: YES. BUT I REALLY DON'T WANT TO
13 WASTE A WHOLE LOT OF TIME ON IT, BECAUSE WE REALLY
14 SHOULD BE IN A POSITION TO GET TO ARGUMENT.

15 AS FAR AS ARGUMENT ITSELF, IS THERE A
16 REQUEST AS TO THE ORDER OF ARGUMENT?

17 MR. LEVIN: YES, YOUR HONOR.

18 I WOULD REQUEST THAT -- OR SUGGEST THAT THE
19 PROSECUTION -- WE ALL GET ONE ARGUMENT. THE PROSECUTION
20 BEGINS, AND WE GO RIGHT DOWN THE LINE, THE DEFENSE OF
21 ERIK MENENDEZ, AND THEN THE DEFENSE OF LYLE MENENDEZ,
22 WITH NO REBUTTAL, NO ADDITIONAL ARGUMENTS BY EITHER

23 SIDE.

24 MR. GESSLER: IT IS OUR INTENTION, YOUR HONOR,
25 THAT TWO COUNSEL ARGUE FOR EACH OF THE DEFENDANTS,
26 PURSUANT TO THE STATUTE, IN THIS ONE ARGUMENT FRAMEWORK,
27 BUT NOT DUPLICATING THE EFFORTS OF CO-COUNSEL FOR EACH
28 DEFENDANT.

-11004

1 THE COURT: OKAY.

2 WHAT IS THE PEOPLE'S POSITION?

3 MR. CONN: WE OPPOSE THAT. WE HAVE A RIGHT TO
4 RESPOND.

5 THE COURT: OPPOSE WHAT?

6 MR. CONN: OPPOSE A SINGLE ARGUMENT. WE HAVE A
7 RIGHT TO RESPOND. THE PROCEDURE IS THE PROSECUTION
8 GOES, THE DEFENSE GOES, AND THE PROSECUTION HAS A CHANCE
9 TO REBUT.

10 MS. ABRAMSON: AND THE DEFENSE GOES AGAIN.

11 MR. CONN: THAT'S CORRECT.

12 THE COURT: ALL RIGHT. I HAVE NO PROBLEM WITH
13 THE PEOPLE OPENING, THE DEFENSE, THE PEOPLE RESPONDING,
14 AND FINAL ARGUMENT BY THE DEFENSE.

15 MR. CONN: ALL RIGHT.

16 THE COURT: THAT'S FINE. LET'S TALK ABOUT
17 EXHIBITS. SO YOU FOLKS CAN DIVVY IT UP ANY WAY YOU
18 WANT.

19 MR. GESSLER: YOUR HONOR, WHAT I HAVE IN MIND --
20 IF THAT OCCURS, IS IT CERTAIN THAT THE PROSECUTION WILL
21 IN FACT RESPOND IN REBUTTAL, OR IS IT AN EFFORT TO LIMIT
22 US, FOR INSTANCE, TO ONE ARGUMENT, AND THEN THEY SAY,
23 "ALL RIGHT, WE PASS." AND SOME OF THE ARGUMENTS THAT WE
24 MIGHT HAVE MADE IN RESPONSE WILL BE LOST.
25 THE COURT: I AM SURE THEY'RE NOT GOING TO DO
26 THAT, AND I WOULDN'T PERMIT THAT. YOU HAVE A RIGHT TO
27 TWO COUNSEL ARGUING FOR THE DEFENSE.
28 MR. GESSLER: BECAUSE GIVEN THAT STATUS, THAT THE

-11003

1 PROSECUTION IS GOING TO REBUT; THE LYLE MENENDEZ TEAM, I
2 BELIEVE WE WOULD DO AN OPENING ARGUMENT WITH ONE
3 COUNSEL, AND THEN THE CLOSING ARGUMENT WITH THE OTHER.

4 THE COURT: THAT'S WHAT I WOULD HAVE ANTICIPATED.

5 MR. GESSLER: AND THEN IF THE PROSECUTION DID NOT
6 RESPOND, WE WOULD ASK THEN TO BE ABLE TO PUT ON A FINAL
7 ARGUMENT THAT WE HAD RESERVED.

8 THE COURT: YES. I AM NOT GOING TO --

9 MR. GESSLER: THAT'S ALL I WANTED TO CLARIFY,
10 YOUR HONOR.

11 THE COURT: AND I CAN'T ANTICIPATE THAT.

12 MS. ABRAMSON: YOUR HONOR, WE ARE PLANNING TO DO
13 SOMETHING DIFFERENT THAN THAT, AND WHAT WE NEED TO DO IS
14 IN THE OPENING PART, BOTH OF US NEED TO SPEAK, AND THEN

15 IN A FINAL PART JUST MR. LEVIN WILL SPEAK.

16 AND I ASK THE COURT -- BECAUSE I AM NOT

17 REALLY MAKING AN ARGUMENT. I AM JUST GOING TO INDICATE

18 SOMETHING ABOUT THE MISCONDUCT THAT'S BEEN ALLEGED, AND

19 I WANTED TO INDICATE TO THE JURY MY AWARENESS OF THAT.

20 THE COURT: WELL, WE HAVE TO MAKE SURE THAT YOU

21 DON'T START PHRASING THINGS AS A WITNESS, AND PRESENTING

22 TO THE JURY THINGS THAT ARE BEYOND THE RECORD.

23 MS. ABRAMSON: NO. NO. I HAVE NO INTENTION OF

24 DEFENDING, EXPLAINING, OR DOING ANYTHING LIKE THAT. I

25 SIMPLY WANT TO URGE THE JURY TO FOLLOW THE INSTRUCTIONS

26 ON WHAT ARE AGGRAVATING FACTORS, AND TO NOT USE ANY

27 NEGATIVE FACTS ABOUT ME AGAINST MY CLIENT.

28 THAT'S IT IN A NUTSHELL.

-11002

1 THE COURT: OKAY. I WILL PERMIT THAT TO OCCUR IN

2 THE WAY THAT YOU'RE SUGGESTING.

3 MS. ABRAMSON: THANK YOU.

4 THE COURT: LET'S TALK ABOUT EXHIBITS HERE.

5 WHAT ARE YOU OFFERING? WHAT EXHIBITS ARE

6 YOU OFFERING? MOST OF THESE ARE DEFENSE EXHIBITS.

7 I ASSUME THE PEOPLE ARE OFFERING THE

8 REDACTED VIDEOTAPE THAT WAS PLAYED THIS AFTERNOON, 464.

9 MR. CONN: YES, YOUR HONOR.

10 MS. NAJERA: AND WE'RE ALSO OFFERING 456 AND 457.

11 THE COURT: OKAY. 464 WILL BE RECEIVED SUBJECT
12 TO, AND OVERRULING, THE OBJECTION OF THE DEFENSE ALREADY
13 ARTICULATED.

14 WHAT ARE THE OTHER TWO YOU'RE OFFERING?

15 MS. NAJERA: 456 AND 457, YOUR HONOR. THOSE WILL
16 BE THE TWO PHOTOGRAPHS, ONE OF JOSE MENENDEZ, ONE OF
17 KITTY MENENDEZ.

18 THE COURT: THEY WILL BE RECEIVED, SUBJECT TO
19 PREVIOUS OBJECTIONS.

20 MS. NAJERA: OKAY.

21 THE COURT: WHAT IS THE DEFENSE OFFERING?

22 MS. TOWERY: CAN WE HAVE JUST A MOMENT, YOUR
23 HONOR?

24 THE COURT: YES.

25 WE START AT 442 AND GO FROM THERE.

26 MS. TOWERY: YOUR HONOR, I THINK THE DEFENSE WILL
27 OFFER 442 THROUGH 449, AND 453 THROUGH 455.

28 MS. ABRAMSON WANTS TO CONSIDER WHETHER OR

-11001

1 NOT SHE WANTS TO OFFER 458, SO SHE WOULD ASK TO RESERVE
2 THAT. WE WOULD OFFER 459 AND 461.

3 MS. NAJERA: 459 -- EXCUSE ME, WHAT WAS THAT?

4 MS. TOWERY: 459 AND 461.

5 MS. NAJERA: OKAY.

6 THE COURT: ALL RIGHT.

7 ANY OBJECTION BY THE PROSECUTION AS TO 442

8 THROUGH 449?

9 MS. NAJERA: I'D LIKE TO LOOK AT THEM AGAIN.

10 MS. TOWERY: I MADE A MISTAKE, I AM SORRY, YOUR

11 HONOR. 450 AS WELL. I MISSPOKE. I MISREAD MY NOTES.

12 THE COURT: OKAY. 442 THROUGH 450 IS BEING

13 OFFERED BY THE DEFENSE.

14 ANY OBJECTIONS?

15 MS. NAJERA: CAN WE HAVE JUST ONE SECOND?

16 THE COURT: 462 IS ONLY FOR IDENTIFICATION, AND

17 WAS RECEIVED ONLY FOR IDENTIFICATION PURPOSES. 463

18 LIKEWISE, ONLY FOR I.D.

19 MS. NAJERA: WE HAVE NO OBJECTION FROM 442 TO

20 450.

21 THE COURT: OKAY, THEN THEY WILL BE RECEIVED.

22 AND THERE WAS ALSO 453 AND 454 AND 455

23 OFFERED BY THE DEFENSE, AND 459 AND 461.

24 MS. NAJERA: WE HAVE NO OBJECTION TO THOSE, YOUR

25 HONOR.

26 THE COURT: OKAY. THEN ALL OF THOSE WILL BE

27 RECEIVED.

28 AND THE DEFENSE IS HOLDING OFF ON WHICH

-11000

1 ONES HERE? WHICH ONES ARE YOU NOT OFFERING?

2 MS. TOWERY: WE ARE NOT OFFERING 451, 452, 458

3 AND 460.

4 THE COURT: OKAY. AND THEY WILL NOT BE RECEIVED.

5 OKAY, THEN. I THINK THAT TAKES CARE OF ALL
6 THE EXHIBITS.

7 MR. GESSLER: WE HAVE ONE UNRESOLVED ISSUE, YOUR
8 HONOR, AND I THINK THAT WAS THERE WERE TWO AREAS OF
9 DISPUTE IN MY MODIFIED 8.88 THAT I SUBMITTED TO THE
10 COURT.

11 THE COURT: I'M SORRY. YES.

12 MR. GESSLER: OTHER THAN THAT, I THINK WE'RE
13 READY TO ROLL.

14 THE COURT: AS READY AS YOU COULD BE.

15 MR. GESSLER: YES.

16 THE COURT: WHAT IS YOUR RESPONSE TO THAT
17 PROPOSAL BY THE DEFENSE?

18 MR. CONN: I HAVE NO OBJECTION, YOUR HONOR.

19 THE COURT: ALL RIGHT.

20 MR. LEVIN: YOUR HONOR, I WILL SUBMIT IT TO THE
21 COURT, I AM ASKING FOR THE ORIGINAL INSTRUCTION THAT I
22 SUBMITTED AND REQUESTED. I THINK IT'S A PROPER
23 STATEMENT OF THE LAW.

24 I AM SUBMITTING THIS ONE BECAUSE I BELIEVE
25 THAT IF I DON'T, THE COURT WILL GIVE NOTHING ON THAT
26 SUBJECT.

27 THE COURT: ALL RIGHT. I WILL GIVE THIS
28 INSTRUCTION. I DON'T KNOW IF I WILL USE THE WORD "BEAR

1 UPON." I MAY USE SOME OTHER WORD.

2 MR. LEVIN: YOU CAN USE "BURY," IF YOU LIKE.

3 MS. ABRAMSON: ANOTHER INSTRUCTION-LIKE WORD.

4 THE COURT: ALL RIGHT. MR. GESSLER HAS PROPOSED
5 MODIFICATIONS TO 8.88.

6 THE PEOPLE'S OBJECTION WAS TO THE WORD
7 "LISTED," AND TO THE ADDITIONAL SENTENCE AT THE BOTTOM
8 OF THE FIRST PAGE REGARDING MITIGATION OF --
9 CIRCUMSTANCES IN MITIGATION.

10 MR. GESSLER: THAT'S CORRECT, YOUR HONOR. THE
11 WORD "LISTED" IS ADDED IN ORDER TO MAKE SURE THAT THE
12 JURY UNDERSTANDS THE LANGUAGE OF PEOPLE VERSUS BOYD, 38
13 CAL.3D AT 772, THAT THE ONLY AGGRAVATING FACTORS THAT
14 THEY CAN CONSIDER ARE THOSE THAT ARE INCLUDED IN 8.85;
15 THAT IS, THE STATUTORILY AGGRAVATING FACTORS.

16 WITHOUT THAT, IT WOULD SEEM THAT THEY MIGHT
17 GIVE MORE PLAY TO THE DEFINITION OF AN AGGRAVATING IS
18 ANY FACT, CONDITION OR EVENT, AND NOT LIMIT IT TO THE
19 COMMISSION OF A CRIME, BUT REACH OUT TO ANYTHING THEIR
20 IMAGINATION EMBRACED.

21 THAT'S THE REASON I ADDED THE WORD "LISTED"
22 THERE.

23 THE COURT: WELL, ISN'T IT TRUE, MR. CONN, THAT
24 THE JURY MUST ONLY CONSIDER THE FACTORS LISTED IN 8.85?

25 MR. CONN: WELL, THAT IS TRUE. IT'S JUST THAT
26 WHEN YOU LOOK AT THE DEFINITION OF WHAT IS MEANT BY AN
27 AGGRAVATING FACTOR, THE AGGRAVATING FACTOR IS NOT

28 LIMITED TO WHAT IS LISTED THERE, BUT INCLUDES ANY FACT,

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1 CONDITION OR EVENT.

2 SO WE COULD ARGUE SPECIFIC FACTS,
3 CONDITIONS OR EVENTS WHICH DO IN FACT AGGRAVATE THE
4 CRIME, AND ARGUE THAT IS AN AGGRAVATING FACTOR.

5 THE PROBLEM WITH COUNSEL'S PROPOSAL IS THAT
6 IT SUGGESTS THAT THAT IS NOT APPROPRIATE, THAT IT MUST
7 BE ONE OF THE LISTED APPLICABLE FACTORS.

8 THE COURT: WELL, IT HAS TO BE.

9 MR. GESSLER: IT DOES.

10 MR. CONN: FOR EXAMPLE, JUST TO GIVE AN EXAMPLE,
11 THE EXTENT OF PREMEDITATION IN THIS CASE.

12 THERE IS EXTENSIVE PREMEDITATION. THAT'S
13 SOMETHING THAT THE JURY CAN CONSIDER. IT'S ONE OF THE
14 FACTS WHICH AGGRAVATES A CRIME.

15 SO THAT IS, ACCORDING TO THE DEFINITION OF
16 AN AGGRAVATING FACTOR, THAT IS A FACT OR CONDITION WHICH
17 AGGRAVATES THE CRIME. THEREFORE, THAT IS AN AGGRAVATING
18 FACTOR.

19 THE PROBLEM WITH THE SECOND PARAGRAPH IS
20 THAT IT SUGGESTS THAT UNLESS EXTENSIVE PREMEDITATION IS
21 LISTED IN THAT LIST, IT CANNOT BE CONSIDERED AS AN
22 AGGRAVATING FACTOR, AND THAT IS SIMPLY NOT TRUE.

23 MR. GESSLER: I THINK IT LIMITS THEIR

24 CONSIDERATION FOR THAT, YOUR HONOR, TO SUBSECTION A,
25 WHICH IS WHERE IT PROPERLY BELONGS; THAT IS, THAT HE CAN
26 ARGUE THAT AS PART OF (A) CIRCUMSTANCES OF A CRIME, BUT
27 IT STILL HAS TO FIT INTO THAT FORMULA.

28 THE COURT: WELL, ALL YOU DO IS ARGUE THAT THE

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1 PREMEDITATION FITS INTO FACTOR A. IT IS A LISTED
2 FACTOR.

3 MR. CONN: RIGHT. THAT'S TRUE. I AM NOT SAYING
4 I WOULD BE PRECLUDED FROM ARGUING THAT, I AM JUST SAYING
5 THAT THE STANDARD INSTRUCTION DOES NOT USE THE WORD
6 "LISTED," SO WHY SHOULD WE ADD THE WORD "LISTED"? IT
7 JUST, I THINK, UNNECESSARILY COMPLICATES THINGS.

8 THE COURT: OKAY. AND WHAT IS YOUR POSITION,
9 MR. GESSLER, AS TO THAT LAST SENTENCE?

10 MR. GESSLER: THE LAST SENTENCE, YOUR HONOR, I
11 BELIEVE IS A TRUE STATEMENT OF THE LAW, BOTH UNDER
12 FEDERAL SUPREME COURT DECISIONS AS WELL AS STATE.

13 I WOULD READ FROM PEOPLE VERSUS DUNCAN, 53
14 CAL.3D 955 AT 978, GOING ON TO 979,

15 IN THIS IT INDICATES THEY WERE
16 DISTINGUISHING THE CALIFORNIA DEATH PENALTY STATUTE FROM
17 THAT DECLARED UNCONSTITUTIONAL BY THE 11TH CIRCUIT, AND
18 BY THE 9TH CIRCUIT FROM ARIZONA, AND I FORGET THE 11TH
19 CIRCUIT ONE. I THINK IT WAS FLORIDA.

20 BUT IT STATES:
21 "THE INSTRUCTION IN JACKSON AND THE
22 STATUTE IN ADAMSON SUFFER FROM A SIMILAR
23 DEFECT. IN EACH, THE SENTENCING ENTITY IS
24 TOLD THAT A SENTENCE OF DEATH IS THE NORM,
25 AND THAT A LESSER PENALTY MAY BE IMPOSED
26 ONLY IF THE DEFENSE PRESENTS SUFFICIENT
27 MITIGATING EVIDENCE.
28 "IN BOTH INSTANCES, THE ACCUSED

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1 BORE THE BURDEN OF DEMONSTRATING THAT
2 DEATH WAS NOT AN APPROPRIATE PENALTY.
3 "IN CONTRAST, OUR STATUTE AND
4 INSTRUCTION GIVE THE JURY BROAD DISCRETION
5 TO DECIDE THE APPROPRIATE PENALTY BY
6 WEIGHING ALL OF THE RELEVANT EVIDENCE.
7 THE JURY MAY DECIDE, EVEN IN THE ABSENCE
8 OF MITIGATING EVIDENCE, THAT THE
9 AGGRAVATING EVIDENCE IS NOT COMPARATIVELY
10 SUBSTANTIAL ENOUGH TO WARRANT DEATH."
11 THIS SENTENCE IS ADDED TO MAKE SURE THAT
12 THE JURY IS AWARE OF THAT, YOUR HONOR, AS BEING A PART
13 OF OUR LAW, BOTH IN THE STATE AND FROM FEDERAL
14 CONSTITUTIONAL DECISIONS.
15 MR. CONN: WELL, I THINK THAT THIS PARTICULAR

16 SENTENCE COMPLICATES AND MISLEADS THE JURY CONCERNING
17 THE WEIGHING PROCESS.

18 IT IS CLEAR THAT THE JURY IS FREE TO ATTACH
19 WHATEVER WEIGHT THEY WANT TO EACH OF THE AGGRAVATING AND
20 MITIGATING FACTORS, AND THE INSTRUCTION TELLS THEM TO BE
21 GUIDED BY THOSE AGGRAVATING AND MITIGATING FACTORS.

22 NOW THIS SENTENCE, AFTER THEY ARE HEARING
23 THAT THEY ARE TO BE GUIDED BY THE EVIDENCE IN MITIGATION
24 AND AGGRAVATION, INSTRUCTS THEM. IT SEEMS TO JUST
25 DISREGARD WHAT IS MITIGATING AND WHAT IS AGGRAVATING,
26 AND JUST FIND AGAINST THE DEATH PENALTY, REGARDLESS OF
27 WEIGHTS THAT THEY ASSIGN TO AGGRAVATING OR MITIGATING
28 EVIDENCE.

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1 SO, I THINK THAT IT -- IT SIMPLY MISLEADS
2 THE JURY.

3 MR. GESSLER: ACTUALLY, YOUR HONOR, IT CLARIFIES
4 TO THE JURY, BECAUSE THE JURY COULD FIND NO MITIGATING
5 CIRCUMSTANCES, IN SPITE OF EVIDENCE THAT WE HAVE
6 PRESENTED.

7 AND YET THEY MUST KNOW THAT THEY ARE STILL
8 FREE, IF THE AGGRAVATING CIRCUMSTANCES ARE NOT
9 SUFFICIENT, TO A RETURN A VERDICT OF LIFE WITHOUT
10 PAROLE. I THINK IT'S A CLEAR STATEMENT OF THE LAW.

11 THE COURT: OKAY. MY VIEW IS THIS INSTRUCTION,

12 8.88, THE ONE THAT WE'RE DISCUSSING, WAS LAST CHANGED IN
13 1989 TO REFLECT THE STATE OF THE LAW AT THE TIME, AND
14 WAS MOST RECENTLY APPROVED, ACCORDING TO THE USE NOTES,
15 BY THE CALIFORNIA SUPREME COURT IN PEOPLE VERSUS DUNCAN
16 AT 53 CAL.3D 955. IT'S THE INSTRUCTION USED IN EACH
17 DEATH PENALTY CASE, AND I JUST DON'T SEE THAT THERE IS A
18 NEED NOW TO TINKER WITH IT AND ALTER IT FROM ITS
19 STANDARD FORM.

20 THEREFORE, THE REQUEST OF THE DEFENSE TO DO
21 THESE MODIFICATIONS IS DENIED, AND WE WILL JUST USE THE
22 STANDARD INSTRUCTION.

23 MR. GESSLER: YOUR HONOR, IS THE COURT ALSO
24 DENYING THE "EACH OF YOU" THAT I HAVE ALLEGED IN TWO
25 DIFFERENT PLACES?

26 THE COURT: NO. THE PEOPLE DON'T OBJECT TO THAT,
27 SO I WILL LEAVE IT IN.

28 MR. GESSLER: BECAUSE THAT'S BASED ON FEDERAL

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1 SUPREME COURT LAW OF MILLS VERSUS MARYLAND, AND I WOULD
2 ASK THAT THAT SEPARATELY BE INCLUDED.

3 SO THAT WILL BE INCLUDED?

4 THE COURT: YES, I WILL LEAVE THAT IN AND DELETE
5 THE OTHER TWO.

6 MR. GESSLER: IS YOUR HONOR FINDING THAT I AM
7 WRONG IN MY STATEMENT AS TO THE LAW; THAT IS, THAT THE

8 JURY CAN RETURN A SENTENCE OF LIFE WITHOUT PAROLE EVEN
9 IN THE ABSENCE OF MITIGATING CIRCUMSTANCES? I AM NOT
10 TALKING ABOUT THE INSTRUCTION NOW.

11 THE COURT: I AM JUST FINDING THAT THE
12 INSTRUCTION IS ADEQUATE, THE CURRENT INSTRUCTION. I AM
13 MAKING NO FINDING AS TO YOUR ANALYSIS OF THE LAW.

14 MR. GESSLER: WELL, I ASK, YOUR HONOR, BECAUSE I
15 INTEND TO TELL THE JURY THAT THAT IS THEIR RIGHT, AND I
16 DO NOT WANT TO BE STOPPED AS A MISSTATEMENT OF THE LAW,
17 BECAUSE I BELIEVE IT IS A FAIR STATEMENT OF THE LAW.

18 THE COURT: I THINK THAT'S A FAIR ARGUMENT.

19 MR. GESSLER: ALL RIGHT.

20 THE COURT: I DON'T THINK THAT THAT'S IMPROPER TO
21 ARGUE, BUT I DON'T THINK THAT IT'S NECESSARY TO INCLUDE
22 THAT IN THE INSTRUCTION.

23 MR. GESSLER: ALL RIGHT.

24 WELL, I STAND BY THE INSTRUCTION, AND I ASK
25 THE COURT TO GIVE IT. BUT WITHOUT WITHDRAWING THAT FROM
26 THE INSTRUCTION, I WOULD INTEND TO ARGUE THAT TO THE
27 JURY, AND I WANTED TO MAKE THAT CLEAR FROM THE GET GO.

28 THE COURT: YES, AND THE COURT WOULD NOT

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1 FORECLOSE THAT.

2 MR. LEVIN: YOUR HONOR, BEFORE WE LEAVE THIS

3 AREA, I HEARD SOMETHING FROM MR. CONN THAT SORT OF --

4 WELL, I DISAGREE WITH.

5 WITH RESPECT TO THE ISSUE OF PREMEDITATION,
6 IT IS INFERRED BY MR. CONN'S COMMENTS THAT HE PROPOSES
7 AN ARGUMENT THAT PREMEDITATION CAN BE USED AS AN
8 AGGRAVATING CIRCUMSTANCE, OR SOMETHING TO CONSIDER TO --
9 IN A DEATH PENALTY CASE TO AGGRAVATE THE CRIME.

10 AND MY UNDERSTANDING OF THE STATE OF THE
11 CALIFORNIA DEATH PENALTY SCHEME -- ESPECIALLY IN THE
12 JURY INSTRUCTION IN 8.88, IN ORDER TO BE AN AGGRAVATING
13 FACTOR, IT'S GOT TO BE BEYOND THE ELEMENTS OF THE CRIME.

14 PREMEDITATION IS AN ELEMENT OF THE CRIME
15 THAT THE JURY HAS ALREADY CONSIDERED AND FOUND TO BE
16 TRUE; AND THEREFORE, ANYTHING DEALING WITH
17 PREMEDITATION, FROM MY UNDERSTANDING OF THE LAW, CANNOT
18 BE USED AS A STATUTORY FACTOR IN AGGRAVATION.

19 I UNDERSTAND WHAT THE LAW REFERS TO BEYOND
20 THE ELEMENTS OF THE CRIME TO GO TO THINGS LIKE MOTIVE.
21 MOTIVE IS NOT AN ELEMENT OF THE CRIME, AND PERHAPS
22 MR. CONN COULD ARGUE THAT IF HE WANTS TO, BUT SUCH
23 THINGS AS PREMEDITATION WOULD BE IMPROPER.

24 THE COURT: DO YOU WISH TO BE HEARD ON THAT?

25 MR. CONN: YES.

26 THE JURY IS SPECIFICALLY INSTRUCTED UNDER
27 FACTOR A THAT THEY CAN CONSIDER THESE CIRCUMSTANCES OF
28 THE CRIME. THESE CIRCUMSTANCES OF THE CRIME CAN BE

1 AGGRAVATING, DEPENDING ON THE CIRCUMSTANCES OF THE
2 CRIME.

3 IT MAKES A DIFFERENCE AS TO WHETHER A
4 PERSON PREMEDITATES FOR TWO MINUTES AND THEN SHOOTS HIS
5 PARENTS TO DEATH, OR WHETHER THAT PERSON PREMEDITATES
6 FOR THREE DAYS AND THEN SHOOTS HIS PARENTS TO DEATH.

7 SO CLEARLY --

8 THE COURT: I AGREE WITH THE PROSECUTION'S
9 ANALYSIS HERE. OBVIOUSLY THE FACTS AND CIRCUMSTANCES OF
10 THE CRIME CAN BE CONSIDERED BY THE JURY, AND THIS GOES
11 BEYOND THE FINDING OF THE SPECIAL CIRCUMSTANCE OF LYING
12 IN WAIT TO THE ACTUAL -- TO USE THE SAME WORD --
13 CIRCUMSTANCES OF THE CRIME; WHAT ACTUALLY HAPPENED, AND
14 HOW IT HAPPENED, AND IT GOES WELL BEYOND JUST THE
15 STATUTORY FINDING OF THE SPECIAL CIRCUMSTANCE OR AN
16 ELEMENT OF THE CRIME.

17 MR. LEVIN: YOUR HONOR, I WOULD OBJECT TO THE
18 GIVING OF THESE INSTRUCTIONS AS BEING UNCONSTITUTIONALLY
19 VAGUE. IT COULD LEAD TO AN ARBITRARY IMPOSITION OF THE
20 DEATH PENALTY.

21 THEY ARE VAGUE IN THAT THEY'RE CONFUSING.
22 8.85 TALKS ABOUT FACTORS FOR CONSIDERATION. WHEN WE
23 TALK IN 8.88, WE'RE TALKING ABOUT FACTORS IN
24 AGGRAVATION. AND THOSE TWO TERMS -- IT MUST BE PRESUMED
25 THAT THE DRAFTERS OF THE CALJIC INSTRUCTIONS, AND THOSE
26 PEOPLE WHO DRAFTED THE CALIFORNIA DEATH PENALTY SCHEME,
27 UNDERSTOOD THAT THERE IS A DISTINCTION BETWEEN FACTORS
28 FOR CONSIDERATION, AND THOSE FACTORS THAT ARE IN

1 AGGRAVATION.

2 8.88 TALKS ABOUT THINGS THAT ARE FACTORS IN
3 AGGRAVATION AS BEING THOSE THINGS BEYOND THE ELEMENTS OF
4 THE CRIME. IT'S CONFUSING WHEN YOU LOOK AT 8.85, WHICH
5 TALKS ABOUT FACTORS FOR CONSIDERATION, AND FACTOR A IS
6 JUST TALKING ABOUT THE CIRCUMSTANCE OF THE CRIME.

7 THAT IS, THAT COULD LEAD TO SOME
8 IMPERMISSIBLE SPECULATION IN THE MINDS OF THE JURORS AS
9 TO WHAT IS THE DISTINCTION BETWEEN A FACTOR IN
10 CONSIDERATION AND A FACTOR IN AGGRAVATION.

11 IT COULD CAUSE THEM NOT TO FOLLOW THE LAW,
12 AND WOULD CAUSE A CONFUSING RESULT -- A CONFUSING
13 ARGUMENT BACK IN THE JURY ROOM WHEN THEY'RE READING
14 8.88, WHICH SAYS THAT THE ONLY WAY THAT THEY CAN RETURN
15 A JUDGMENT OF DEATH IS IF THEY FIND THAT THE AGGRAVATION
16 SUBSTANTIALLY OUTWEIGHS THE MITIGATION.

17 MS. ABRAMSON: BARRY, ARE YOU LOOKING AT 8.88 AS
18 WE MODIFIED IT?

19 MR. LEVIN: I AM LOOKING AT 8.85 IN CALJIC. HAVE
20 WE TAKEN THAT LANGUAGE OUT?

21 MS. TOWERY: YES.

22 THE COURT: OKAY, MR. LEVIN. YOU LOSE ANOTHER
23 ONE.

24 MR. LEVIN: WELL, MAYBE WE SHOULD RESUBMIT THE
25 CALJIC AND ARGUE IT. SO MR. GESSLER REMOVED MY

26 BEAUTIFUL CONSTITUTIONAL DIATRIBE.

27 THE COURT: ANYTHING ELSE BEFORE WE TAKE A

28 RECESS?

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1 MS. NAJERA: NO.

2 MR. LEVIN: JUST ONE OTHER THING, YOUR HONOR.

3 I WOULD ASK THAT THE PROSECUTION BE
4 PROHIBITED IN ITS ARGUMENT FROM ARGUING MISCONDUCT ON
5 THE PART OF MS. ABRAMSON, OR INFERRING OR MENTIONING IT
6 DIRECTLY OR INDIRECTLY. I WOULD ASK THAT THE COURT LIMIT
7 HIS ARGUMENT TO DISCUSSING THE --

8 MR. CONN: THAT IS A PART OF THE FACTS OF THIS
9 CASE, YOUR HONOR. IT GOES TO DR. VICARY, WHAT HE DID,
10 WHY HE DID IT. WE CAN'T SEPARATE THAT FROM THE FACTS OF
11 THIS CASE.

12 THE COURT: WHAT IS IT THAT YOU PROPOSE TO DO?

13 MR. CONN: I DON'T KNOW EXACTLY HOW I AM GOING TO
14 PHRASE IT, BUT I INTEND TO POINT OUT TO THE JURY WHAT
15 DR. VICARY SAID HE DID, WHY HE SAID HE DID IT, AND JUST
16 TAKE IT FROM THERE. I HAVEN'T GONE THROUGH MY ARGUMENT
17 CONCERNING THAT.

18 MS. ABRAMSON: IN OTHER WORDS, YOUR HONOR, HE
19 WANTS TO SIMPLY SMEAR THE WHOLE DEFENSE WITH THIS, AND I
20 DON'T UNDERSTAND THE PURPOSE, AFTER THE COURT GIVING AN
21 INSTRUCTION TO THE JURY TELLING THEM THEY CANNOT TAKE IT

22 INTO CONSIDERATION, AND THEN LETTING THE PROSECUTION GET
23 UP HERE AND TELL THEM THEY CAN TAKE IT INTO
24 CONSIDERATION.

25 THAT'S INSANE. IF THEY DO THAT, WE'RE
26 GOING TO BE IN MISTRIAL-LAND ALL OVER AGAIN, MAYBE FOR
27 REAL THIS TIME.

28 MS. TOWERY: IT'S ALWAYS BEEN FOR REAL.

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1 MS. ABRAMSON: MAYBE THE COURT WOULD GRANT IT
2 THIS TIME.

3 THE COURT: I WOULD SUGGEST THAT THIS AREA NOT BE
4 GONE INTO WITHOUT SOME DISCUSSION BEFORE YOU DO IT,
5 MR. CONN, BECAUSE CLEARLY YOU CAN TALK ABOUT VICARY AND
6 HIS DEEDS AND MISDEEDS, BUT TO THEN GO TO THE DEFENSE
7 AND ARGUE MISCONDUCT OF COUNSEL, TO THE POINT OF IT
8 BECOMING AN ISSUE FOR THE JURY TO CONSIDER, GOES
9 CONTRARY TO THE INSTRUCTIONS I WILL BE GIVING THE JURY.

10 IT DOESN'T MAKE SENSE TO GIVE THOSE
11 INSTRUCTIONS, AND TELL THEM THEY CAN'T CONSIDER IT --

12 MR. CONN: ALL RIGHT. BUT I SHOULD BE ABLE TO
13 REFER TO IT AS A FACT -- IT'S PART OF THE FACTS OF THIS
14 CASE. HE DID IT FOR THAT REASON, AND I INTEND TO POINT
15 OUT THAT THAT IS WHAT HE TESTIFIED TO.

16 MS. ABRAMSON: SO?

17 THE COURT: THE EVIDENCE IS THE EVIDENCE, AND IT

18 HASN'T BEEN STRICKEN. IT'S THERE. BUT THE FOCUS HAS TO
19 BE ON VICARY, NOT ON COUNSEL.

20 AND THE COURT, DEPENDING UPON THE NATURE OF
21 YOUR ARGUMENT, MIGHT AT THAT STAGE OF YOUR REMARKS BE
22 COMPELLED TO INTERCEDE AND INSTRUCT THE JURY AGAIN,
23 RIGHT THEN, THAT THE CONDUCT OF COUNSEL CANNOT IN ANY
24 WAY BE CONSIDERED.

25 MR. CONN: ALL RIGHT.

26 THE COURT: SO IF YOU GET BEYOND CONDEMNING AND
27 CRITICIZING VICARY TO IMPUGNING COUNSEL TO THE POINT
28 WHERE THE COURT FEELS THAT THE JURY WOULD BE CALLED UPON

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1 TO CONSIDER THE CONDUCT OF COUNSEL IN DECIDING THE CASE,
2 THEN THE COURT WOULD INTERCEDE AT THAT POINT AND
3 INSTRUCT THE JURY.

4 MR. CONN: ALL RIGHT. I UNDERSTAND.

5 MR. LEVIN: ONE OTHER POINT, YOUR HONOR.

6 I HAVE NOT CONSULTED WITH CO-COUNSEL ON
7 THIS, BUT I -- WHEN THE COURT ASKED ABOUT THE PROCESS
8 SUGGESTED FOR CLOSING ARGUMENT, AND CAME UP WITH A
9 SCHEME THAT CALLS FOR WHAT I COUNT AS SIX ARGUMENTS.

10 I WOULD ASK, WOULD THE COURT CONSIDER, IF
11 THE DEFENSE AGREED AND THE PROSECUTION AGREED, TO JUST
12 HAVE THREE; WHERE THE PROSECUTION WOULD ARGUE FIRST, ONE
13 COUNSEL FOR EACH SIDE WOULD THEN ARGUE AND CLOSE.

14 THE COURT: I AM MORE THAN HAPPY TO DO THAT IF
15 EVERYONE WANTS TO AGREE TO DO THAT. THE STATUTE
16 PROVIDES NO GUIDANCE IN THIS, IT'S PURELY DISCRETIONARY.
17 NORMALLY THE COURT -- AND CERTAINLY I AM INTERESTED IN
18 THE REQUESTS OF COUNSEL. IF YOU HAVE SOME WAY OF
19 STREAMLINING IT, I WILL BE MORE THAN HAPPY TO HEAR IT.

20 MR. LEVIN: WOULD MR. CONN GIVE AN INDICATION AS
21 TO WHETHER HE WOULD AGREE THAT IF WE DO --

22 MR. CONN: I ALREADY OPPOSED THAT. THE PEOPLE
23 HAVE A RIGHT TO REBUT THE DEFENSE ARGUMENT. WE ARE NOT
24 GOING TO WAIVE THAT RIGHT.

25 MR. LEVIN: WOULD THE COURT, IF THE DEFENSE
26 STATED THAT ONE SIDE WOULD ARGUE THE CASE, LIMIT THE
27 PROSECUTION TO ONE ARGUMENT, AND NOT HAVE A REBUTTAL AND
28 THEN A SURREBUTTAL BY THE DEFENSE ALLOWED. THERE IS NO

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1 NEED, IN MY VIEW, TO HAVE TWO ARGUMENTS.

2 THE COURT: WELL, YOU SAID YOU WANTED IT -- YOU
3 WANTED BOTH LAWYERS FOR EACH DEFENDANT TO ARGUE.

4 MR. LEVIN: I AM JUST PROPOSING -- I AM JUST
5 PROPOSING AN ALTERNATIVE, AND I WANT TO KNOW WHAT THE
6 COURT'S INDICATED RULING WOULD BE IF ONE COUNSEL FOR
7 EACH SIDE ARGUED.

8 THE COURT: MY FEELING IS THAT THE DEFENSE SHOULD
9 CLOSE, AND MY FEELING ALSO IS THAT WHEN THERE IS AN

10 OPENING ARGUMENT, EVEN THOUGH THE DEFENSE IS CLOSING,
11 THE PROSECUTION SHOULD HAVE A CHANCE TO RESPOND TO
12 SOMETHING THAT THE DEFENSE SAYS BEFORE THE DEFENSE
13 CLOSES. I JUST THINK THAT'S FAIR THAT IT WORK THAT WAY,
14 SO THAT IT'S NOT JUST PEOPLE AND THEN NOTHING ELSE
15 AFTERWARDS.

16 ANYWAY, THAT'S HOW I SEE IT. SO IF IT'S A
17 LITTLE CUMBERSOME, THAT'S THE WAY IT IS, AND IT'S NOT AN
18 UNUSUAL PROCEDURE.

19 OKAY. WE'LL BE IN RECESS UNTIL TOMORROW AT
20 8:30.

21 (AT 4:55 P.M. PROCEEDINGS WERE
22 ADJOURNED UNTIL 8:30 A.M. THE
23 FOLLOWING DAY.)

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