

1 VAN NUYS, CALIFORNIA; THURSDAY, FEBRUARY 15, 1996

2 10:00 A.M.

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

4 (APPEARANCES AS HERETOFORE NOTED)

5 (MARY LU MURPHY, OFFICIAL REPORTER)

6

7 (THE FOLLOWING PROCEEDINGS WERE

8 HELD IN OPEN COURT OUT OF THE

9 PRESENCE OF THE JURY:)

10

11 THE COURT: ALL RIGHT.

12 IN THE TRIAL, THE DEFENDANTS ARE HERE. THE

13 LAWYERS FOR ALL THE DEFENDANTS ARE HERE, AND THE PEOPLE

14 ARE HERE.

15 AND THE SUBJECT THAT WE WERE DISCUSSING

16 YESTERDAY AT THE RECESS WAS THE DEFENSE OFFER OF THE

17 TESTIMONY OF DR. VICARY, WHO IS IN THE AUDIENCE.

18 MS. ABRAMSON: YES, YOUR HONOR.

19 I WANT TO MAKE A SPECIFIC OFFER OF PROOF

20 WITH RESPECT TO DR. VICARY.

21 MR. CONN: WE WOULD ASK THAT THE WITNESS BE

22 EXCLUDED WHILE WE ARGUE THIS, YOUR HONOR.

23 THE COURT: HE CAN REMAIN.

24 ALL RIGHT.

25 MS. ABRAMSON: WE BELIEVE THAT UNDER ALL THE CASE

26 AUTHORITY THAT WE'RE AWARE OF, AND THE GENERAL RULES OF

27 PRESENTATION OF EVIDENCE IN CRIMINAL CASES, THAT WE ARE

28 ENTITLED TO PRESENT SURREBUTTAL EVIDENCE TO REFUTE

1 SPECIFIC ISSUES THAT ARE RAISED IN THE PROSECUTION'S
2 REBUTTAL.

3 THERE ARE A NUMBER OF GLOBAL KINDS OF
4 ISSUES THAT DR. DIETZ RAISED IN HIS TESTIMONY THAT WE
5 BELIEVE WE SHOULD BE ENTITLED TO ADDRESS BY CALLING
6 DR. VICARY.

7 THE FIRST IS DR. DIETZ' GENERAL DIS'ING, IF
8 YOU WILL, OF PSYCHOLOGISTS, WHICH I BELIEVE WAS DONE
9 SPECIFICALLY TO CALL INTO QUESTION DR. WILSON'S
10 CREDENTIALS. HIS DIS'ING OF PEOPLE --

11 THE COURT: WHAT DOES "DIS'ING" MEAN, BY THE WAY?

12 MS. ABRAMSON: IT MEANS DISMISSING OR IMPLYING
13 THAT THEY ARE LESS QUALIFIED THAN HE, A MEDICAL DOCTOR
14 AND FORENSIC PSYCHIATRIST.

15 THE COURT: DISPARAGING IN SOME WAY?

16 MS. ABRAMSON: DISPARAGING IS A VERY GOOD WORD,
17 AND DISRESPECTING. THANK YOU.

18 AND SO HE SUGGESTED THAT ONLY PSYCHOLOGISTS
19 WOULD USE SUCH TERMS AS BATTERED-PERSON'S SYNDROME; THAT
20 THE PSYCHOLOGISTS HAVE COME UP WITH THOSE TERMS;
21 GENERALLY DENIGRATING THE BACKGROUND AND CREDENTIALS OF
22 A PSYCHOLOGIST -- OF DR. WILSON, WHO IS A PSYCHOLOGIST.

23 HE ALSO TESTIFIED THAT FORENSIC
24 PSYCHIATRISTS CANNOT OR SHOULD NOT MAKE A DIAGNOSIS OF
25 POST-TRAUMATIC STRESS DISORDER WITH A STRESSOR SUCH AS

26 THAT WHICH IS ALLEGED IN THIS CASE, AND INDICATING THAT
27 IT'S SOMEHOW IMPROPER TO DO THAT, WHICH AGAIN CASTS
28 ASPERSIONS ON DR. WILSON, WHO INDEED MADE SUCH A

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1 DIAGNOSIS.

2 THOSE ARE THE -- ALSO -- WELL, I'LL GET TO
3 THAT WHEN I MAKE THE SPECIFIC OFFERS.

4 NOW, THE SPECIFIC THINGS -- AND I HAVE
5 REVIEWED DR. DIETZ' TESTIMONY IN SOME DETAIL THE OTHER
6 DAY IN ORDER TO PREPARE FOR DR. VICARY'S EXAMINATION,
7 AND I HAVE A COLUMN OF THINGS SPECIFICALLY RAISED BY
8 DR. DIETZ THAT I WISH TO REFUTE WITH DOCTOR VICARY.

9 AND I WOULD POINT OUT, YOUR HONOR, THAT MY
10 CROSS-EXAMINATION OF DR. DIETZ WAS DESIGNED THE WAY IT
11 WAS, AND CONDUCTED THE WAY IT WAS, BECAUSE OF MY
12 EXPECTATION, WHICH I BELIEVE WAS A REASONABLE ONE, THAT
13 I WOULD BE ABLE TO CALL DR. VICARY IN REBUTTAL.

14 THEREFORE, THERE WERE AREAS WHERE I NEVER
15 EVEN CROSS-EXAMINED DR. DIETZ, BECAUSE I FELT IT WAS
16 MORE APPROPRIATE TO REFUTE HIS CLAIMS BY CALLING
17 DR. VICARY.

18 SO I WOULD SAY THAT IF THE COURT PROHIBITS
19 US FROM CALLING DR. VICARY, I AM ASKING FOR THE
20 OPPORTUNITY TO RECALL DR. DIETZ FOR FURTHER
21 CROSS-EXAMINATION ON THE AREAS WHICH I SPECIFICALLY

22 AVOIDED, BECAUSE I FELT IT WOULD BE BEST ADDRESSED
23 THROUGH MY OWN WITNESS.
24 OKAY. DR. DIETZ TESTIFIED THAT NOTHING
25 ABOUT THE BACKGROUND INFORMATION IS RELEVANT FOR MAKING
26 A DETERMINATION OF MENTAL STATE AT THE TIME OF THE
27 OFFENSE, M.S.O., AS HE CALLS IT IN HIS NOTES;
28 THAT IT'S OKAY THAT HE DIDN'T READ ALL THE

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1 REPORTS, READ THE DEFENSE WITNESSES, READ ANY OF THE
2 SOURCE MATERIAL THAT WAS SUBMITTED TO HIM EXCEPT THE
3 SUMMARIES THAT HE GOT AFTER HE HAD FORMULATED HIS
4 OPINIONS IN ORDER TO RENDER THOSE OPINIONS.

5 AND DR. VICARY WOULD REFUTE THAT AND
6 INDICATE WHAT THE IMPORTANCE IS IN GATHERING ALL THAT
7 INFORMATION AND EXAMINING IT CAREFULLY.

8 FIRST OF ALL, THE MAIN THING IS THAT
9 DR. DIETZ' DIAGNOSIS OF GENERAL ANXIETY DISORDER, WE
10 WOULD REFUTE THAT THAT IS INAPPROPRIATE IN THIS CASE.
11 THAT IS NOT THE MENTAL DISEASE OR DISORDER THAT MY
12 CLIENT SUFFERS FROM; THAT IN ADDITION TO POST-TRAUMATIC
13 STRESS DISORDER, HE ALSO SUFFERS FROM SOME OTHER
14 FEATURES, NOTABLY DEPRESSION, WHICH DR. DIETZ IGNORED
15 ALTOGETHER, AND BEFORE HE WAS MEDICATED HAD
16 PSYCHOTIC-LIKE SYMPTOMS.

17 DR. VICARY WOULD TESTIFY THAT, CONTRARY TO

18 DR. DIETZ' TESTIMONY THAT ALL MY CLIENT SUFFERED FROM
19 WAS A TYPE OF NERVOUS WORRY CONCERNING SCHOOL
20 PERFORMANCE AND OTHER PERFORMANCE, THAT WHAT DR. DIETZ
21 HAS LEFT OUT -- HE LEFT OUT -- IT'S IN HIS OWN NOTES --
22 THAT THE PERVASIVE ANXIETY OF MY CLIENT'S LIFETIME WAS
23 FEAR OF HIS PARENTS AND FEAR OF SEXUAL ASSAULT, NOT JUST
24 FEAR OF -- AND FEAR OF DISAPPROVAL AND FEAR OF LOSS OF
25 THEIR LOVE, AND HE WAS EXCESSIVELY ANXIOUS AND WORRIED
26 ABOUT THOSE THINGS, AND NOT JUST HIS SCHOOL PERFORMANCE
27 AND TENNIS PERFORMANCE THAT DR. DIETZ REFERS TO.
28 FURTHERMORE, DR. DIETZ CLAIMS THAT IN ORDER

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1 TO FORMULATE A DIAGNOSIS OF POST-TRAUMATIC STRESS
2 DISORDER, YOU HAVE TO HAVE SOME EVIDENCE OF WHAT'S KNOWN
3 AS AVOIDANT BEHAVIOR, AND CLAIMS ON THE ONE HAND THAT HE
4 CANNOT RELY ON MY CLIENT'S WORD ALONE FOR THESE P.T.S.D.
5 SYMPTOMS.

6 HOWEVER, HE TESTIFIES, YOUR HONOR, THAT DUE
7 TO G.A.D., GENERAL ANXIETY DISORDER, THAT GENERAL
8 ANXIETY DISORDER INTERFERED, HE FOUND, WITH TWO AREAS OF
9 MY CLIENT'S LIFE; SCHOOL PERFORMANCE AND RELATIONSHIPS
10 WITH WOMEN AND GIRLS.

11 NOW, THAT INFORMATION ABOUT RELATIONSHIPS
12 WITH WOMEN AND GIRLS APPEARS IN DR. DIETZ' NOTES. HE
13 HAD EXTENSIVE INTERVIEWS WITH MY CLIENT ABOUT MY

14 CLIENT'S SEXUAL DIFFICULTIES, AND ACCEPTED APPARENTLY
15 THAT INFORMATION ABOUT MY CLIENT'S SEXUAL DYSFUNCTION,
16 CONCERNS ABOUT HAVING SEX WITH GIRLS, ALL KINDS OF
17 DIFFICULTIES IN THAT AREA. HE ACCEPTS THAT FOR HIS
18 G.A.D. DIAGNOSIS, WHEN THE FACT OF THE MATTER IS, AS
19 DR. VICARY WILL TESTIFY, THAT THAT IS AVOIDANT. THAT IS
20 A SYMPTOM OF POST-TRAUMATIC STRESS DISORDER.

21 IT IS AVOIDANT BEHAVIOR. IT IS BEHAVIOR
22 THAT GETTING INVOLVED IN SEXUAL RELATIONSHIPS CAUSES
23 THIS AVERSIVE REACTION, WHICH IS SYMPTOMATIC OF PEOPLE
24 WHO HAVE BEEN TRAUMATIZED IN A SEXUAL WAY; SYMPTOMATIC
25 OF BOYS WHO HAVE BEEN MOLESTED.

26 SO I WANT TO SHOW THAT DR. DIETZ IS BEING
27 INCONSISTENT IN CLAIMING THAT THERE IS NO SUCH EVIDENCE
28 OF AVOIDANCE, WHILE RELYING ON THE EVIDENCE HE IS

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1 RECEIVING FROM MY CLIENT TO DETERMINE HOW G.A.D.

2 INTERFERED WITH MY CLIENT'S LIFE.

3 HE CLAIMED, DR. DIETZ, THAT G.A.D. IS

4 BELIEVED GENERALLY IN THE SCIENTIFIC COMMUNITY TO BE A

5 BIOLOGICALLY DETERMINED CONDITION SUFFERED BY 15 PERCENT

6 OF THE POPULATION. IN OTHER WORDS, HE SAID, IT WAS

7 PROBABLY INHERITED.

8 NOW, ACCORDING TO THE DSM-IV WHICH HE

9 CLAIMED TO BE RELYING ON, WHICH I WASN'T AWARE OF UNTIL

10 DR. VICARY TOLD ME AFTER DR. DIETZ' TESTIMONY, ON PAGE
11 434 OF THE DIAGNOSTIC AND STATISTICAL MANUAL IT SAYS
12 EXACTLY THE OPPOSITE; THAT THE GENERALLY HELD BELIEF IN
13 THE RESEARCH COMMUNITY IS THAT IT IS NOT GENETIC, NOT
14 INHERITED, NOT BIOLOGICALLY DETERMINED, AND THAT ONLY
15 FIVE PERCENT OF THE GENERAL POPULATION SEEMED TO SUFFER
16 FROM THIS, NOT THE 15 PERCENT THAT DR. DIETZ USED, WHICH
17 WAS TO SUGGEST THAT IT'S SO COMMON THAT THERE WAS
18 NOTHING EXTRAORDINARY ABOUT MY CLIENT'S LEVEL OF
19 ANXIETY, OR, AS HE PUT IT, EVEN HE CONCEDED A HIGHER
20 LEVEL OF SENSITIVITY TO THREAT STRESS -- THREAT CUES.

21 IN ADDITION -- AND THIS JUST TRACKS THE
22 CHRONOLOGY OF DR. DIETZ' TESTIMONY.

23 DR. DIETZ WAS PERMITTED, OVER STRENUOUS
24 OBJECTION, TO TESTIFY TO WHAT HE CALLED PERSONALITY
25 TRAITS OF MY CLIENT, WHICH HE CLAIMED SOMEHOW WERE
26 RELATED TO THE OFFENSE IN THE 402 HEARING, ALTHOUGH HE
27 NEVER RELATED THEM DIRECTLY TO MENTAL STATE AT THE TIME
28 OF THE CRIME. ONE WAS THEATRICALITY. THE SECOND WAS

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1 RAPIDLY SHIFTING AND SHALLOW EXPRESSION OF EMOTION.

2 NOW, THAT IS COMPLETELY UNTRUE, BASED ON
3 DR. VICARY'S EXAMINATION OF MY CLIENT OVER THE PERIOD OF
4 FIVE YEARS. WHAT DR. DIETZ MAY BE SEEING IS THE PRODUCT
5 OF SOMEONE WHO HAS BEEN MEDICATED FOR FIVE OF -- MORE

6 THAN FIVE OF THOSE FIVE YEARS AND EIGHT MONTHS.

7 AND ON THIS POINT, I THINK IT IS CRUCIAL

8 THAT DR. VICARY BE PERMITTED TO TESTIFY TO THE

9 EMOTIONALITY AND THE PERSONALITY WITH RESPECT TO EMOTION

10 THAT HE OBSERVED BEFORE MR. MENENDEZ WAS PLACED ON

11 MEDICATION, AND EVEN FOR SOME PERIOD AFTER UNTIL THE

12 MEDICATION WAS PROPERLY ADJUSTED.

13 AND THAT IS COMPLETE A MISREADING OF MY

14 CLIENT BY DR. DIETZ, AND PART OF IT IS CAUSED BY THE

15 FACT THAT HE IS ONLY SEEING HIM SIX YEARS LATER, AND AT

16 A TIME WHEN HE'S ON MEDICATION.

17 SO, IN SPITE OF THE FACT -- AND IN

18 ADDITION, THE TESTIMONY FROM DR. VICARY WOULD REFUTE

19 DR. DIETZ' CLAIM THAT THE MEDICATION DIDN'T REALLY MAKE

20 ANY DIFFERENCE; THAT HE WOULD SIMPLY ASSUME THAT WITHOUT

21 THE MEDICATION MY CLIENT WOULD BE ABSOLUTELY MORE

22 NERVOUS OR ANXIOUS, AND THAT IS NOT AT ALL WHAT MY

23 CLIENT WAS LIKE WITHOUT THE MEDICATION.

24 SO I THINK THAT WE SHOULD BE ENTITLED TO

25 LET DR. VICARY EXPLAIN WHAT HE WAS LIKE WITHOUT

26 MEDICATION.

27 THE OTHER THINGS THAT DR. DIETZ TESTIFIED.

28 DISRESPECT FOR THE LAW IS NOT A PERSONALITY

1 TRAIT, AND IT IS NOT THE WAY IN WHICH MY CLIENT,

2 QUOTE, OPERATED. THAT WAS NOTHING BUT A CHARACTER
3 ASSASSINATION ATTEMPT, AND IT HAS NO RELEVANCE FOR STATE
4 OF MIND AT THE TIME OF THESE OFFENSES.

5 NOW, HE ALSO TESTIFIED THAT ALL GENERAL
6 ANXIETY WOULD DO CONCERNING MENTAL STATE AT THE TIME OF
7 THE OFFENSE WAS MAKE MY CLIENT MORE NERVOUS THAN THE
8 AVERAGE PERSON COMMITTING SIMILAR ACTIONS.

9 DR. VICARY WOULD TESTIFY THAT EVEN IF THE
10 ONLY DISORDER THAT MY CLIENT HAD WAS GENERAL ANXIETY
11 DISORDER, THAT DOESN'T HAVE ANYTHING TO DO WITH BEING
12 NERVOUS IN THE FACE OF A THREAT THAT ONE PERCEIVES TO
13 LIFE, OR CAUSING GREAT BODILY INJURY. NERVOUS IS NOT AT
14 ALL THE RIGHT TERM.

15 WHAT HAPPENS TO PEOPLE WITH ANY ANXIETY
16 DISORDER WHEN FACED WITH THEIR -- THE THING ABOUT WHICH
17 THEY ARE ANXIOUS, OR THE PERSONS WHO MAKE THEM ANXIOUS,
18 OR THE PEOPLE THEY FEAR IS A FAR MORE DRAMATIC MENTAL
19 STATE THAN NERVOUSNESS.

20 HE ALSO TESTIFIED THAT ONE SUFFERING FROM
21 GENERAL ANXIETY DISORDER COULDN'T BE LESS RATIONAL OR
22 INCAPABLE OF REFLECTIVE THOUGHT, OR IMPAIRED IN THEIR
23 ABILITY TO CONTROL IMPULSES, OR IN THE HIGHER CORTICAL
24 FUNCTIONS WOULD NOT BE IMPAIRED BY ANXIETY. THE HIGHER
25 CORTICAL FUNCTIONS WOULD NOT BE IMPAIRED BY ANXIETY, AND
26 FOR THAT PURPOSE HE QUOTED THE GREAT DR. RICHARD RESTAK.

27 WELL, DR. VICARY IS PREPARED TO TESTIFY
28 THAT NONE OF THAT IS TRUE; THAT IN A HIGH STATE OF

1 EMOTIONALITY YOU ARE LESS RATIONAL, YOU ARE LIMITED IN
2 YOUR CAPACITY FOR REFLECTIVE THOUGHT, YOU ARE DEFINITELY
3 IMPAIRED IN YOUR ABILITY TO CONTROL IMPULSES, BECAUSE
4 YOU CAN'T CONTROL YOUR FEARS, AND THE HIGHER CORTICAL
5 FUNCTIONS, QUOTING FROM DR. RICHARD RESTAK IS AS
6 FOLLOWS:

7 "NO ONE ACTS REASONABLY WHEN
8 FEELING THREATENED BY DEATH OR SEVERE
9 BODILY HARM. TERROR CAN CAUSE ANXIOUS
10 BRAIN STRUCTURES THAT GOVERN RAGE AND
11 AGGRESSION TO OVERWHELM THE HIGHER REGIONS
12 REGARDING RATIONALITY."

13 THAT IS A QUOTE FROM DR. RESTAK.

14 THERE DR. VICARY WILL TESTIFY THAT
15 DR. DIETZ HAS MISQUOTED THE GREAT NEUROBIOLOGIST, AND
16 MISSTATED THE RESEARCH ON THE EFFECTS OF EXTREME FEAR ON
17 HIGHER RATIONAL FUNCTIONING.

18 DR. DIETZ TESTIFIED THAT IT IS NOT WITHIN
19 THE POWER OF ANXIETY TO MAKE A PERSON INCAPABLE OF
20 REFLECTIVE THOUGHT. IT CAN MAKE A PERSON EXERCISE POOR
21 JUDGEMENT OR ACT HASTILY, BUT IT CAN'T MAKE THEM
22 INCAPABLE OF THINKING.

23 DR. VICARY WOULD EXPLAIN, WHICH DR. DIETZ
24 NEVER DID, WHAT EXACTLY CAN HAPPEN WITH RESPECT TO THE
25 ABILITY TO REFLECT AND CONSIDER OPTIONS AND WEIGH
26 ALTERNATIVES WHEN ONE IS UNDER THE THRALL OF AN EXTREME

27 EMOTION SUCH AS FEAR, AND TO COUNTER THIS NOTION THAT
28 ABSOLUTELY NOTHING CHANGES EXCEPT YOUR HEART RATE WHEN

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1 YOU'RE TERRIFIED, WHICH IS WHAT DR. DIETZ WAS TRYING TO
2 SUGGEST.

3 DR. VICARY WOULD NOT TESTIFY THAT A PERSON
4 WHO IS IN THAT STATE IS INCAPABLE OF THINKING, BUT WE
5 HAVE NEVER MADE THAT CLAIM.

6 DR. DIETZ TESTIFIED THAT SPECIFICALLY
7 ANXIETY DOESN'T IMPAIR HIGHER CORTICAL FUNCTIONING. YOU
8 HAVE ALREADY HEARD MY ARGUMENT THAT EVEN RESTAK SAYS
9 THAT IT DOES.

10 DR. DIETZ CLAIMED IT DOESN'T IMPAIR
11 DECISION MAKING, OR VIEWING OPTIONS, OR CONSIDERING
12 OPTIONS, OR MAKING CHOICES OR REASONING, AND IN FACT IT
13 IMPAIRS ALL OF THOSE, AND THE LAW RECOGNIZES THAT IT
14 IMPAIRS ALL OF THOSE, OR THERE WOULD BE NO INSTRUCTIONS
15 ON THE NECESSITY FOR DELIBERATION. THERE WOULD BE NO
16 DEFINITION OF DELIBERATION IN 8.20 OF CALJIC. THERE
17 WOULD BE NO EXCEPTION FOR HEAT OF PASSION, WHICH THERE
18 IS IN THE LAW.

19 IT IS VERY CLEAR TO ME, YOUR HONOR, THAT
20 WHAT THE PEOPLE WERE TRYING DO WITH DR. DIETZ WAS SET UP
21 THEIR OWN DEFINITIONS OF TERMS THAT ARE INCLUDED IN THE
22 INSTRUCTIONS, AND TO DO IT IN SUCH A WAY TO JUST USE

23 BLANKET LABELS, WITHOUT ANY EXPLANATION, TO MISLEAD AND
24 CONFUSE THIS JURY INTO THINKING THAT IF DR. DIETZ SAID
25 SOMEONE HAD REFLECTIVE THOUGHT, THAT THAT MEANS THAT
26 HEAT OF PASSION DOESN'T MEAN WHAT HEAT OF PASSION MEANS.

27 AND I THINK IT IS IMPORTANT TO PUT ON A
28 PSYCHIATRIST TO SAY THAT ALL OF THOSE FUNCTIONS CAN BE

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1 AFFECTED BY EXTREME ANXIETY AND EXTREME FEAR, EXTREME
2 EMOTION OF ANY KIND. AND WE RECOGNIZE THAT, WE BEING
3 THE BODY POLITIC OF THE UNITED STATES, BECAUSE EVERY
4 STATE IN THE UNION HAS A LESSER FORM OF HOMICIDE BASED
5 ON EMOTIONALITY, SO LONG AS IT IS PROVOKED.

6 AND I THINK THAT IS THE POINT, THAT SO LONG
7 AS IT IS PROVOKED THE LAW MAKES ALLOWANCE FOR WHAT WE
8 UNDERSTAND TO BE THE DISTINCTION BETWEEN EMOTIONAL
9 THINKING AND NON-EMOTIONAL THINKING, AND I THINK THE
10 EFFORTS OF THE PROSECUTION HERE WERE TO MISLEAD THE JURY
11 INTO THINKING IT DOESN'T MATTER WHETHER YOU WERE IN A
12 HIGH STATE OF EMOTION OR NOT.

13 NOW, AS I SAID, DR. DIETZ TESTIFIED YOU
14 NEED SPECIFIC AVOIDANCE OF STIMULI IN ORDER TO FIND
15 P.T.S.D., AND THEN HE IGNORED THE INFORMATION IN HIS OWN
16 NOTES FOR WHICH HE RELIED FOR OTHER PURPOSES.

17 DR. VICARY WOULD REFUTE DR. DIETZ' CLAIM
18 THAT THE ONLY EFFECT THAT P.T.S.D. COULD HAVE ON A

19 MENTAL STATE AT THE TIME OF AN OFFENSE IS IF THERE IS
20 DISSOCIATION.
21 THAT'S ABSOLUTELY NOT TRUE BASED ON THE
22 LITERATURE, AND BASED ON WHAT HE, AS A PSYCHIATRIST,
23 UNDERSTANDS TO BE THE INTERACTION BETWEEN HYPERAROUSAL,
24 WHICH DR. DIETZ CONCEDES EXISTS BOTH FOR PEOPLE WITH
25 P.T.S.D. AND FOR PEOPLE WITH G.A.D., AND THE EFFECT ON
26 THE KIND OF THINKING NECESSARY FOR VARIOUS MENTAL
27 STATES.
28 GENERALLY THESE ARE ALL YOUR HONOR POSED AS

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1 HYPOTHETICAL QUESTIONS TO DR. VICARY.
2 DR. DIETZ GAVE THE FALSE IMPRESSION THAT
3 FIGHT OR FLIGHT IS NOT A CONDITION IN WHICH ONE HAS
4 HIGHLY AROUSED EMOTIONS THAT COULD INTERFERE WITH THE
5 HIGHER CORTICAL FUNCTIONS. DR. VICARY WOULD EXPLAIN
6 THAT IT IS.
7 DR. DIETZ TRIED TO SUGGEST THAT THE ONLY
8 THING THAT EXTREME ANXIETY OR HIGH EMOTIONALITY COULD
9 AFFECT IS JUDGMENT, MAKES PEOPLE EXERCISE POOR JUDGMENT.
10 DR. VICARY WOULD REFUTE THAT IT AFFECTS FAR
11 MORE ASPECTS OF ONE'S RATIONAL FUNCTIONING.
12 DR. DIETZ TESTIFIED THAT THERE IS NO LOSS
13 OF ABILITY WITH P.T.S.D. TO UNDERSTAND OR ANALYZE A
14 SITUATION THAN, QUOTE, ANYONE ELSE WHO IS UPSET, WITHOUT

15 INDICATING WHAT UPSET IS, AND THAT INDEED THAT IS THE
16 DIFFERENCE BETWEEN UPSET AND HYPERAROUSAL.
17 DR. DIETZ BASED THAT ON THE QUESTIONING BY
18 MR. CONN. HE COMPLETELY MISCONSTRUED DR. WILSON'S
19 TESTIMONY ABOUT PANIC MODE. HE SUBSTITUTED FOR PANIC
20 MODE, WHICH I UNDERSTOOD DR. WILSON'S TESTIMONY TO MEAN
21 IN A STATE OF PANIC, AND THE COMMONLY USED TERM "STATE
22 OF PANIC," WHICH EVERYONE UNDERSTANDS. HE CHANGED THAT
23 TO MEAN PANIC ATTACK.

24 AND IT'S VERY OBVIOUS WHY HE DID THAT.
25 ALTHOUGH CONCEDING THAT WHILE IN A PANIC ATTACK ONE
26 FEELS THEY ARE ABOUT TO DIE, FEELS THEY ARE LOSING
27 CONTROL, AND HAS EXTREME PHYSICAL SYMPTOMS, HE FINDS MY
28 CLIENT'S CONDITION CONSISTENT WITH PANIC ATTACK.

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1 HE THEN CLAIMS, HOWEVER, THAT IN A PANIC
2 ATTACK EVERYBODY RUNS AWAY; AND THEREFORE, IF HE DIDN'T
3 RUN AWAY, HE EITHER WASN'T HAVING A PANIC ATTACK, OR HE
4 HAD SUCH CALMNESS TO OVERCOME THE FEAR. AND THAT'S
5 RIDICULOUS PSYCHOLOGICALLY. DR. VICARY WOULD TESTIFY
6 THAT IS NOT TRUE PSYCHIATRICALY.

7 NUMBER TWO, THAT PANIC ATTACK IS NOT THE
8 SAME THING AS BEING IN A PANIC, AND THAT WHEN ONE IS IN
9 FIGHT OR FLIGHT, THERE IS NO HIGHER OR LOWER CHOICE.
10 EITHER YOU FLEE OR EITHER YOU FIGHT, AND IT DOESN'T

11 DEPEND ON MAKING A CONSCIOUS CHOICE AS TO WHICH ONE
12 YOU'RE GOING TO DO. EVEN DR. DIETZ TESTIFIED THAT FIGHT
13 OR FLIGHT IS SOMETHING THAT A PERSON FEELS RATHER THAN
14 DECIDES TO DO.

15 BUT I THINK THE EFFORT HERE WAS TO CONFUSE
16 THE JURY AND TO SUBSTITUTE PANIC ATTACK FOR STATE OF
17 PANIC, AND I THINK THAT NEEDS TO BE CLARIFIED, THAT
18 THERE ARE TWO COMPLETELY DIFFERENT THINGS HERE.

19 DR. DIETZ ALSO OFFERED THE OPINION THAT FOR
20 MY CLIENT TO RUN INTO THE DEN IN A PANIC ATTACK, HE
21 SOMEHOW OVERCAME THE ANXIETY, WHICH WOULD LEAD THE JURY
22 TO BELIEVE THAT SOMEHOW ALL OF HIS FEAR WENT AWAY, SO
23 THAT HE COULD NOW OVERCOME THE FEAR AND RUN INTO THE
24 DEN.

25 DR. VICARY WOULD REFUTE THE MECHANISM THAT
26 WOULD ALLOW THAT TO HAPPEN.

27 THEN SPECIFICALLY THE PROSECUTION WENT
28 THROUGH A LIST OF EXTERNAL BEHAVIORS AND ELICITED -- AND

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1 THIS IS THE AREA IN WHICH I DIDN'T EVEN BOTHER
2 CROSS-EXAMINING BECAUSE OF MY RELIANCE THAT DR. VICARY
3 WOULD BE PERMITTED, AS I BELIEVE HE SHOULD BE, TO
4 TESTIFY IN REBUTTAL.

5 DR. DIETZ TESTIFIED IN RESPONSE TO A
6 LEADING QUESTION THAT THINKING OF GETTING A GUN AND

7 UNLOADING AND RELOADING IT INDICATES REFLECTIVE THOUGHT,
8 MAKING CHOICES AND BEING RATIONAL.

9 DR. DIETZ WAS ASKED WHETHER CONSIDERING
10 LOCKING THE DOOR WAS CONSISTENT WITH OR INCONSISTENT
11 WITH REFLECTIVE THOUGHT. HE SAID CONSISTENT.

12 THAT WAS A COMPLETE MISLEADING OF THE JURY,
13 SINCE THERE WAS NO TESTIFYING THAT MY CLIENT CONSIDERED
14 LOCKING THE DOOR. BUT EVEN IF THERE HAD BEEN, WHAT
15 DR. VICARY WILL TESTIFY IS THAT ISOLATING THESE
16 INDIVIDUAL MOMENTS IN A TWO AND-A-HALF MINUTE COURSE OF
17 RAPID CONDUCT IS AN IMPERMISSIBLE WAY TO TRY TO ASSESS
18 MENTAL STATE AT THE TIME OF THE OFFENSE.

19 MOREOVER, ALL OF THE THOUGHTS THAT MY
20 CLIENT TESTIFIED TO THAT DR. DIETZ -- OF THE FOUR OR
21 FIVE THAT DR. DIETZ CLAIMED -- WELL, STRIKE THAT. LET
22 ME BACK UP.

23 DR. DIETZ ACTUALLY NEVER ADDRESSED THE
24 SPECIFIC THOUGHTS EXCEPT FOR THIS ONE, WHICH WAS
25 MISREPRESENTED TO HIM, CONCERNING CONSIDERING LOCKING
26 THE DOOR.

27 WHAT HE WAS ADDRESSING WAS ACTION, BECAUSE
28 THE NEXT ONE IN THIS LIST THAT DOCTOR -- MR. CONN GAVE

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1 HIM WAS LOOKING FOR AMMUNITION AND UNLOADING AND
2 RELOADING, WAS CONSISTENT WITH REFLECTIVE THOUGHT.

3 AND THEN THE THOUGHT -- THE LAST THING HE
4 WAS ASKED ABOUT WAS MY CLIENT'S THOUGHT THAT IF LYLE
5 DIDN'T SHOW UP WHILE HE WAS UNLOADING AND RELOADING, HE
6 MIGHT HAVE TO GO IT ALONE, HE INDICATED WAS INDICATIVE
7 OF REFLECTIVE THOUGHT.

8 NOW, WHAT DR. VICARY WOULD SAY IS THAT IN
9 ORDER TO TALK IN MEANINGFUL WAYS ABOUT REFLECTIVE
10 THOUGHT DURING AN EVENT SUCH AS THIS, YOU WOULD HAVE TO
11 FIND EVIDENCE THAT THE PERSON WAS REFLECTING UPON, AS
12 THE INSTRUCTION SAYS, HIS CHOICES AND OPTIONS, AND
13 CAREFULLY WEIGHING THEM.

14 THESE THOUGHT FRAGMENTS THAT WERE PRESENTED
15 TO DR. DIETZ ARE THOUGHTS ONLY ABOUT MOMENTS OF ACTUAL
16 ACTION; THE THINGS THAT MY CLIENT WAS DOING. ALL HE IS
17 THINKING ABOUT ARE THE ACTUAL PHYSICAL THINGS HE'S
18 DOING.

19 THERE IS NO EVIDENCE WHATSOEVER THAT HE HAD
20 ANY THOUGHTS ABOUT THE REALITY OF THE SITUATION, WHAT
21 HIS OPTIONS WERE AT THAT POINT, WHETHER HE WAS
22 CONSIDERING OR WEIGHING WHETHER THE RISK WAS AS HE
23 BELIEVED IT TO BE, WHETHER THE THREAT WAS AS HE BELIEVED
24 IT TO BE.

25 AND SO DR. DIETZ' USE OF THE TERM
26 "REFLECTIVE THOUGHT," WHICH UNSURPRISINGLY HE NEVER
27 OFFERED A DEFINITION OF, IS HIGHLY MISLEADING TO THE
28 JURY, AND I THINK IT'S INCUMBENT ON US TO POINT OUT WHAT

1 THESE THOUGHTS HAD TO DO WITH, AND WHETHER THEY QUALIFY
2 IN THE PSYCHIATRIC LITERATURE AND UNDERSTANDING OF THE
3 NOTIONS OF REASONING AND THE HIGHER CORTICAL FUNCTIONS,
4 WHETHER THOSE ARE TRULY REFLECTIVE THOUGHTS.

5 MOREOVER, DR. DIETZ LEAVES OUT IN HIS -- IN
6 THIS LITTLE RECITATION OF REFLECTIVE THOUGHTS -- THE
7 ACTUAL THOUGHTS THAT MY CLIENT HAD; FOR EXAMPLE, WHEN HE
8 GOT AND HANDLED THE AMMUNITION AT THE TIME OF THE
9 RELOADING.

10 HIS FIRST -- HIS DESCRIPTION OF THAT, OF
11 EVEN GOING OUT TO THE CAR, WAS THAT HE FELT COMPLETELY
12 DEFENSELESS. HE FELT THE THREAT WAS STILL REAL, AND HE
13 WAS STILL AFRAID, AND HE RAN TO THE CAR THINKING ONLY
14 ABOUT THAT.

15 THERE WASN'T EVEN ANY TESTIMONY THAT HE WAS
16 THINKING: "GEE, I HAVE TO FIND SOME AMMO." ALL HE
17 TESTIFIED TO WAS DOING THAT, RUMMAGING AROUND, COMING UP
18 WITH A SHELL AND HANDING IT OVER TO HIS BROTHER.

19 THEN WITH RESPECT TO DR. DIETZ'
20 DESCRIPTIONS OF HELPLESSNESS AND HYPERVIGILANCE, WE
21 WOULD LIKE TO POINT OUT THAT DR. DIETZ IGNORED ALL OF
22 THE RESEARCH THAT HE REQUESTED IN ORDER TO SUPPOSEDLY
23 PREPARE HIMSELF.

24 WE WERE TURNED OVER ALL OF HIS RESEARCH,
25 AND NONE OF THAT RESEARCH SUPPORTS HIS DESCRIPTION OF
26 HELPLESSNESS, NOR DOES IT SUPPORT HIS ANALYSIS THAT
27 SOMEONE WITH HYPERVIGILANCE WOULD BE ENGAGING IN ACTS OF

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1 PREVENTION.

2 THUS, HE TESTIFIED THAT MY CLIENT, IF HE
3 WERE REALLY HYPERVIGILANT, WOULD HAVE TAKEN THE SHOTGUN,
4 AND HE AND HIS BROTHER COULD HAVE TAKEN THEIR SHOTGUNS
5 ON TO THE BOAT, SOMEHOW EQUATING THE NOTION OF
6 HYPERVIGILANCE WITH TAKING ACTION, WHICH SEEMS TOTALLY
7 INCONSISTENT. BUT NEVERTHELESS THAT'S WHAT HE TESTIFIED
8 TO.

9 AND WE WOULD LIKE TO POINT OUT THAT THE
10 RESEARCH THAT HE HAD TURNED OVER TO US DOES NOT SUPPORT
11 HIS CONCEPTION OF LEARNED HELPLESSNESS, HYPERVIGILANCE,
12 OR HOPELESSNESS.

13 THEN HE CHOSE TO DENIGRATE DR. VICARY IN
14 HIS TESTIMONY, LABELING HIM A "JAIL PSYCHIATRIST".

15 THIS JURY HAS HEARD THAT DOCTOR -- NOW, LET
16 ME JUST SAY, THIS JURY HAS HEARD THAT DR. WILSON READ
17 DR. VICARY'S NOTES. THEY HAVE NOT HEARD THAT HE RELIED
18 ON ANY DIAGNOSIS -- THAT DR. WILSON RELIED ON ANY
19 DIAGNOSIS OF DR. VICARY. THAT WAS NOT ASKED. IN FACT,
20 HE WAS NOT ASKED IF HE RELIED ON ANYBODY'S DIAGNOSES.

21 AND IN FACT, AS THE COURT KNOWS, AT THE
22 PRESENT TIME CASE AUTHORITY IS SUCH THAT EVEN IF HE SAID
23 HE HAD, I COULD NOT HAVE ELICITED THOSE DIAGNOSES OF

24 OTHER MENTAL HEALTH PROFESSIONALS, BECAUSE THE CASE
25 AUTHORITY INDICATES THAT YOU CAN'T BRING IN THE OPINIONS
26 OR CONCLUSIONS OF OTHER MENTAL HEALTH EXPERTS WHO AREN'T
27 THEMSELVES TESTIFYING BEFORE THE JURY.

28 HOWEVER, THE JURY KNOWS THAT DR. WILSON

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1 READ DR. VICARY'S NOTES AND PRIOR TESTIMONY, AND IS
2 AWARE, WITHOUT ANY ELABORATION WHATSOEVER BEING
3 PERMITTED, WAS AWARE OF THE MANNER IN WHICH
4 DR. VICARY -- IS AWARE OF THE MANNER WHICH MR. -- STRIKE
5 THAT -- THE FACT THAT MR. MENENDEZ FIRST TOLD THE STORY
6 CONCERNING HIS SEXUAL MOLESTATION TO DR. VICARY.

7 AND THEN ALONG COMES DR. DIETZ, AND HE
8 DENIGRATES DR. VICARY, AGAIN DOING THE SAME THING. HE
9 IS THE FAR MORE QUALIFIED AND SUPERIOR EXPERT IS THE
10 GENERAL FEELING -- BASED ON WHAT HE CHARGES, I SUPPOSE.
11 BUT HE WANTS TO CLAIM HE'S WORTH IT, I SUPPOSE, BY
12 GIVING OUT THE NOTION HE IS THE TRUE, PURE FORENSIC
13 PSYCHIATRIST. VICARY IS ANOTHER ONE OF THOSE HELPERS,
14 AND THAT HE IS A JAIL PSYCHIATRIST, WHEN OF COURSE
15 THAT'S UTTERLY UNTRUE AND AN UNNECESSARY JAB AT
16 DR. VICARY'S CREDENTIALS.

17 BUT THE WHOLE PURPOSE IS TO DENIGRATE THE
18 IMPORTANCE OF DR. VICARY'S INFORMATION, AS DR. WILSON
19 WAS AWARE OF IT, ALTHOUGH THE JURY DOESN'T HAVE

20 DR. VICARY'S INFORMATION YET.

21 NOW, I DON'T KNOW WHAT THE PURPOSE IS

22 SPECIFICALLY, BECAUSE I TRY VERY HARD TO TRY NOT TO READ

23 THE COURT'S MIND, FINDING MYSELF IN ERROR MORE OFTEN

24 THAN NOT.

25 CONCERNING THE COURT'S QUESTIONS LATE

26 YESTERDAY AFTERNOON WHETHER DR. VICARY'S NOTES INDICATED

27 HIS DIAGNOSIS, I CAN -- I DON'T KNOW WHAT THE COURT'S

28 POINT WAS. BUT ONE THING I SUPPOSE IT COULD HAVE BEEN

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1 WAS THAT IF DR. VICARY'S NOTES INDICATED THE DIAGNOSIS

2 OF P.T.S.D., AND DR. WILSON RELIED UPON THAT, SOMEHOW

3 THAT WOULD MEAN THAT DR. VICARY COULD NOT BE CALLED,

4 BECAUSE ALL OF HIS INFORMATION ALREADY FORMED PART OF

5 DR. WILSON'S OPINION.

6 BUT OF COURSE THE JURY DIDN'T KNOW THAT TO

7 BEGIN WITH.

8 THE COURT: NO. THE REASON FOR THAT INQUIRY WAS

9 THE COURT WAS TRYING TO ASSESS THE EXTENT OF THE

10 EXAMINATION OF DR. VICARY THAT WOULD ENTAIL FROM THE

11 DEFENSE CALLING HIM, AND THE FACT THAT HE HAD NOT MADE

12 ANY WRITTEN DIAGNOSIS THAT WAS DOCUMENTED IN HIS NOTES.

13 AND FURTHER, AS I RECALL, HE DID NOT

14 TESTIFY IN 1993 OF ANY DIAGNOSIS OTHER THAN DEPRESSION

15 AND ANXIETY; ALTHOUGH CHARACTERIZING THE DEFENDANT AS

16 "SICK," TO USE HIS PHRASE. AND WHEN ASKED WHAT HE MEANT
17 BY SICK, DESCRIBED IT AS DEPRESSION AND ANXIETY.
18 AND THE PURPOSE OF THAT INQUIRY WAS TO
19 ASSESS THE EXTENT OF LITIGATION REGARDING HIS
20 CREDIBILITY THAT WOULD ENTAIL FROM THAT SORT OF RECORD;
21 THAT WE DON'T LOOK AT THIS IN A VACUUM, BUT TO
22 ANTICIPATE WHAT SORT OF EXAMINATION WOULD BE INVOLVED
23 WITH HIS TESTIMONY. NOT JUST WHAT YOU WANT TO BRING OUT
24 IN DIRECT, BUT WHAT THE PROSECUTION WOULD RIGHTFULLY BE
25 ENTITLED TO BRING OUT ON CROSS-EXAMINATION.
26 MS. ABRAMSON: WELL, THE COURT RECOGNIZES THAT WE
27 WERE LIMITED IN THE LAST TRIAL. SIMILARLY IN THIS
28 ONE -- BUT MORE SO IN THIS ONE, I WOULD HAVE TO SAY --

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1 BUT LIMITED AT LEAST WITH RESPECT TO NOT BEING ABLE TO
2 PRESENT MORE THAN ONE EXPERT ON THE ISSUE OF MY CLIENT'S
3 MENTAL STATE AT THE TIME OF THE OFFENSE.
4 WHAT DR. VICARY WAS TESTIFYING TO IN THE
5 LAST TRIAL WAS HIS INITIAL IMPRESSIONS OF MY CLIENT, AND
6 THOSE ARE STILL HIS INITIAL IMPRESSIONS, BEFORE THE FOUR
7 MONTH PERIOD WENT BY WHERE HE HAD OBTAINED THE
8 SIGNIFICANT HISTORY, THE COMPLETE HISTORY, IF YOU WILL,
9 OF THE SEXUAL MOLESTATION.
10 HE WAS NOT PREPARED TO MADE A
11 POST-TRAUMATIC STRESS DISORDER DIAGNOSIS, AND DIDN'T

12 MAKE SUCH A DIAGNOSIS UNTIL AFTER -- WELL, LET'S PUT IT
13 THIS WAY. HE WAS NOT IN A POSITION TO MAKE SUCH A
14 DIAGNOSIS UNTIL AFTER HE HAD HEARD THE HISTORY; AND
15 FRANKLY, AFTER HE HAD RECEIVED A GREAT DEAL OF THE
16 DEFENSE INVESTIGATION CONCERNING WITNESSES THAT WE HAD
17 INTERVIEWED WHO HAD OBSERVED THE FAMILY, AND THE FAMILY
18 FUNCTIONING. AND IN FACT, AFTER HE RECEIVED THE ANDY
19 CANO STATEMENT IN FEBRUARY OF '91, HE WOULD NOT HAVE
20 BEEN COMFORTABLE MAKING THAT DIAGNOSIS, JUST AS
21 DR. WILSON WOULD NOT HAVE AT THAT STAGE.

22 NOW, HE WASN'T ASKED ABOUT ULTIMATE
23 DIAGNOSIS DURING HIS TESTIMONY LAST TIME.

24 THE COURT: WELL, I NEVER FORECLOSED THAT.

25 MS. ABRAMSON: I CHOSE NOT TO ASK IT, AS I HAVE A
26 RIGHT TO DO OR NOT DO.

27 THE COURT: THE AREA THE COURT FORECLOSED IN THE
28 FIRST TRIAL WAS THE DUPLICATION OF THE TESTIMONY OF

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1 DR. BURGESS AS TO THE MENTAL STATE OF THE DEFENDANT AT
2 THE TIME OF THE CRIME.

3 AS FAR AS A DIAGNOSIS BY DR. VICARY OF THE
4 DEFENDANT, IF HE HAD A DIAGNOSIS OF POST-TRAUMATIC
5 STRESS DISORDER OR DEPRESSION OR WHATEVER IT WAS, I
6 NEVER FORECLOSED THAT, AND IT NEVER CAME OUT DURING HIS
7 EXAMINATION.

8 MS. ABRAMSON: IT WASN'T ASKED.

9 THE COURT: WELL, HE WAS ASKED WHAT HE MEANT BY
10 THE DEFENDANT BEING SICK, AND -- BY YOU. YOU ASKED HIM
11 THAT.

12 MS. ABRAMSON: HE'S TALKING ABOUT WHAT HE SAW.
13 HE SAID HE WAS VERY SICK. HE WAS A BASKET CASE. HE IS
14 TALKING ABOUT WHAT HE SAW AT THAT POINT.

15 NOW, I MEAN --

16 THE COURT: WELL, LIKE I SAID, THE ONLY REASON I
17 AM GETTING INTO THIS NOW IS THAT IS WHAT I WAS CONCERNED
18 ABOUT BECAUSE OF THE STATE OF THE RECORD AND THE STATE
19 HIS NOTES, AND THAT'S PART OF THE OVERALL PICTURE OF
20 EVALUATING THE TESTIMONY -- PROPOSED TESTIMONY OF THE
21 WITNESSES, THE NATURE OF THE EXAMINATION AND THE EXTENT
22 OF THE EXAMINATION.

23 MS. ABRAMSON: WELL, I CAN'T IMAGINE IT WOULD
24 TAKE VERY LONG FOR THE PEOPLE TO ASK THE QUESTIONS ABOUT
25 WHETHER HE TESTIFIED TO THAT BEFORE, OR WHETHER IT'S IN
26 HIS NOTES. THAT SEEMS TO BE FIVE MINUTES.

27 THE COURT: OKAY. THAT'S BASICALLY WHAT I WAS
28 REFERRING TO.

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1 MS. ABRAMSON: ABOUT FIVE MINUTES.

2 BUT I AM CONCERNED ABOUT THE NOTION THE
3 COURT WOULD TRY TO MAKE ANY CREDIBILITY RULINGS ABOUT

4 THE CREDIBILITY OF THIS EXPERT.

5 THE COURT: I NEVER TOLD YOU I WAS, AND THAT'S
6 NOT THE ROLE I PERFORM HERE. I AM RULING UPON THE
7 ADMISSIBILITY OF EVIDENCE. THE JURY DECIDES THE
8 CREDIBILITY ISSUES.

9 MS. ABRAMSON: EXACTLY.

10 NOW, I THINK, YOUR HONOR, JUST FROM A SHEER
11 REBUTTAL STANDPOINT, I THINK WE SHOULD HAVE A RIGHT TO
12 CALL DR. VICARY TO REBUT THOSE SPECIFIC THINGS THAT
13 DR. DIETZ TESTIFIED TO, AND JUST THE MOST OBVIOUS IS HIS
14 MISDIAGNOSIS OF MY CLIENT AS SUFFERING FROM GENERAL
15 ANXIETY DISORDER, AND HIS MISSTATEMENT ABOUT HOW
16 ANXIETY -- EVEN ANXIETY DISORDER INTERACTS WITH MENTAL
17 STATE AT THE TIME OF THE OFFENSE.

18 AS I HAVE INDICATED BEFORE, I DON'T INTEND
19 TO TRY TO ELICIT FROM DR. VICARY HIS ULTIMATE OPINIONS
20 OR CONCLUSIONS ABOUT MENTAL STATE, EVEN IN HYPOTHETICAL
21 FORM, WHICH IS APPROPRIATE.

22 I DON'T INTEND -- ALTHOUGH I THINK THE
23 COURT'S RULING ON -- WELL, I THINK THE COURT'S ANALYSIS
24 THAT THIS IS THE EQUIVALENT OF ELICITING TESTIMONY ABOUT
25 CHILD ABUSE ACCOMMODATION SYNDROME IS NOT THE CORRECT
26 ANALYSIS WHEN IT IS A CRIMINAL DEFENDANT WHO IS MAKING
27 ASSERTIONS CONCERNING HIS OWN HISTORY AND MENTAL STATE,
28 AS COMPARED TO A VICTIM, WHERE SYNDROME EVIDENCE IS

1 BEING USED TO REMOVE FROM THE JURY THE ULTIMATE FACT IN
2 THE CASE.

3 NEVERTHELESS, ABIDING BY THE COURT'S
4 THINKING AND RULINGS ON THAT AREA, WE WOULD NOT BE
5 ELICITING HIS OPINION AS TO WHETHER OR NOT, IN FACT, MY
6 CLIENT WAS MOLESTED.

7 AND REALLY HIS TESTIMONY LAST TIME WAS
8 RELEVANT TO REFUTE MATTERS THAT DR. DIETZ AVERRED, SUCH
9 AS THIS PERSONALITY BUSINESS ABOUT SHIFTING AND SHALLOW
10 EMOTION. I THINK, THEREFORE, IT SHOULD COME IN.

11 IN ADDITION, I THINK WE SHOULD BE ENTITLED,
12 SINCE DR. WILSON DIDN'T GET INTO IT, AND WE DIDN'T RAISE
13 IT, AND WE TRIED TO PREVENT TESTIMONY ABOUT SO-CALLED
14 PERSONALITY TRAITS. THERE ARE PERSONALITY TRAITS OF MY
15 CLIENT THAT DR. VICARY CONSIDERS RELEVANT FOR HIS MENTAL
16 STATE AT THE TIME OF THE OFFENSES THAT WE WOULD LIKE TO
17 ELICIT FROM HIM THAT ARE SOMEWHAT DIFFERENT FROM THE
18 ONES THAT DR. DIETZ CLAIMED HE OBSERVED. I THINK THAT
19 SO-CALLED PERSONALITY TRAITS CLOSER IN TIME TO THE TIME
20 OF THE EVENT, AND PRIOR TO ANY TREATMENT, ARE MORE
21 RELIABLE THAN PERSONALITY TRAITS THAT DR. DIETZ CLAIMS
22 TO HAVE DETERMINED SIX YEARS LATER ON MEDICATION AND
23 AFTER TREATMENT.

24 NOW, I DON'T THINK, YOUR HONOR, THAT THE
25 EXAMINATION ON DIRECT OF DR. VICARY WOULD TAKE MORE THAN
26 A COUPLE OF HOURS.

27 THE COURT: OKAY.

28 LET ME HERE HEAR THE PEOPLE, IF THEY HAVE

1 ANYTHING ELSE.

2 MR. CONN: I THINK THAT WHAT COUNSEL IS PROPOSING
3 IS IN ESSENCE A REHASH OF DR. WILSON'S TESTIMONY. IT'S
4 SIMPLY DRESSING IT UP WITH DIFFERENT LANGUAGE AND GIVING
5 IT A DIFFERENT SPIN, OR A DIFFERENT APPROACH. BUT IT'S
6 THE SAME OLD MATERIAL THAT WE HAVE LISTENED TO FOR SEVEN
7 DAYS WITH DR. WILSON ON THE STAND.

8 WE HAVE TO REMEMBER, I THINK, JUST HOW LONG
9 HE WAS ON THE STAND. HE WAS ON THE STAND FOR DAYS
10 BEFORE HE EVEN GOT INTO THE FACTS OF THIS PARTICULAR
11 CASE. THE PEOPLE THEN CALLED DR. DIETZ FOR A FEW HOURS
12 TO RESPOND TO THE VERY LENGTHY AND DETAILED TESTIMONY OF
13 DR. WILSON.

14 SO I THINK THAT THE DEFENSE HAS HAD AN
15 AMPLE OPPORTUNITY TO ADDRESS EVERY SINGLE ISSUE THAT SHE
16 HAS RAISED HERE TODAY, AND SHE HAS REALLY NOTHING NEW TO
17 OFFER. SHE SIMPLY REALLY WANTS TO PRESENT A SECOND
18 WITNESS JUST FOR GAINING SOME NUMERICAL ADVANTAGE,
19 MAKING IT TWO AGAINST ONE, AND I DON'T THINK THE COURT
20 SHOULD PERMIT THAT.

21 UNDER EVIDENCE CODE SECTION 723 THE COURT
22 SPECIFICALLY HAS THE DISCRETION TO LIMIT THE NUMBER OF
23 EXPERT WITNESSES. THAT PROVIDES THE COURT MAY, AT ANY
24 TIME BEFORE OR DURING THE TRIAL OF AN ACTION, LIMIT THE
25 NUMBER OF EXPERT WITNESSES TO BE CALLED BY ANY PARTY.

26 SO THIS IS A VERY DIFFERENT SITUATION FROM
27 A PERCIPIENT WITNESS WHO HAS NEW AND ADDITIONAL
28 INFORMATION TO PROVIDE TO THE COURT.

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1 ALSO UNDER EVIDENCE CODE SECTION 352, I
2 THINK THE COURT CAN RECOGNIZE THE REAL PURPOSE FOR WHICH
3 THESE WITNESSES ARE BEING CALLED; THAT IS TO CONFUSE THE
4 JURY EVEN MORE IN REGARD TO THESE ISSUES, AND MAKE THIS
5 CASE AS DIFFICULT AND COMPLICATED AS THEY POSSIBLY CAN.
6 THAT HAS BEEN THE GOAL OF THE DEFENSE IN THE FIRST
7 TRIAL. IT'S BEEN THE GOAL OF THE DEFENSE TO THE EXTENT
8 THAT THEY WERE PERMITTED TO CALL WITNESSES IN THE
9 RETRIAL, AND THAT IS EXACTLY WHAT THEY WERE HERE TO DO.

10 THEY HAD AN AMPLE OPPORTUNITY TO CONFUSE
11 THE JURY WHEN MR. WILSON WAS ON THE STAND, AND DID SO
12 FOR ABOUT A WEEK OF TESTIMONY. WE HAD A FEW HOURS TO
13 CLEAR IT UP, AND NOW THEY WANT TO GET BACK AND DO IT ONE
14 MORE TIME.

15 I WOULD SUBMIT THAT DR. DIETZ, IN HIS
16 TESTIMONY, TRACKED VERY CLOSELY THE PRESENTATION OF
17 EVIDENCE BY MR. WILSON, AND HE DID NOT VENTURE INTO NEW
18 AREAS AND INCORPORATE NEW MATERIAL FOR COUNSEL TO REBUT.

19 AND SINCE HE TRACKED THE TESTIMONY OF
20 DR. WILSON SO CLOSELY AND USED THE TERMS -- AND I
21 SPECIFICALLY DIRECTED HIM TO THE VARIOUS LANGUAGE THAT

22 DR. WILSON USED THROUGHOUT HIS TESTIMONY, HAD HIM
23 RESPOND TO TERMS SUCH AS A "SURVIVOR MODE" AND "PANIC
24 MODE," AND DISCUSSIONS THAT WE HAD CONCERNING A PANIC
25 STATE AND SO FORTH, SIMPLY STEMMED FROM DR. WILSON'S
26 TESTIMONY REGARDING THOSE ISSUES.

27 SO IT'S NOT AS IF WE BROUGHT TO THIS TRIAL
28 A GREAT DEAL OF NEW MATERIAL. IT WAS SIMPLY FOCUSED

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1 ON REBUTTING THE TESTIMONY OF DR. WILSON. NOW THIS JURY
2 HAS HEARD BOTH SIDES OF THOSE SPECIFIC ISSUES THAT WERE
3 RAISED BY DR. WILSON.

4 AS FAR AS DR. DIETZ TESTIFYING TO
5 DISPARAGING REMARKS CONCERNING PSYCHOLOGISTS,
6 DR. WILSON WAS THE ONE WHO USED CERTAIN TERMS IN HIS
7 TESTIMONY. HE SAID THAT THOSE TERMS THAT HE WAS USING
8 IN HIS TESTIMONY WERE VALID TERMS USED BY THE MENTAL
9 HEALTH COMMUNITY.

10 SO THAT POINT OF VIEW HAS BEEN ADEQUATELY
11 REPRESENTED TO THE JURY AT THIS POINT IN TIME. THERE IS
12 NO REASON TO CALL IN A SECOND WITNESS TO SAY, "I AGREE
13 WITH DR. WILSON THAT THOSE TERMS SUCH AS SURVIVOR MODE
14 AND PANIC ATTACK," OR PANIC MODE, OR WHATEVER HE CALLED
15 IT, "ARE IN FACT VALID TERMS."

16 DR. WILSON HAD MORE THAN AMPLE OPPORTUNITY
17 TO ELABORATE UPON THOSE TERMS AND THE BASIS FOR THOSE

18 TERMS.

19 AS FAR AS THE PRESENCE OF A STRESSOR IN
20 THIS CASE, DR. WILSON PRESENTED HIS POINT OF VIEW, AND
21 HE INDICATED WHY HE CONCLUDED THAT THERE WAS A STRESSOR
22 IN THIS CASE, AND HE REFERRED TO MATERIAL THAT HE RELIED
23 UPON.

24 IT DOESN'T HELP THE DEFENSE AT THIS POINT
25 TO BRING IN ANOTHER EXPERT TO TALK ABOUT WHY THE
26 PRESENCE OF A STRESSOR CAN BE FOUND IN THIS CASE,
27 BECAUSE ALL THEY ARE DOING IS, ONCE AGAIN, GETTING A TWO
28 TO ONE NUMERICAL ADVANTAGE OVER THE PROSECUTION. DR.

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1 WILSON FULLY EXPLORED THIS ISSUE, AND MORE TESTIMONY
2 REGARDING THIS ISSUE IS UNNECESSARY.

3 AS FAR AS BACKGROUND INFORMATION ON WHETHER
4 SUCH INFORMATION IS RELEVANT TO A DETERMINATION OF A
5 DIAGNOSIS IN THIS CASE, DR. WILSON FULLY TESTIFIED TO
6 THE BACKGROUND INFORMATION THAT HE RELIED UPON AND THE
7 REASONS FOR IT, FOR RELYING UPON THAT MATERIAL AND HOW
8 THAT LED TO HIS DETERMINATION IN THIS CASE OF
9 POST-TRAUMATIC STRESS DISORDER.

10 SO, COUNSEL HAS HAD A FULL OPPORTUNITY TO
11 EXPLORE THOSE ISSUES WITH THE JURY, AND TO EXPLAIN TO
12 THE JURY THROUGH THE TESTIMONY OF DR. WILSON THE NEED
13 FOR BACKGROUND INFORMATION, AND HOW THAT BACKGROUND

14 INFORMATION CAN ASSIST IN A DIAGNOSIS IN THIS CASE.

15 ONCE AGAIN, SHE SIMPLY WANTS DR. VICARY TO
16 JUMP ON DR. WILSON'S BANDWAGON AND SAY "I AGREE WITH HIM
17 THAT IT IS NOT NECESSARY," AND THE COURT DOES NOT HAVE
18 TO ALLOW THAT.

19 AS FAR AS DR. DIETZ NOT READING VARIOUS
20 REPORTS, COUNSEL WAS ABLE TO EXPLORE WITH THE WITNESS
21 WHICH REPORTS HE HAD READ AND WHICH HE HAD NOT READ.

22 DR. WILSON ALSO TESTIFIED TO THE
23 SIGNIFICANCE OF VARIOUS MATERIAL THAT HE TESTIFIED TO,
24 AND THAT ISSUE IS NOT NOW RIPE FOR ARGUMENT. THERE IS
25 NO REASON TO PUT A WITNESS ON THE STAND TO SAY, "I AGREE
26 THE ORIGINAL REPORTS MIGHT HAVE BEEN HELPFUL."

27 THE JURY KNOWS WHAT DR. WILSON OR DR. DIETZ
28 TESTIFIED. THERE IS NO ADDITIONAL INFORMATION OR

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1 OPINION THAT NEEDS TO BE PROVIDED IN THAT REGARD.

2 AS FAR AS DR. DIETZ TESTIFYING TO GENERAL
3 ANXIETY DISORDER, DR. WILSON DID TESTIFY TO HIS OPINION,
4 DIAGNOSIS AND THE REASON FOR HIS DIAGNOSIS.

5 DR. DIETZ TESTIFIED TO HIS DIAGNOSIS AND
6 THE REASON FOR THAT DIAGNOSIS, AND WE HAVE NOW EACH OF
7 THOSE DIAGNOSES FULLY EXPLAINED TO THE JURY, AND THE
8 BASIS FOR THOSE DIAGNOSES, THE EVIDENCE IN SUPPORT OF
9 THOSE DIAGNOSES, AND THE JURY IS IN A POSITION AT THIS

10 TIME TO DETERMINE WHICH OF THOSE OPINIONS ARE MORE
11 RELIABLE, AND WHY.

12 THERE IS NO REASON TO ALLOW THE DEFENDANTS
13 TO SIMPLY HAVE A TWO TO ONE NUMERICAL ADVANTAGE TO --
14 FOR DR. VICARY TO COME IN AND SAY, "WELL, I AGREE WITH
15 DR. WILSON THAT P.T.S.D. IS THE CORRECT DIAGNOSIS IN
16 THIS CASE."

17 AS FAR AS THE CONCEPT OF DEPRESSION IS
18 CONCERNED, DEPRESSION WAS SOMETHING WHICH ENTERED INTO
19 THE TESTIMONY OF BOTH DR. WILSON AND DR. DIETZ. BOTH OF
20 THEM REFERRED TO DEPRESSION THROUGHOUT THEIR TESTIMONY.

21 SO THAT IS A CONCEPT WHICH HAS BEEN FULLY
22 EXPLAINED AND ELABORATED ON BY BOTH MENTAL HEALTH
23 EXPERTS BEFORE THIS JURY, AND TO ALLOW FURTHER TESTIMONY
24 REGARDING DEPRESSION AT THIS POINT IS JUST BEATING A
25 DEAD HORSE.

26 AT SOME POINT 352 HAS TO KICK IN, AND I
27 WOULD SUBMIT THIS IS THE TIME.

28 AS FAR AS THE DEFENDANT'S BEING FEARFUL OF

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1 THINGS, DR. WILSON TESTIFIED AT GREAT LENGTH TO THE
2 BACKGROUND OF THE DEFENDANT, AS WELL AS CHILDREN IN
3 GENERAL, AND WHAT THEY ARE FEARFUL OF, AND HOW THEY
4 BECOME FEARFUL, AND WE HEARD A GREAT DEAL OF TESTIMONY
5 RELATING TO ERIK MENENDEZ AND VIETNAM VETERANS, AND

6 BATTERED WOMEN AND FEAR, AND THE ROLE THAT FEAR PLAYS IN
7 ALL THIS. COUNSEL JUST WANTS TO ONCE AGAIN PRESENT THAT
8 STEW OF EMOTIONAL TRAUMA BEFORE THIS JURY AND START
9 GETTING INTO THE WHOLE ISSUE OF FEAR AGAIN.

10 THERE IS SIMPLY NO REASON TO DO THAT, AND
11 DR. WILSON TESTIFIED TO IT COMPLETELY, IN REGARD TO THAT
12 ISSUE, FOR SO MANY DAYS.

13 AS FAR AS POST-TRAUMATIC AND AVOIDANCE
14 BEHAVIOR, DR. WILSON FULLY TESTIFIED TO ALL OF THE
15 CLUSTERS OF SYMPTOMS THAT ARE ASSOCIATED WITH
16 POST-TRAUMATIC STRESS DISORDER, AND HE TESTIFIED
17 SPECIFICALLY IN REGARD TO THE AVOIDANCE CLUSTERS, AND HE
18 WENT THROUGH EVERY SINGLE ASPECT OF THE AVOIDANCE
19 CLUSTER, AND WHAT EVIDENCE IN THIS CASE WAS CONSISTENT
20 WITH AVOIDANCE BEHAVIOR, AND HOW HE CONCLUDED THAT EACH
21 OF THOSE AVOIDANCE BEHAVIORS WERE SATISFIED IN THIS
22 CASE.

23 HE WENT THROUGH A CHECKLIST, AND HE TOLD US
24 THIS ONE WAS SHOWN AND THIS ONE WAS SHOWN, AND HE TOLD
25 US HOW MANY OF THEM WERE SHOWN, AND WHY THEY WERE SHOWN,
26 AND HOW IN THIS CASE WHAT WE OBSERVED WAS AVOIDANCE
27 BEHAVIOR.

28 THERE IS ABSOLUTELY NO REASON WHY WE HAVE

1 TO GO THROUGH THIS ONE MORE TIME WITH ANOTHER EXPERT,

2 JUST TO GET THE TWO TO ONE NUMERICAL ADVANTAGE.

3 THE JURY HAS HEARD THIS CASE. THEY HAVE

4 HEARD THESE ISSUES, AND THERE IS NO REASON TO BEAT A

5 DEAD HORSE TO DEATH.

6 AS FAR AS THE GENERALIZED ANXIETY DISORDER

7 APPEARING IN A POPULATION, FIVE PERCENT VERSUS 15

8 PERCENT, I THINK THIS IS A RELATIVELY MINOR ISSUE. IT'S

9 A COLLATERAL ISSUE. IT DOESN'T GO TO THE HEART OF THE

10 WITNESS' TESTIMONY.

11 BASED ON THE GROUNDS OF IT BEING

12 COLLATERAL, I WOULD ASK THAT THE COURT EXCLUDE IT. IT

13 DOESN'T MAKE ANY SUBSTANTIAL CONTRIBUTION TO THE ISSUES

14 THAT ARE BEFORE THIS JURY.

15 AS FAR AS THE PERSONALITY TRAITS ARE

16 CONCERNED THAT DR. DIETZ TESTIFIED TO, THAT WAS PART OF

17 HIS DIAGNOSIS, AND WE HAD DR. WILSON TESTIFY FULLY TO

18 HIS DIAGNOSIS, WHICH CONSISTED NOT ONLY OF

19 POST-TRAUMATIC STRESS DISORDER AND BATTERED-PERSON'S

20 SYNDROME, BUT HE WAS PERMITTED TO ELABORATE FULLY ON ALL

21 OF THE ISSUES WHICH LED TO THAT PARTICULAR -- THOSE

22 PARTICULAR DIAGNOSES. HE WAS NOT LIMITED IN ANY WAY IN

23 REGARD TO TESTIFYING ABOUT THOSE VARIOUS FEATURES

24 BEARING UPON THE DEFENDANT'S PERSONALITY AND HIS

25 BEHAVIOR AT THE TIME OF THE COMMISSION OF THE CRIME.

26 NOW WE HAVE SOMEONE WHO CAME IN, DR. DIETZ,

27 AND HE POINTED TO OTHER THINGS IN THE DSM.

28 NOW, DOES THAT MEAN THAT NOW THEY HAVE A

1 RIGHT TO ONCE AGAIN REHASH THE SAME AREAS ONCE AGAIN?
2 WELL, I WOULD SUBMIT NOT. BOTH SIDES HAD AN OPPORTUNITY
3 TO TESTIFY -- TO PRESENT WITNESSES WHO WOULD TESTIFY TO
4 THE DIAGNOSIS OF THE DEFENDANT, AND I DON'T THINK THAT
5 THE DEFENSE SHOULD, IN THIS AREA WHERE THE COURT HAS
6 DISCRETION, BE PERMITTED TO PRESENT YET ANOTHER WITNESS
7 TO TALK ABOUT OTHER ASPECTS OF THE DEFENDANT'S
8 PERSONALITY WHEN THEY HAVE HAD A FULL AND AMPLE
9 OPPORTUNITY, WHICH GREATLY EXCEEDED THE PRESENTATION
10 PRESENTED BY THE PROSECUTION, TO SPEND DAYS AND DAYS OF
11 PRESENTING TESTIMONY CONCERNING THE PERSONALITY TRAITS
12 OF THE DEFENDANT.

13 AS FAR AS THE ROLE OF THE MEDICATION IS
14 CONCERNED, I WOULD SUBMIT THAT THAT IS A COLLATERAL
15 ISSUE, AND EVEN THOUGH IT IS A COLLATERAL ISSUE, IT IS
16 SOMETHING THAT DR. WILSON WAS PERMITTED TO TESTIFY TO,
17 AND DID IN FACT MAKE REFERENCE TO IN HIS TESTIMONY.

18 AS FAR AS THE MISIMPRESSIONS THAT
19 DR. DIETZ MAY HAVE GIVEN TO THE JURY, I WOULD SUBMIT
20 THAT DR. DIETZ DID NOT MISSTATE ANY OF THESE MATTERS TO
21 THE JURY. DR. DIETZ DID NOT SAY THAT GENERAL ANXIETY
22 DISORDER DOES NOT -- COULD NOT RESULT IN A PERSON'S
23 JUDGMENT BEING IMPAIRED. IN FACT, HE TESTIFIED TO JUST
24 THE CONTRARY. I THINK COUNSEL MISSTATED THE TESTIMONY
25 OF DR. DIETZ HERE.

26 HE SAID THAT GENERALIZED ANXIETY DISORDER

27 COULD RESULT IN A LAPSE OF JUDGMENT, AND WE DO SEE THAT
28 SOMETIMES IN PERSONS WHO ARE SUFFERING FROM GENERALIZED

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1 ANXIETY DISORDER.

2 SO I THINK THAT IS TAKING HIS TESTIMONY OUT
3 OF CONTEXT AND MISSTATING IT.

4 AS FAR AS POST-TRAUMATIC STRESS DISORDER
5 AND WHETHER OR NOT IT CAN AFFECT A PERSON'S MENTAL STATE
6 OTHER THAN DISSOCIATION, THIS WAS AN AREA THAT HE WAS
7 CLEAR IN HIS TESTIMONY. I THINK ONCE AGAIN THAT COUNSEL
8 HAS MISSTATED HIS TESTIMONY IN THIS AREA.

9 NEVERTHELESS, SHE HAD AN OPPORTUNITY TO
10 FULLY EXAMINE DR. DIETZ IN REGARD TO THIS AREA, AND
11 DR. WILSON HIMSELF TESTIFIED TO POST-TRAUMATIC STRESS
12 DISORDER, AND ALL THE VARIATIONS OF IT, AND THE FORMS OF
13 IT, AND HOW IT MANIFESTS ITSELF. SO I THINK -- AND
14 INCLUDING HYPERAROUSAL, WHICH IS ONE OF THE THINGS SHE
15 NOW WANTS TO GET INTO AND REHASH IN FRONT OF THE JURY.
16 THERE IS NO REASON TO BE REHASHING HYPERAROUSAL ONE MORE
17 TIME IN FRONT OF THIS JURY.

18 I THINK UNDER 352 WE'VE GOT TO DRAW THE
19 LINE SOMEWHERE, AND THE AMOUNT OF TIME WE HAVE SPENT ON
20 EXPERT WITNESSES IN THIS CASE, PARTICULARLY EXPERT
21 WITNESSES FROM THE DEFENSE, ENOUGH IS ENOUGH.

22 AS FAR AS PANIC ATTACK VERSUS A STATE OF

23 PANIC; AGAIN, THIS IS AN AREA THAT THE PROSECUTION
24 PRESENTED TESTIMONY ONLY IN RESPONSE TO TESTIMONY
25 PRESENTED BY DR. WILSON. THESE ARE HIS TERMS, INCLUDING
26 TERMS SUCH AS LEARNED HELPLESSNESS AND HYPERVIGILANCE,
27 AND ALL OF THE TERMS THAT HE USED; THE TERMS THAT HE WAS
28 SIMPLY RESPONDING TO THE TESTIMONY OF DR. WILSON.

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1 THEY SHOULD NOT BE PERMITTED TO ONCE AGAIN
2 REOPEN THE WHOLE ISSUE OF PANIC ATTACK VERSUS STATE OF
3 PANIC. DR. WILSON HAD AN OPPORTUNITY TO FULLY PRESENT
4 HIS VIEWS CONCERNING THIS, AND I WOULD SUBMIT A TWO TO
5 ONE NUMERICAL ADVANTAGE SHOULD NOT BE PERMITTED JUST FOR
6 THE PURPOSE OF BUTTRESSING THE TESTIMONY OF DR. WILSON.

7 SO I WILL SUBMIT THAT THIS MATTER HAS BEEN
8 FULLY EXPLORED BY BOTH SIDES, AND I ASK THE COURT TO
9 EXERCISE ITS AUTHORITY UNDER EVIDENCE CODE SECTIONS 723
10 AND 352, AND NOT ALLOW FURTHER TESTIMONY WITH REGARD TO
11 THE DEFENDANT'S MENTAL STATE.

12 MS. ABRAMSON: I'D LIKE TO BE HEARD IN RESPONSE,
13 YOUR HONOR.

14 THE COURT: YES.

15 MS. ABRAMSON: THE PROSECUTION IS CALLING FOR A
16 RULE THAT WOULD SAY THAT IN EVERY CRIMINAL CASE, IF THE
17 DEFENSE PUTS ON A PSYCHIATRIC DEFENSE, AND THE
18 PROSECUTION PUTS ON A WITNESS TO REBUT THAT, WHICH BY

19 ITS NATURE HAS TO BE REFLECTIVE OF AND SOMEHOW NEGATING
20 WHAT THE DEFENSE HAS PUT ON, THAT THAT'S IT. THE
21 DEFENSE CAN NEVER CALL ANOTHER EXPERT IN SURREBUTTAL.
22 THERE IS NO SUCH RULE. THERE ARE NO CASES
23 THAT SAY THERE IS SUCH A RULE, AND THE PROSECUTION
24 WHINING ABOUT A TWO TO ONE ADVANTAGE MAKES NO SENSE TO
25 ME WHATSOEVER. THEY CAN CALL WHOEVER ELSE THEY WANT IN
26 REBUTTAL, IF THEY THINK THERE IS A WITNESS WITH
27 INTEGRITY THAT THEY CAN CALL TO DO THAT. THERE IS NO
28 LIMIT BEING PLACED ON THEM.

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1 IT'S INCONCEIVABLE TO ME THAT IN A CAPITAL
2 CASE WHERE WE WERE PREVENTED FROM CALLING SCORES OF
3 SOURCE WITNESSES, AND WERE TOLD THAT THEIR ONLY
4 SIGNIFICANCE OR RELEVANCE WAS IN ORDER TO BUTTRESS AN
5 EXPERT'S OPINION, THAT NOW THE PROSECUTION IS CALLING
6 FOR A RULE THAT IF THAT EXPERT TAKES A LOT OF TIME ON
7 THE WITNESS STAND, BECAUSE HE HAS TO DO THE JOB FOR
8 SCORES OF WITNESSES WHO ARE NOT BEING ALLOWED TO
9 TESTIFY, THAT SOMEHOW THE DEFENSE HAS USED UP ITS MENTAL
10 HEALTH TIME SLOT WITHIN THE TRIAL, AND THAT'S ABSURD.
11 I MEAN, THE FACT OF THE MATTER IS THEY
12 DIDN'T HAVE TO CALL DR. DIETZ. AND MORE IMPORTANTLY,
13 WHEN DR. WILSON TESTIFIED, WE HAD NO IDEA WHAT DR. DIETZ
14 WOULD OR WOULDN'T SAY. WE HAD NO IDEA IF DR. DIETZ

15 WOULD EVEN TESTIFY.

16 THERE WAS NO WAY TO ANTICIPATE THAT
17 DR. DIETZ WOULD MISCONSTRUE AND MISREPRESENT THE
18 TERMINOLOGY THAT DR. WILSON WAS USING. THERE WAS NO WAY
19 TO KNOW THAT HE WOULD COME UP WITH AN ALTERNATIVE
20 DIAGNOSIS THAT WE ARE IN A POSITION TO REFUTE, BECAUSE
21 HE HADN'T EVEN SEEN THE DEFENDANT AT THAT POINT.

22 SO, IT IS JUST SIMPLY ILLOGICAL TO SAY THAT
23 WE HAD EVERY OPPORTUNITY TO ADDRESS THE ISSUES WE NOW
24 WISH TO ADDRESS CONCERNING WHAT DR. DIETZ WOULD SAY,
25 WHEN WE DIDN'T KNOW THERE WOULD EVER BE A DR. DIETZ.

26 AND THE COURT -- IN FACT, WHEN WE WERE
27 ARGUING ABOUT WHETHER DR. VICARY SHOULD BE PERMITTED TO
28 TESTIFY IN THE DEFENSE CASE-IN-CHIEF, INDICATED THERE

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1 WAS NO NEED FOR HIM TO TESTIFY THEN; THAT IF DR. DIETZ
2 TESTIFIED, WE WOULD BE CALLING HIM IN SURREBUTTAL, I
3 BELIEVE WAS THE PHRASE THAT THE COURT USED. "YOU WILL
4 BE CALLING HIM, IN ANY EVENT, IN SURREBUTTAL."

5 AND THE FACT OF THE MATTER IS UNTIL
6 DR. DIETZ DID COME UP WITH HIS OPINIONS AND CONCLUSIONS,
7 THERE WAS NO WAY FOR US TO DO A PREEMPTIVE STRIKE ON
8 THEM, OR TO EXPLAIN CERTAIN TERMS ANY DIFFERENTLY,
9 BECAUSE WE DIDN'T KNOW WHAT IN THE WORLD HE WOULD SAY.

10 IT WAS OUR EXPECTATION HE WOULD DO WHAT HE

11 USUALLY DOES, WHICH IS TO FIND SOME HUGE NEGATIVE
12 PERSONALITY DISORDER TO LABEL THE DEFENDANT WITH. BUT
13 HE DIDN'T DO THAT IN THIS CASE. I THINK HIS TESTIMONY
14 WENT TO THE RIGHTEOUSNESS OF MY CLIENT'S POSITION.

15 BUT BESIDES THAT, THE FACT IS WE COULDN'T
16 ANTICIPATE IT DURING DR. WILSON'S TESTIMONY.

17 AND SO IT IS -- WHAT THE PEOPLE ARE ASKING
18 FOR IS A BLANKET RULE THAT WOULD APPLY IN EVERY CASE,
19 AND LOGICALLY IT WOULD; THAT IF A DEFENSE PUTS ON A
20 MENTAL HEALTH DEFENSE, IF THE PROSECUTION CALLS A
21 WITNESS IN REBUTTAL OF THAT DEFENSE, THE DEFENSE MAY
22 NEVER CALL ANOTHER WITNESS IN SURREBUTTAL.

23 AND I THINK THAT WOULD BE UNCONSTITUTIONAL,
24 SUCH A RULE, AND WOULD DEFINITELY HAMPER A DEFENDANT'S
25 RIGHT TO PRESENT HIS DEFENSE, AND HIS RIGHT FOR A FAIR
26 TRIAL.

27 THE FACT IS THAT TECHNICALLY THE LAW DOES
28 GIVE AN ADVANTAGE TO THE DEFENSE, AND I DON'T THINK OUR

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1 DEMOCRACY HAS BEEN OVERTURNED BASED ON THAT.
2 TECHNICALLY SPEAKING, THE DEFENDANT IS PRESUMED
3 INNOCENT. TECHNICALLY SPEAKING, THE PEOPLE AND ONLY THE
4 PEOPLE HAVE AN ENORMOUS BURDEN.

5 SO THE FACT THAT TECHNICALLY SPEAKING WE
6 MIGHT HAVE A NUMERICAL DECISION, WHICH IS A DECISION THE

7 PEOPLE HAVE MADE -- THEY CAN CALL ANOTHER EXPERT IF THEY
8 WISH TO -- IS A SPECIOUS ARGUMENT.

9 NOW, REALITY-WISE WE KNOW THAT DEFENDANTS
10 DON'T REALLY HAVE AN ADVANTAGE, THAT OFTEN THEY ARE
11 PRESUMED TO BE GUILTY; THAT MENTAL HEALTH DEFENSES ARE
12 NOT PARTICULARLY POPULAR WITH JURIES; THAT UNDERSTANDING
13 MENTAL HEALTH TERMINOLOGY IS NOT AN EASY TASK FOR
14 JURIES.

15 AND THEREFORE WE URGE IN THIS SPECIFIC
16 AREA, WHERE WE BELIEVE TERMINOLOGY OF OUR EXPERT HAS
17 BEEN MISCONSTRUED BY THE PROSECUTION'S EXPERT, WE SHOULD
18 BE ENTITLED TO CLARIFY. WE THINK THE JURY HAS BEEN
19 MISLED, AND WE THINK DR. VICARY'S TESTIMONY WOULD
20 CLARIFY THE ISSUES, AND HAS NOTHING TO DO WITH HIS
21 AGREEMENT WITH DR. WILSON.

22 I HAVE NO INTENTION OF ASKING HIM A SINGLE
23 QUESTION ABOUT DR. WILSON, WHETHER HE AGREES WITH
24 DR. WILSON OR NOT. I INTEND TO ASK HIM ABOUT HIS OWN
25 OPINIONS AND CONCLUSIONS WHICH HAVE BEEN FORMULATED OVER
26 THE COURSE OF FIVE YEARS AND EIGHT MONTHS.

27 AND NOW, YOUR HONOR, IF THE COURT RULES
28 AGAINST ME, I AM GOING TO ASK LEAVE OF COURT TO RECALL

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1 DR. DIETZ FOR THE AREAS THAT I DIDN'T CROSS-EXAMINE HIM
2 ON, BECAUSE IT SEEMED TO ME WITHOUT A FORMAL PLEADING

3 FROM THE PEOPLE, WITHOUT CITATION TO ANY AUTHORITY
4 WHATSOEVER, IT FRANKLY WAS INCONCEIVABLE TO ME; AND
5 GIVEN THE NATURE OF THE DIALOGUE WITH THE COURT, THAT
6 THE COURT WOULD PREVENT US FROM CALLING THE WITNESS IN
7 SURREBUTTAL.

8 SO THAT IS MY FALL-BACK POSITION, OR FALL
9 DOWN POSITION, AS THE CASE MAY BE.

10 THE COURT: OKAY.

11 IN RELATIONSHIP TO THE DISCUSSIONS WE HAD,
12 YOU REFERRED TO --

13 MS. ABRAMSON: I HAVE THEM HERE, YOUR HONOR.

14 THE COURT: BASICALLY WHAT WE WERE DISCUSSING WAS
15 TWO-FOLD: THE SCOPE OF TESTIMONY TO BE OFFERED BY THE
16 DEFENSE OF DR. VICARY IN THE DEFENSE CASE-IN-CHIEF, AND
17 THE DISCUSSIONS FOCUSED ON WHETHER -- AND I AM TRYING TO
18 RECALL SPECIFICALLY NOW WHAT I SAID -- BUT THE
19 DISCUSSIONS FOCUSED ON WHETHER, DURING DR. WILSON'S
20 EXAMINATION, CERTAIN MATTERS WERE BROUGHT UP RELATING TO
21 WHAT DR. WILSON HAD RELIED UPON FROM THE NOTES OR
22 MATERIALS DERIVED FROM DR. VICARY, AND WHETHER OR NOT
23 THAT AREA OF INQUIRY WAS FORECLOSED BY THE COURT, AND
24 WHETHER OR NOT THE COURT HAD MADE SOME STATEMENT AT THE
25 TIME THAT DR. VICARY WAS GOING TO BE A WITNESS CALLED BY
26 THE DEFENSE.

27 AND I REQUESTED THAT THE DEFENSE FIND FOR
28 ME IN THE TRANSCRIPT WHERE THAT OCCURRED DURING

1 DR. WILSON'S TESTIMONY, AND THEN WE CAME BACK THE NEXT
2 DAY, AND I WAS NOT POINTED TO OR DIRECTED TO ANY SUCH
3 MATERIAL IN DR. WILSON'S TESTIMONY. I NEVER SAW THAT.

4 YOU INQUIRED AS TO WHETHER OR NOT YOU WOULD
5 BE LIMITED JUST TO PUTTING ON DR. VICARY TO TESTIFY
6 ABOUT THAT PARTICULAR MATTER, WHATEVER IT WAS, AND I
7 NEVER HEARD WHAT IT WAS, BECAUSE I NEVER WAS DIRECTED TO
8 THAT PORTION OF DR. WILSON'S TESTIMONY.

9 MS. ABRAMSON: CAN I INTERRUPT FOR A MOMENT?

10 THE COURT: LET ME FINISH. LET ME FINISH.

11 THAT WAS THE NATURE OF THAT DISCUSSION.

12 AND THEREAFTER THE COURT RULED THAT THE
13 OTHER EVIDENCE, THE TESTIMONY OF DR. VICARY IN THE
14 DEFENSE CASE-IN-CHIEF, AFTER I REVIEWED HIS TESTIMONY
15 FROM THE FIRST TRIAL, AND THE ARGUMENTS LEADING UP TO
16 HIS TESTIMONY IN THE FIRST TRIAL, AND AFTER I REVIEWED
17 THE OFFER OF PROOF OF THE DEFENSE IN THIS TRIAL AS TO
18 WHAT DR. VICARY WOULD SAY, I RULED THAT HIS TESTIMONY
19 WAS CUMULATIVE IN THE DEFENSE CASE-IN-CHIEF, AND IF
20 ADMISSIBLE AT ALL, WOULD BE SO IN THE REBUTTAL.

21 MS. ABRAMSON: MAY I QUOTE WHAT YOU SAID, YOUR
22 HONOR?

23 THE COURT: YES.

24 MS. ABRAMSON: AT 48,711 YOU SAID: "MY FEELING
25 IS IF DIETZ TESTIFIES, YOU'RE CALLING VICARY BACK, AND
26 HE IS GOING TO BE TESTIFYING ABOUT THESE MATTERS."

27 AND THAT HAD TO DO --

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1 MS. ABRAMSON: WHEN I WAS MAKING THE OFFER OF
2 DR. VICARY'S -- THIS OBJECTION. WHAT I WAS ARGUING HERE
3 IS THAT MY CLIENT'S BEING ATTACKED; THAT WILSON IS BEING
4 ATTACKED, FOR RELYING ON VICARY'S NOTES, BECAUSE
5 VICARY'S NOTES ONLY REFLECTED WHAT MY CLIENT TOLD HIM,
6 SO THAT THERE WAS A DOUBLE-BARRELED CHALLENGE IN THE WAY
7 WILSON WAS EXAMINED, A CHALLENGE BOTH TO MY CLIENT AND
8 TO VICARY.

9 THIS IS WHEN I WAS ARGUING ABOUT THE RIGHT
10 TO PRESENT THE INFORMATION FROM DR. VICARY, NOT OF A
11 DIAGNOSTIC NATURE, BUT THE MANNER IN WHICH THE STORY
12 UNFOLDED AND THE WAY MY CLIENT PRESENTED SYMPTOMATOLOGY
13 WHEN DR. VICARY FIRST SAW HIM.

14 AND THEN I WAS ARGUING I THOUGHT IT WAS
15 PROPER, GIVEN THE ATTACKS ON DR. WILSON, TO SHOW WHAT
16 THE SOURCE OF THE MATERIAL THAT HE RELIED UPON IS. THIS
17 WAS THE NATURE OF THIS DISCUSSION.

18 I INDICATED TO YOU I'D BE HAPPY TO HAVE
19 DR. VICARY GIVE THE ULTIMATE OPINION ON THE MENTAL
20 STATE, BUT I KNEW THAT WOULD BE CONSIDERED DUPLICATIVE.

21 SO I WAS TALKING ABOUT THE OTHER REASON TO
22 CALL DR. VICARY, WHICH WAS TO SUPPORT MY CLIENT'S
23 CREDIBILITY, AND TO SUPPORT THE CREDIBILITY OF

24 DR. WILSON CONCERNING WHETHER OR NOT MALINGERING WAS
25 INVOLVED, WHETHER OR NOT THE WAY IN WHICH THE STORY WAS
26 TOLD AND THE SYMPTOMS THAT MY CLIENT WAS HAVING WERE
27 FLORID AND ACUTE AND EXTREME AT THAT TIME, WERE
28 CONSISTENT WITH DR. WILSON'S CONCLUSIONS ABOUT SYMPTOMS.

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1 NOT EVEN GETTING TO THE ULTIMATE DIAGNOSIS.

2 THAT'S WHAT YOU SAID, YOUR HONOR. "MY
3 FEELING IS IF DIETZ TESTIFIES, YOU'RE CALLING VICARY
4 BACK, AND HE IS GOING TO BE TESTIFYING ABOUT THESE
5 MATTERS."

6 AND ULTIMATELY WHAT YOU RULED, WHICH WAS
7 THE NEXT DAY IN VOLUME 287 -- I DON'T THINK WE HAD A
8 VERY LONG DIALOGUE ABOUT IT THE NEXT DAY. I WAS NOW
9 UNDER THE ASSUMPTION THAT I WOULD BE CALLING DR. VICARY
10 IN SURREBUTTAL.

11 AND I WOULD POINT OUT, YOUR HONOR, THAT
12 THIS IS REALLY A RATHER EXTRAORDINARY SITUATION WHERE
13 THE PEOPLE NEVER FILED A MOTION TO PROHIBIT THIS, NEVER
14 CITED ANY AUTHORITY. I AM LED TO BELIEVE -- AND I AM
15 NOT SUGGESTING THAT THE COURT WAS TRYING TO MISLEAD
16 ME -- BUT I WAS LED TO BELIEVE, BASED ON THIS ENTIRE
17 COLLOQUY ABOUT WHEN DR. VICARY SHOULD TESTIFY, AND MY
18 OWN EXPERIENCE IN SUCH CASES, THAT I WOULD BE PERMITTED
19 TO CALL HIM IN SURREBUTTAL AND CONDUCT WHAT I AM SURE

20 THE COURT -- I MEAN, I ACTUALLY KEPT MY PROMISE AND SAID
21 I WAS GOING TO BE BRIEF WITH DR. DIETZ, AND I WAS, AND
22 IGNORED WHOLE AREAS BECAUSE I FELT THEY WERE BEST
23 DONE -- RATHER THAN ARGUING WITH THAT WITNESS -- BEST
24 DONE BY CALLING ANOTHER WITNESS TO REFUTE IT.
25 BUT LET ME GET TO WHEN WE FINALLY HAD --
26 FIRST WE WERE TALKING ABOUT THE VIDEOTAPE.
27 THE COURT: I RULED THAT HIS TESTIMONY ON
28 DIRECT -- ON THE DEFENSE CASE-IN-CHIEF WOULD BE

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1 CUMULATIVE, AND THEN I INDICATED THAT, IF ADMISSIBLE AT
2 ALL, IT WOULD BE ADMISSIBLE IN REBUTTAL OR SURREBUTTAL.
3 I MEAN, THAT'S BASICALLY WHAT I SAID.
4 MS. ABRAMSON: I DON'T REMEMBER YOU USING THE
5 SCARY LANGUAGE "ADMISSIBLE AT ALL".
6 THE COURT: PERHAPS I DIDN'T USE THAT PHRASE.
7 MS. ABRAMSON: WHEN YOU SAY THAT, YOU KNOW, THE
8 HAIRS ON THE BACK OF MY HEAD STAND OUT. I GO THROUGH
9 THIS PANIC ATTACK REACTION, YOUR HONOR. I LISTEN. I
10 DON'T BELIEVE YOU SAID THAT.
11 THE COURT: IT COULD BE I DIDN'T USE THAT
12 PARTICULAR PHRASE. I AM NOT SAYING I DID. BUT
13 GENERALLY THAT WAS THE NATURE OF THE CONVERSATION. IT
14 WAS CUMULATIVE ON THE CASE-IN-CHIEF, AND WOULD BE
15 SURREBUTTAL EVIDENCE.

16 MS. ABRAMSON: AND I DID MAKE AN ARGUMENT THAT I
17 THINK IS EVEN MORE APROPOS AT THIS TIME.
18 WELL, FIRST OF ALL, THERE IS ALSO THE
19 SUGGESTION THAT ALL THE SYMTOMATOLOGY THAT MY CLIENT
20 SHOWED WAS INSPIRED BY DR. WILSON'S 801 TESTIMONY.
21 OBVIOUSLY THE SYMPTOMS DR. VICARY SAW, HE SAW FIVE YEARS
22 BEFORE THAT.
23 BUT I ALSO MADE THE ARGUMENT, AND I THINK
24 IT'S EVEN TRUE NOW, THAT BASICALLY IF DR. VICARY IS
25 PROHIBITED FROM TESTIFYING, WE HAVE MADE A DE FACTO
26 ELECTION WITHOUT EVER KNOWING WE WERE BEING PUT TO THE
27 TEST OF KNOWING WHICH WITNESS TO CALL.
28 THE COURT: THAT'S THE ARGUMENT YOU MADE DURING

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1 THE PHASE OF WHEN YOU WERE TRYING TO HAVE HIM TESTIFY IN
2 YOUR CASE-IN-CHIEF.
3 MS. ABRAMSON: IT IS EVEN MORE TELLING NOW THAT
4 THERE HAS BEEN NEW INFORMATION AND A NEW DIAGNOSIS FROM
5 DR. DIETZ, WHICH, AS THE COURT KNOWS, WE GOT ORALLY.
6 AND I WOULD INDICATE WE DID NOT HEAR ORALLY
7 IN OUR MEETINGS WITH HIM SOME OF THE THINGS HE WAS GOING
8 TO SAY, AND TO SOME EXTENT THAT WAS BECAUSE THE
9 PROSECUTION STARTED A BARRAGE OF WORDS WHEN WE TRIED TO
10 GET ANSWERS TO CERTAIN QUESTIONS FROM DR. DIETZ, AND HE
11 WAS NOT ALLOWED TO ANSWER CERTAIN QUESTIONS.

12 SO WE NEVER GOT A REPORT. AND THIS IS FROM
13 AN EXPERT WHO USUALLY WRITES ONE BETWEEN 125 AND 200
14 PAGES LONG.

15 WE DID NOT KNOW SPECIFICALLY WHAT HE WAS
16 GOING TO SAY. THERE WAS NO WAY TO PREPARE DR. WILSON TO
17 COUNTER IT. AND NOW WE ARE FACED WITH THE PROSPECT --
18 WE ARE BEING TOLD IN A CAPITAL CASE THE DEFENDANT CAN'T
19 REBUT THE PROSECUTION'S PSYCHIATRIC EXPERT.

20 THE COURT: ALL RIGHT. LET ME THEN PROCEED HERE.
21 I DIGRESSED TO DEAL WITH ONE OF THE SUBJECTS THAT YOU
22 HAVE RAISED.

23 THE PURPOSE OF SURREBUTTAL EVIDENCE, THAT
24 IS EVIDENCE OFFERED BY THE DEFENSE AFTER THE PROSECUTION
25 HAS PRESENTED ITS REBUTTAL, IS TO PERMIT THE DEFENDANT
26 TO PRESENT EVIDENCE TO REBUT THAT PRESENTED BY THE
27 PROSECUTION; TO REBUT NEW MATTERS PRESENTED BY THE
28 PROSECUTION WHICH THE DEFENDANT COULD NOT HAVE PRESENTED

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1 OR OPPOSED AT THE TIME IT PRESENTED ITS CASE-IN-CHIEF.

2 THAT'S THE PURPOSE OF SURREBUTTAL.

3 SURREBUTTAL IS NOT DESIGNED FOR THE PRESENTATION OF
4 CUMULATIVE EVIDENCE TO THAT WHICH WAS PRESENTED IN THE
5 DEFENSE CASE-IN-CHIEF.

6 IN EVALUATING SURREBUTTAL, THE COURT HAS TO
7 WAIT UNTIL THE PEOPLE'S REBUTTAL IS PRESENTED BEFORE

8 EVALUATING AND DETERMINING WHAT IT IS THAT WOULD BE
9 ADMISSIBLE IN SURREBUTTAL, AND THAT HAS OCCURRED. THE
10 COURT HAS HEARD THE PEOPLE'S REBUTTAL, AND NOW THE
11 DEFENSE IS OFFERING SURREBUTTAL.

12 AS THE PROSECUTION ARGUES, AS THE SUPREME
13 COURT IN PEOPLE VERSUS STOLL STATED AT 49 CAL.3D 1159:

14 "THE TRIAL COURT HAS BROAD
15 DISCRETION TO LIMIT THE NUMBER OF
16 COMPETING EXPERTS, OR TO EXCLUDE
17 CUMULATIVE OR CONFUSING EXPERT TESTIMONY
18 ALL TOGETHER."

19 AND THAT IS FOLLOWED BY A CITATION TO
20 EVIDENCE CODE SECTION 352. THIS IS A FOOTNOTE AT PAGE
21 1159 OF THAT DECISION. ALBEIT IT WAS NOT IN REFERENCE
22 TO SURREBUTTAL, IT DOES STATE A GENERAL PRINCIPLE THAT
23 THE TRIAL COURT HAS A BROAD DISCRETION REGARDING THE
24 NUMBER OF COMPETING EXPERTS, AS WELL AS THE BROAD
25 DISCRETION TO DEAL WITH WHAT IS AND WHAT IS NOT
26 ADMISSIBLE EVIDENCE IN SURREBUTTAL.

27 PRIOR TO THE DEFENSE PRESENTATION OF
28 EVIDENCE IN THIS CASE, THE COURT MADE IT CLEAR -- AND

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1 IT'S BEEN MENTIONED HERE AS WELL -- THAT BEFORE ANY
2 SOURCE WITNESSES COULD BE CALLED TO TESTIFY ABOUT
3 SYMPTOMS OR STRESSORS OR BACKGROUND INFORMATION

4 REGARDING THE DEFENDANT, THE DEFENDANT WOULD FIRST BE
5 REQUIRED TO TESTIFY AND PLACE HIS MENTAL STATE IN ISSUE;
6 OTHERWISE ALL THIS BACKGROUND MATERIAL AND INFORMATION
7 WOULD HAVE NO RELEVANCE, AND HAVE NOTHING TO DO WITH
8 THIS CASE, AND WOULD NORMALLY BE REGARDED AS IRRELEVANT
9 AND EXCLUDABLE UNDER SECTION 352 OF THE EVIDENCE CODE.

10 THE ONLY BASIS FOR SUCH EVIDENCE BEING
11 ADMISSIBLE WAS AS IT RELATED TO THE DEFENDANT'S MENTAL
12 STATE AT THE TIME OF THE CRIME.

13 THE DEFENDANT WAS ALSO PUT ON NOTICE THAT
14 BEFORE ANY OF THESE SOURCE WITNESSES WOULD BE PERMITTED
15 TO TESTIFY, THE DEFENSE EXPERT WOULD ALSO BE EXPECTED TO
16 TESTIFY, AND STATE HIS RELIANCE UPON THE MATERIALS, THE
17 SOURCE INFORMATION; WHETHER IT BE FAMILY MEMBERS,
18 FRIENDS OR OTHERS. AND TO THE EXTENT THAT THAT
19 MATERIAL -- THOSE SOURCE WITNESSES OR SOURCE INFORMATION
20 WAS DISPUTED BY THE PROSECUTION, THEN THE COURT WOULD
21 EXERCISE ITS DISCRETION IN EVALUATING THAT MATERIAL THAT
22 WOULD BE OFFERED BY THE DEFENDANT TO SUPPORT AND
23 BUTTRESS THE EXPERT OPINION AND THE TESTIMONY OF THE
24 DEFENDANT BY REVIEWING THOSE SOURCE WITNESSES -- SOURCE
25 WITNESSES WHICH THE DEFENDANT OFFERED, IN DETERMINING
26 WHETHER OR NOT THERE WAS A BASIS FOR ADMISSIBILITY OF
27 THAT TESTIMONY, AND THAT DID OCCUR DURING THE
28 PRESENTATION OF THE DEFENSE CASE.

1 AS WE HAVE DISCUSSED HERE AT THE CONCLUSION
2 OF THE DEFENSE CASE, THE DEFENDANT OFFERED THE TESTIMONY
3 OF DR. VICARY. AND THE COURT, AS I SAID, REVIEWED THE
4 OFFER OF EVIDENCE AS ARTICULATED BY MS. ABRAMSON AS TO
5 WHAT DR. VICARY WOULD TESTIFY ABOUT. I ALSO REVIEWED
6 HIS TESTIMONY FROM THE FIRST TRIAL, AND AT THAT TIME
7 DETERMINED THAT HIS TESTIMONY WOULD BE CUMULATIVE, AS I
8 RECALL IT.

9 THE AREA THAT WAS ISOLATED THAT MIGHT BE
10 THE SUBJECT OF DR. VICARY'S TESTIMONY WAS THAT AREA IN
11 WHICH THERE WAS REFERENCE BY DR. WILSON TO HAVING RELIED
12 UPON DR. VICARY'S REPORTS OR NOTES, AND EITHER THERE WAS
13 AN OBJECTION TO WHAT IT WAS THAT DR. VICARY HAD STATED
14 IN THOSE REPORTS OR NOTES, OR THE COURT HAD FORECLOSED
15 THAT INQUIRY.

16 AND THEREAFTER THE COURT REQUESTED THAT THE
17 DEFENSE PROVIDE IT WITH A CITATION TO THOSE AREAS OF
18 DR. WILSON'S TESTIMONY TO DETERMINE WHETHER OR NOT THAT
19 DID OCCUR IN DR. WILSON'S TESTIMONY, SINCE HE WAS ON THE
20 STAND FOR MANY DAYS, AND I HAD NO CLEAR RECOLLECTION OF
21 THE SPECIFICS THAT THE DEFENSE WAS REFERRING TO, AND I
22 ASKED FOR REFERENCE TO THE TRANSCRIPT.

23 AND THAT WAS NEVER PROVIDED TO ME AS TO
24 SPECIFICALLY THIS FACT THAT WAS IN DISPUTE, OR THIS FACT
25 AS STATED BY DR. WILSON AS HAVING BEEN RELIED UPON IN
26 REGARD TO WHAT DR. VICARY HAD SAID, AND IT WAS
27 FORECLOSED, OR IN SOME FASHION WAS NOT PERMITTED.

28 AND THEREFORE THE COURT WAS NOT PRESENTED

1 WITH THAT MATERIAL, AND I RULED THAT THE OFFER OF
2 EVIDENCE OF DR. VICARY AS PRESENTED TO ME WAS CUMULATIVE
3 AT THAT STAGE.

4 THE QUESTION NOW IS WHETHER OR NOT ANYTHING
5 HAS OCCURRED DURING THE PEOPLE'S REBUTTAL THAT
6 INTRODUCES NEW MATTER THAT THE DEFENDANT COULDN'T HAVE
7 ANTICIPATED AND DEALT WITH IN ITS CASE-IN-CHIEF, AND
8 THAT NOW SHOULD BE THE SUBJECT OF SURREBUTTAL.

9 AND WHAT I LOOK AT IS WHAT OCCURRED DURING
10 THE PEOPLE'S REBUTTAL, AND WHEN I DO THAT, I LOOK AT
11 DR. VICARY IN TWO DIFFERENT WAYS, AND LOOK AT THE OFFER
12 OF PROOF HERE BY THE DEFENSE AND -- OR SEPARATE THE
13 OFFER IN THIS WAY:

14 ONE, DR. VICARY AS A SOURCE WITNESS. THAT
15 IS, THAT HE MADE OBSERVATIONS AND OBSERVED THINGS AND
16 FORMED OPINIONS ON WHICH DR. WILSON RELIED, AND UPON
17 WHICH DR. VICARY -- I'M SORRY, THAT DR. DIETZ DID NOT
18 PROBABLY PREFER TO, AS TO WHETHER OR NOT, BY WHAT
19 OCCURRED DURING THE REBUTTAL, SOMEHOW DR. VICARY'S
20 OBSERVATIONS AND OPINIONS AND DIAGNOSIS IS NOW
21 ADMISSIBLE BASED ON WHAT WAS OFFERED DURING THE REBUTTAL
22 STAGE BY THE PROSECUTION.

23 I DON'T FIND THAT ANYTHING THAT OCCURRED
24 DURING THE TESTIMONY OF DR. DIETZ IN REGARD TO THESE
25 ISSUES RAISES ANY NEW MATTER. HE DOESN'T DISPUTE ANY OF

26 THE OBSERVATIONS OF DR. VICARY. WHETHER HE DID OR
27 DIDN'T CONSIDER THOSE OBSERVATIONS IS SOMETHING FOR THE
28 JURY TO EVALUATE, NOT FOR DR. VICARY TO COMMENT ON.

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1 THE PURPOSE OF SURREBUTTAL ISN'T TO CALL A
2 WITNESS TO CRITIQUE A WITNESS OFFERED IN REBUTTAL, BUT
3 TO REFUTE NEW MATTERS THAT WERE NOT ANTICIPATED BY THE
4 DEFENSE, AND COULDN'T BE ANTICIPATED BY THE DEFENSE IN
5 ITS PRESENTATION OF ITS CASE-IN-CHIEF.

6 AND MUCH OF WHAT IT IS THAT THE DEFENSE
7 REFERS TO IN ITS OFFER HERE IS AS IT WAS WHEN I LOOKED
8 AT IT, WHEN THE PEOPLE -- WHEN THE DEFENSE RESTED IN ITS
9 DEFENSE CASE-IN-CHIEF, CUMULATIVE EVIDENCE. IT JUST IS
10 A REGURGITATION OF WHAT DR. WILSON TESTIFIED ABOUT. IT
11 IS JUST ANOTHER WITNESS TESTIFYING ABOUT OPINIONS THAT
12 WERE THE SUBJECT OF THE TESTIMONY OF DR. WILSON, AND
13 REALLY ARE NOT NEW MATTERS, BUT PURELY CUMULATIVE
14 EVIDENCE.

15 THE COURT ISN'T DEALING WITH ANY ABSOLUTE
16 RULE. THE COURT IS DEALING WITH THIS PARTICULAR CASE
17 AND WHAT IS PRESENTED HERE.

18 MS. ABRAMSON: YOUR HONOR, IF I COULD JUST FOR A
19 MOMENT --

20 THE COURT: NO. NO, LET ME FINISH.

21 WHAT IS OCCURRING IS, AS I SAID, THAT THE

22 COURT IS LOOKING AT DR. VICARY BECAUSE OF THE WAY IT'S
23 PRESENTED BY THE DEFENSE IN ITS OFFER HERE AS -- IN TWO
24 DIFFERENT WAYS.
25 ONE IS AS A WITNESS TO SOURCE INFORMATION,
26 AND A WITNESS AS TO OPINIONS AND DIAGNOSIS AND MENTAL
27 STATE OF THE DEFENDANT AT THE TIME OF THE CRIME, ALL OF
28 WHICH WOULD BE CUMULATIVE TO WHAT IT IS THAT DR. WILSON

-15097

1 TESTIFIED ABOUT, AND THAT IS NOT PROPERLY THE SUBJECT OF
2 SURREBUTTAL TO WHAT WAS PRESENTED BY DR. DIETZ.
3 THE OTHER ASPECT OF THE OFFER BY THE
4 DEFENSE IS THAT DR. VICARY HIMSELF IS AN EXPERT IN THE
5 FIELD OF FORENSIC PSYCHIATRY, AND SEPARATE AND APART
6 FROM HIS INVOLVEMENT IN THIS CASE, SEPARATE AND APART
7 FROM HIS DEALINGS WITH THE DEFENDANT, HE HAS SOME
8 GENERAL INFORMATION ABOUT MATTERS THAT WERE TESTIFIED TO
9 BY DR. DIETZ. THE AREA THAT I SPEAK ABOUT IS THE
10 SUBJECT OF THIS DIAGNOSIS OF GENERAL ANXIETY DISORDER,
11 AND CERTAIN GENERAL CHARACTERISTICS DESCRIBED BY
12 DR. DIETZ AS TO THE IMPACT OF THAT THOUGHT PROCESS ON
13 THE DIAGNOSIS OF AN INDIVIDUAL, OR THE THOUGHT PROCESS
14 OF AN INDIVIDUAL.
15 SINCE THAT DIAGNOSIS WAS NOT PRESENTED
16 DURING THE DEFENSE CASE, THE DEFENSE WAS NOT MADE AWARE
17 OF IT, AND THAT IS NEW MATTER. THAT IS THE TYPE OF

18 DIAGNOSIS, QUITE FRANKLY, IN LISTENING TO DR. DIETZ'
19 TESTIMONY, SYMPTOMS, THINGS OF THAT NATURE, I WAS STRUCK
20 BY THE SIMILARITY OF WHAT HE SAYS THE DEFENDANT -- HOW
21 HE DESCRIBED THE DEFENDANT, AND HOW IT WAS DESCRIBED BY
22 DR. WILSON. I DON'T SEE THIS GREAT CONFLICT BETWEEN THE
23 TWO, QUITE FRANKLY, IN MUCH OF WHAT WAS SAID.
24 HOWEVER, THERE IS A DIFFERENT DIAGNOSIS.
25 NOW, TO THE EXTENT AND ONLY TO THE EXTENT
26 THAT DR. VICARY IS PRESENTED AS AN EXPERT IN FORENSIC
27 PSYCHIATRY AND TESTIFIES, AND IS PROPOSED TO TESTIFY AS
28 TO HIS UNDERSTANDING OF GENERAL ANXIETY DISORDER AND HOW

-15096

1 IT AFFECTS INDIVIDUALS.
2 NOT HOW IT DID OR DID NOT AFFECT THE
3 DEFENDANT IN THIS CASE, NOT HOW POST-TRAUMATIC STRESS
4 DISORDER DID OR NOT AFFECT THE DEFENDANT IN THIS CASE.
5 NOT AS TO HOW HE DIAGNOSED THE DEFENDANT. NOTHING OF
6 THAT NATURE, BUT JUST AS A GENERALIST, TALKING AS A
7 GENERALIST ON THE SUBJECT OF GENERAL ANXIETY AND STRESS
8 DISORDER, WOULD THERE BE AN AREA OF PROPER SURREBUTTAL;
9 THAT IS, AN AREA THAT WAS NOT BROUGHT OUT DURING THE
10 DEFENSE CASE AND WAS NEW MATTER THAT WAS BROUGHT OUT
11 DURING THE PEOPLE'S REBUTTAL.
12 AND ONLY TO THAT EXTENT DO I SEE THAT AS
13 PROPER SURREBUTTAL. THAT IS, NOTHING CASE SPECIFIC TO

14 THIS DEFENDANT. NOTHING REGARDING ANY DIAGNOSIS OF THIS
15 DEFENDANT, ANY OPINIONS ABOUT THIS DEFENDANT, ALL OF
16 WHICH WAS MATTER COVERED BY DR. WILSON AND IS NOT
17 SUBJECT TO SURREBUTTAL OR THE SCOPE OF SURREBUTTAL.

18 ALL THESE OTHER MATTERS THAT HAVE BEEN
19 MENTIONED HERE, WHETHER IT'S PERSONALITY TRAITS AND
20 THINGS OF THAT SORT, ALL OF THAT WAS COVERED BY
21 DR. WILSON AND BY DR. DIETZ, AND IT'S BASICALLY ALL BEEN
22 PRESENTED.

23 AND THE ONLY AREA THAT I SEE OF NEW MATTER,
24 AS I HAVE INDICATED, TO REPEAT, IS THAT WHICH WOULD COME
25 FROM DR. VICARY, OR ANY OTHER EXPERT WHO THE DEFENSE
26 WISHED TO CALL, ON THAT GENERAL SUBJECT OF IMPEACHMENT
27 RELATING TO THIS NEW MATTER OF GENERAL ANXIETY DISORDER
28 AND HOW IT CAN AFFECT OR IMPACT INDIVIDUALS IN GENERAL,

-15095

1 NOT CASE-SPECIFIC TO THIS CASE.

2 MS. ABRAMSON: WELL, THE PROBLEM WITH THAT, YOUR
3 HONOR, IS MY CLIENT DOESN'T HAVE GENERAL ANXIETY
4 DISORDER, SO I DON'T UNDERSTAND.

5 I MEAN, THE FACT OF THE MATTER IS, FROM OUR
6 PERSPECTIVE, GENERAL ANXIETY DISORDER ISN'T RELEVANT,
7 BECAUSE IT'S NOT WHAT HE HAS.

8 THE COURT: THEN YOU DON'T HAVE TO PUT ON ANY
9 EVIDENCE ABOUT IT.

10 MS. ABRAMSON: I AM SURE IT WOULD BE MUCH BETTER
11 FOR EVERYBODY IN THIS COURTROOM BUT FOR US, BUT THAT'S
12 NOT EXACTLY HOW WE FEEL OUR RESPONSIBILITY TO OUR CLIENT
13 LIES.

14 AND I DO THINK THAT WHAT THE COURT HAS
15 BASICALLY SAID IS THAT UNBEKNOWNST TO US WE MADE AN
16 ELECTION OF EXPERTS, AND IF THAT IS TRUE, IF I SHOULD
17 HAVE ANTICIPATED THAT THIS COURT WOULD FASHION THIS RULE
18 THAT IN SURREBUTTAL THE DEFENSE CAN'T PUT ON AN EXPERT
19 TO ACTUALLY TESTIFY CONCERNING THIS PARTICULAR CASE,
20 THEN I WANT IT SPREAD ON THE RECORD THAT I HAVE BEEN
21 UTTERLY AND COMPLETELY INCOMPETENT IN REPRESENTING
22 MR. MENENDEZ IN THIS CASE; THAT DR. VICARY IS THE
23 WITNESS I SHOULD HAVE CALLED, ANTICIPATING THIS ULTIMATE
24 RULING, AND PERHAPS INDEED I SHOULD HAVE.

25 AND I WANT IT VERY CLEAR THAT I OPERATED
26 UNDER THE -- A COMPLETELY ERRONEOUS, FALLACIOUS AND
27 STUPID ASSUMPTION THAT I WOULD BE ABLE TO CALL
28 DR. VICARY TO REFUTE THE FACTUAL INACCURACIES, THE

-15094

1 MISLEADING AND CONFUSING CONCLUSIONS THAT DR. DIETZ PUT
2 FORWARD.

3 AND SINCE I WAS OBVIOUSLY TOTALLY
4 RIDICULOUS TO THINK THAT, I HAVE BEEN INCOMPETENT IN
5 REPRESENTING THIS DEFENDANT IN THIS CAPITAL CASE.

6 NOW I WOULD LIKE A RECESS TO TALK TO
7 DR. VICARY TO SEE IF THERE IS ANYTHING OF ANY VALUE HE
8 CAN ADD TO THIS PROCESS NOW THAT THE HEART OF THIS
9 SURREBUTTAL HAS BEEN CUT OUT.

10 THE COURT: AS FAR AS YOUR OBSERVATIONS, YOU MAY
11 STATE ANYTHING ON THE RECORD YOU WANT TO STATE AS FAR AS
12 YOUR THOUGHT PROCESS, WITH THE UNDERSTANDING THAT THE
13 RECORD IS FULLY AVAILABLE FOR A REVIEWING COURT TO
14 REVIEW OBJECTIVELY YOUR POSITION.

15 ALL RIGHT. HOW MUCH TIME DO YOU NEED?

16 MS. ABRAMSON: ABOUT 15, 20 MINUTES.

17 THE COURT: OKAY. WE'LL MAKE IT --

18 MS. ABRAMSON: THERE IS ONE OTHER THING I WANTED
19 TO SAY, YOUR HONOR.

20 THE COURT: BEFORE WE GET TO THAT, WHAT IS THE
21 STORY WITH YOUR CALENDAR, MR. GESSLER?

22 MR. GESSLER: STILL WAITING FOR IT, YOUR HONOR.
23 IT WAS SUPPOSED TO BE HERE 45 MINUTES AGO. I HAVEN'T
24 HAD A CHANCE TO CHECK.

25 THE COURT: YES.

26 MS. ABRAMSON: YOUR HONOR, I STILL WOULD INDICATE
27 THAT THERE WAS NO DISCUSSION OF PERSONALITY TRAITS.

28 IF THE COURT MAY RECALL, BEFORE DR. DIETZ

1 TESTIFIED HE WANTED TO SAY THERE WERE FEATURES OF

2 PERSONALITY DISORDERS THAT HE FOUND IN MY CLIENT, AND
3 THE COURT WOULD NOT ALLOW HIM TO IDENTIFY THOSE THINGS
4 THAT HE STATED WERE FEATURES OF A PERSONALITY DISORDER,
5 AND THERE WAS NO SUCH EVIDENCE THAT I AM AWARE OF FROM
6 DR. WILSON.

7 SO I DO THINK THE PEOPLE WERE PERMITTED TO
8 INJECT INTO THE CASE SOMETHING KNEW, WHICH IS THIS
9 SUPPOSED ASSESSMENT OF MY CLIENT'S PERSONALITY TRAITS,
10 THAT WE SHOULD BE PERMITTED TO REBUT, AND THAT HAD --
11 AND THAT WOULD BE VERY BRIEF TESTIMONY. IT HAS TO DO
12 WITH DR. DIETZ' CONCLUSION THAT MY CLIENT HAS THIS
13 SHALLOW AND SHIFTING EMOTION; THAT -- AND IT OMITTS -- IT
14 ALSO MISSTATES WHAT SUGGESTABILITY MEANS, AND IT ALSO
15 OMITTS CERTAIN OTHER PERSONALITY TRAITS THAT HE HAS THAT
16 ARE RELEVANT TO MENTAL STATE AT THE TIME OF THE CRIME.

17 AND I THINK THAT IN ADDITION TO THAT -- AND
18 I JUST DON'T SEE HOW THAT ISN'T NEW MATERIAL, SINCE
19 DR. WILSON NEVER ADDRESSD IT.

20 BUT I ALSO THINK THAT BEYOND JUST A GENERAL
21 DISCUSSION OF GENERALIZED ANXIETY DISORDER, THAT
22 DR. VICARY SHOULD BE PERMITTED TO TESTIFY TO REFUTE
23 CERTAIN SPECIFIC THINGS DR. DIETZ SAID ABOUT WHETHER ONE
24 CAN OR CANNOT DIAGNOSIS FOR P.T.S.D. AS A FORENSIC
25 PSYCHIATRIST, AND SOME OF THE GENERAL TERMS THAT HE
26 INSINUATED INTO THIS CASE.

27 DR. WILSON NEVER TALKED ABOUT PANIC ATTACK,
28 THAT IS SOMETHING THAT DR. DIETZ HAS TALKED ABOUT, AND I

1 BELIEVE WE SHOULD BE ABLE TO REFUTE.

2 AND I THINK WE SHOULD ALSO BE ABLE TO
3 REFUTE THE NOTION THAT -- WELL, I THINK WE CAN DEAL WITH
4 WHETHER EVEN GENERAL ANXIETY DISORDER IN AN AROUSED
5 STATE DOES INTERFERE WITH HIGHER REASONING. I SUPPOSE
6 WE ARE PERMITTED TO DO THAT, SINCE WE ARE TALKING ABOUT
7 GENERALIZED ANXIETY DISORDER. SO WE WILL DO THAT.

8 THE COURT: ALL RIGHT.

9 AS FAR AS THE --

10 MS. ABRAMSON: I DO THINK THERE IS ONE THING,
11 THOUGH, THAT'S TROUBLING.

12 THE COURT: YES.

13 MS. ABRAMSON: I MEAN, THERE'S MUCH THAT'S
14 TROUBLING, BUT ABOUT DR. VICARY.

15 I WOULD LIKE TO BE ABLE TO AT LEAST LET THE
16 JURY KNOW -- I MEAN, IT WILL LOOK LIKE WE ARE HIDING
17 SOMETHING BAD IF I CANNOT EVEN GET DR. VICARY TO
18 INDICATE THAT YES, HE IS THE SAME DR. VICARY THEY HAVE
19 HEARD ABOUT. YES, HE HAS EXAMINED ERIK MENENDEZ. YES,
20 HE DID TURN NOTES OVER TO DR. WILSON.

21 SINCE OBVIOUSLY HE'S NOT GOING TO BE ABLE
22 TO STATE ANY OF HIS CONCLUSIONS OR OBSERVATIONS, I DON'T
23 WANT THEM TO -- I MEAN, IT'S GOING TO LOOK VERY PECULIAR
24 WHEN HE DOESN'T, BECAUSE THEY'VE HEARD ABOUT HIM, AND
25 THEY ARE GOING TO WONDER IF WE ARE HIDING SOMETHING
26 NEGATIVE.

27 THE COURT: I HAVE NO PROBLEM WITH YOU
28 IDENTIFYING HIM AS THE SAME PERSON THAT WAS REFERRED TO

-15091

1 IN THE EARLIER TESTIMONY.

2 MS. ABRAMSON: OKAY.

3 AND THEN I AM GOING TO INDICATE THAT HE'S
4 BEING CALLED FOR THE LIMITED PURPOSE OF RESPONDING TO
5 THE TESTIMONY OF DR. DIETZ CONCERNING GENERAL ANXIETY
6 DISORDER.

7 THE COURT: YES. CERTAIN SPECIFIC THINGS, AND
8 LIMIT IT TO THAT, SURE.

9 OKAY. WE WILL TAKE A RECESS, AND WE WILL
10 RESUME AT 20 MINUTES TO THE HOUR. THAT'S 15 MINUTES
11 FROM NOW. AND WE WILL GET THE -- DO YOU ANTICIPATE
12 PROCEEDING THEN WITH DR. VICARY? IF YOU DO, WE'LL HAVE
13 THE JURY COME OVER.

14 MS. ABRAMSON: I WOULD LIKE TO TALK TO HIM FIRST,
15 JUDGE. WE DIDN'T ACTUALLY ANTICIPATE THIS RULING.

16 THE COURT: OKAY. WHY DON'T YOU FIND OUT,
17 BECAUSE THERE IS SOME JUROR WHO ACTED IN RELIANCE UPON
18 THE JUROR WHO WAS EXCUSED HAVING AN APPOINTMENT THIS
19 AFTERNOON, WHO HAS ALSO SCHEDULED SOMETHING THIS
20 AFTERNOON AROUND 2:30.

21 MS. ABRAMSON: SO WE'RE GOING TO HAVE A SHORT
22 DAY.

23 MR. GESSLER: I WILL CHECK DURING THE RECESS,
24 YOUR HONOR. I INTEND TO DO THAT.
25 THE COURT: YES.
26 (AT 11:20 A.M. PROCEEDINGS WERE
27 ADJOURNED TO 1:30 P.M.OF THE
28 SAME DAY)

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1 VAN NUYS, CALIFORNIA; THURSDAY, FEBRUARY 15, 1996
2 1:30 P.M.
3 DEPARTMENT NW "N" HON. STANLEY M. WEISBERG, JUDGE
4 (APPEARANCES AS HERETOFORE NOTED)
5 (MARY LU MURPHY, OFFICIAL REPORTER)
6
7 (THE FOLLOWING PROCEEDINGS WERE
8 HELD IN OPEN COURT OUT OF THE
9 PRESENCE OF THE JURY:)
10
11 THE COURT: ALL RIGHT. EVERYONE IS HERE, AND WE
12 WILL RESUME WITH THE TRIAL. WE WILL HAVE THE JURY OUT.
13 MR. GESSLER: WE DO HAVE THE CALENDAR, YOUR
14 HONOR.
15 (THE JURY ENTERS THE COURTROOM
16 AND THE FOLLOWING PROCEEDINGS
17 WERE HELD:)
18
19 THE COURT: THE JURY IS IN THE JURY BOX.
20 GOOD AFTERNOON. BELIEVE IT OR NOT, WE'RE

21 MAKING PROGRESS HERE.

22 ALL RIGHT, THE DEFENSE MAY CALL ITS NEXT

23 WITNESS.

24 MS. ABRAMSON: THANK YOU, YOUR HONOR.

25 WE CALL DR. WILLIAM VICARY.

26

27 ///

28 ///

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1 WILLIAM VICARY,

2 CALLED AS A WITNESS ON BEHALF OF THE DEFENSE, WAS SWORN

3 AND TESTIFIED AS FOLLOWS:

4

5 THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE

6 TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE

7 THIS COURT WILL BE THE TRUTH, THE WHOLE TRUTH, AND

8 NOTHING BUT THE TRUTH, SO HELP YOU GOD.

9 THE WITNESS: I DO.

10 THE CLERK: PLEASE TAKE THE STAND AND STATE YOUR

11 NAME FOR THE RECORD.

12 THE WITNESS: WILLIAM VICARY.

13 THE CLERK: SPELL YOUR LAST NAME, PLEASE.

14 THE WITNESS: V-I-C-A-R-Y.

15

16 DIRECT EXAMINATION

17 BY MS. ABRAMSON:

18 Q. DR. VICARY, WHAT IS YOUR PROFESSION?

19 A. I AM A PSYCHIATRIST.

20 Q. DO YOU HAVE A PARTICULAR PSYCHIATRIC

21 SPECIALTY?

22 A. YES.

23 Q. WHAT IS IT?

24 A. FORENSIC PSYCHIATRY.

25 Q. AND WE'VE ALREADY HAD A DEFINITION IN THIS

26 COURTROOM OF FORENSIC PSYCHIATRY, SO WILL YOU GIVE US A

27 BRIEF SUMMARY OF YOUR EDUCATIONAL BACKGROUND AND

28 PROFESSIONAL EXPERIENCE IN THE AREA OF FORENSIC OR LEGAL

-15088

1 PSYCHIATRY.

2 FIRST START WITH YOUR EDUCATION AND THEN

3 I'LL JUMP IN LATER.

4 A. I GRADUATED FROM THE UNIVERSITY OF NEW

5 MEXICO AND WENT TO HARVARD LAW SCHOOL, FINISHING THERE

6 IN 1969.

7 Q. SO YOU BECAME A LAWYER FIRST?

8 A. I WANTED TO BE A LAWYER, AND THEN I HAD A

9 CHANGE OF HEART MY SECOND YEAR IN LAW SCHOOL AND I

10 DECIDED I DIDN'T WANT TO BE A LAWYER, BUT I FINISHED LAW

11 SCHOOL, AND THEN I WENT RIGHT INTO USC MEDICAL SCHOOL.

12 Q. AND YOU GOT ALL YOUR MEDICAL TRAINING AT

13 USC MEDICAL SCHOOL HERE IN LOS ANGELES?

14 A. YES.

15 Q. AND BY THE WAY, ARE YOU FROM ALBUQUERQUE,
16 NEW MEXICO?

17 A. THAT'S MY HOMETOWN.

18 Q. AND WHEN WAS IT THAT YOU OBTAINED YOUR
19 FIRST MEDICAL DEGREE?

20 A. IN 1973.

21 Q. AND THAT WAS A GENERAL PHYSICIAN'S MEDICAL
22 DEGREE?

23 A. RIGHT.

24 Q. AND AFTER THAT DID YOU PURSUE A SPECIALTY
25 IN PSYCHIATRY?

26 A. YES. I DID A ONE-YEAR GENERAL INTERNSHIP.
27 AND AFTER THAT I DID A THREE-YEAR RESIDENCY IN
28 PSYCHIATRY AT USC MEDICAL CENTER.

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1 Q. AND THEN DID YOU HAVE A FELLOWSHIP
2 FOLLOWING YOUR RESIDENCY AT USC MEDICAL CENTER?

3 A. YES.

4 Q. AND WHAT WAS THAT FELLOWSHIP IN?

5 A. FORENSIC PSYCHIATRY.

6 Q. AND THAT WAS A TWO-YEAR FELLOWSHIP?

7 A. YES.

8 Q. NOW, DID YOU INDICATE WHAT LAW SCHOOL YOU

9 WENT TO?

10 A. I THOUGHT I DID.

11 Q. IT WAS HARVARD?

12 A. HARVARD LAW SCHOOL, YES.

13 Q. DID YOU EVER TAKE THE BAR EXAMINATION TO

14 PRACTICE LAW IN ANY STATE?

15 A. I SIGNED UP FOR IT, BUT ONCE I GOT INTO

16 MEDICAL SCHOOL I GOT PRETTY BUSY AND I NEVER DID TAKE

17 THE BAR IN ANY STATE.

18 Q. AS SOMEONE INVOLVED IN FORENSIC PSYCHIATRY,

19 DID YOU FIND YOUR LEGAL TRAINING AND EDUCATION HELPFUL

20 TO YOU IN YOUR LATER CAREER?

21 A. A GREAT DEAL.

22 Q. AND DO YOU -- DO YOU MAKE EFFORTS TO STAY

23 CURRENT WITH THE KNOWLEDGE AND RESEARCH IN THE AREA OF

24 GENERAL PSYCHIATRY AND FORENSIC PSYCHIATRY?

25 A. YES.

26 Q. AND DO YOU TRY TO STAY KNOWLEDGABLE IN THE

27 AREA OF LAW INSOFAR AS IT INTERACTS WITH LEGAL

28 PSYCHIATRY?

-15086

1 A. YES.

2 Q. NOW, DID YOU HAVE ANY TEACHING ROLE AT USC

3 AFTER YOU COMPLETED YOUR RESIDENCY THERE?

4 A. YES.

5 Q. AND WHAT WAS IT YOU WERE DOING THERE IN A
6 TEACHING ROLE?

7 A. I STAYED ON IN THE DEPARTMENT OF LAW AND
8 PSYCHIATRY AT USC MEDICAL SCHOOL AS AN ASSISTANT
9 PROFESSOR FOR THREE YEARS.

10 Q. AND WAS THAT YOUR FULL-TIME JOB?

11 A. YES.

12 Q. AND WHAT WAS THE DEPARTMENT OF LAW AND
13 PSYCHIATRY AT USC?

14 A. THAT WAS A LITTLE SECTION OF THE PSYCHIATRY
15 DEPARTMENT THAT WAS DEVOTED TO TRAINING, TEACHING AND
16 PERFORMING EVALUATIONS IN THE AREA OF LEGAL PSYCHIATRY.

17 Q. AND DURING THAT PERIOD OF TIME THAT YOU
18 WERE AN ASSISTANT PROFESSOR OF CLINICAL PSYCHIATRY, WERE
19 YOU TRAINING OTHER PSYCHIATRISTS IN HOW TO CONDUCT AND
20 DO EVALUATIONS OF PEOPLE'S MENTAL CONDITIONS FOR COURTS?

21 A. YES.

22 Q. HOW MANY YEARS WERE YOU AN ASSISTANT
23 PROFESSOR OF CLINICAL PSYCHIATRY AT USC?

24 A. FULL-TIME I WAS THERE FOR THREE YEARS, AND
25 I REMAIN ON THE STAFF THERE, EVEN THOUGH I WENT INTO
26 PRIVATE PRACTICE IN 1982.

27 Q. SO FROM 1982 TO THE PRESENT, 1996, ARE YOU
28 STILL -- HAVE YOU STILL BEEN ENGAGED IN TEACHING AT USC?

1 A. EVERY YEAR.

2 Q. AND WHO DO YOU TEACH?

3 A. WE TEACH THE PSYCHIATRISTS THAT HAVE JUST
4 COMPLETED THEIR TRAINING FOR ONE YEAR OR TWO YEARS, HOW
5 TO DO FORENSIC EVALUATIONS.

6 Q. AND DURING THE TIME THAT YOU WERE FULL-TIME
7 AS AN ASSISTANT PROFESSOR AT USC, DID YOU CONDUCT
8 PSYCHIATRIC EVALUATIONS APART FROM THE TEACHING
9 FUNCTIONS? DID YOU ACTUALLY DO EVALUATIONS FOR THE LOS
10 ANGELES COUNTY SUPERIOR COURT?

11 A. EVERY WEEK.

12 Q. AND APPROXIMATELY HOW MANY SUCH EVALUATIONS
13 A WEEK WERE YOU DOING DURING THAT THREE-YEAR PERIOD THAT
14 YOU WERE A FULL-TIME ASSISTANT PROFESSOR?

15 A. PROBABLY FIVE TO 10 COURT EVALUATIONS PER
16 WEEK, PLUS THE CASES THAT WE WERE CONSULTING ON AT
17 TERMINAL ISLAND FEDERAL PRISON DOWN NEAR LONG BEACH, AND
18 THE CASES WE WERE CONSULTING ON AT PATTON STATE HOSPITAL
19 AND THE CALIFORNIA YOUTH AUTHORITY.

20 Q. SO THE USC DEPARTMENT OF LAW AND PSYCHIATRY
21 WAS BEING CALLED UPON FOR EVALUATIONS FOR ALL THOSE
22 DIFFERENT AGENCIES?

23 A. YES.

24 Q. SO YOU WERE DOING FIVE TO 10 A WEEK FOR THE
25 SUPERIOR COURT, PLUS CASES FOR THE FEDERAL AUTHORITIES
26 AND PATTON STATE HOSPITAL?

27 A. AND THE CALIFORNIA YOUTH AUTHORITY.

28 Q. ALL OF THOSE?

1 A. YES.

2 Q. AND WAS THERE A PARTICULAR TREATMENT
3 PROGRAM AT USC'S MEDICAL SCHOOL DURING THAT PERIOD OF
4 TIME THAT YOU RAN?

5 A. YES.

6 Q. AND WHAT WAS THAT TREATMENT PROGRAM?

7 A. IT WAS THE SEX OFFENDER TREATMENT PROGRAM.

8 Q. AND AS PART OF THE SEX OFFENDER TREATMENT
9 PROGRAM, DID YOU DO EVALUATIONS OF PEOPLE INVOLVED IN
10 CASES ALLEGING MOLESTATION OF CHILDREN?

11 A. EVERY WEEK.

12 Q. AND HOW MANY SUCH CASES DID YOU EITHER
13 PERSONALLY DO EVALUATIONS IN OR SUPERVISE?

14 MR. CONN: OBJECTION. IRRELEVANT.

15 THE COURT: OVERRULED.

16 YOU CAN ANSWER THE QUESTION.

17 THE WITNESS: SEVERAL HUNDRED CASES OVER MY YEARS
18 OF TRAINING AND STAFF EXPERIENCE THERE.

19 Q. BY MS. ABRAMSON: HOW LONG WERE YOU -- DID
20 YOU RUN THE SEX OFFENDER TREATMENT PROGRAM THERE?

21 A. ABOUT FOUR YEARS.

22 Q. AND DID YOU CONTINUE TO DO EVALUATIONS
23 INVOLVING SEXUAL MOLESTATION CASES EVEN AFTER THAT
24 FOUR-YEAR PERIOD?

25 A. YES.

26 Q. CAN YOU GIVE US AN ESTIMATE OF HOW MANY
27 EVALUATIONS WHERE THE ISSUE WAS WHETHER OR NOT SOMEONE
28 HAD BEEN SEXUALLY MOLESTED YOU'VE DONE OVER YOUR CAREER?

-15083

1 A. PROBABLY FIVE CASES A WEEK OVER THE PAST 15
2 YEARS.

3 Q. I CAN'T COMPUTE THAT. CAN YOU?

4 MR. LEVIN: 3700.

5 MS. ABRAMSON: HOW MANY?

6 MR. LEVIN: 3700.

7 Q. BY MS. ABRAMSON: 3700 SOUND ABOUT RIGHT?

8 A. YES.

9 THE COURT: WHERE IS YOUR CALCULATOR, MR. LEVIN?

10 MR. LEVIN: IT JUST CAME TO ME, YOUR HONOR.

11 MS. ABRAMSON: IT FLASHED INTO HIS MIND.

12 Q. NOW, HAVE YOU BEEN IN PRIVATE PRACTICE
13 SINCE 1982?

14 A. YES.

15 Q. AND WHAT IS THE MAJOR COMPONENT OF YOUR
16 PRIVATE PRACTICE? BASICALLY WHAT IS THE BULK OF YOUR
17 WORK?

18 A. DOING FORENSIC EVALUATIONS FOR THE LOS
19 ANGELES COUNTY SUPERIOR COURT, ATTORNEYS AND JUDGES AND
20 PROSECUTORS AND DEFENSE ATTORNEYS, AND IN OTHER
21 JURISDICTIONS AS WELL AS LOS ANGELES COUNTY.

22 Q. AND SO YOU'RE DOING -- WHEN YOU SAY
23 "FORENSIC EVALUATIONS," YOU'RE TRYING TO FIGURE OUT
24 WHETHER PEOPLE SUFFER FROM OR DON'T SUFFER FROM A
25 VARIETY OF MENTAL DISORDERS; IS THAT ONE COMPONENT OF
26 IT?

27 A. THAT'S ROUTINE IN EVERY CASE.

28 Q. AND DO YOU ALSO MAKE DETERMINATIONS WHERE

-15082

1 POSSIBLE CONCERNING WHETHER A PERSON'S MENTAL DISORDER,
2 ASSUMING THEY HAVE ONE, AFFECTED THEIR BEHAVIOR OR
3 MENTAL STATE IN THE PAST WHEN AN ALLEGED OFFENSE WAS
4 COMMITTED?

5 A. YES.

6 Q. AND YOU DO THAT -- HOW MANY SUCH CASES A
7 YEAR DO YOU DO WHERE THOSE ARE THE ISSUES?

8 A. PROBABLY 15 CASES WEEK.

9 Q. 15 A WEEK. AND YOU'VE BEEN DOING THAT
10 PRETTY MUCH FOR THE WHOLE PERIOD SINCE 1982, I TAKE IT?

11 A. AND EVEN WHEN I WAS AT USC. I MEAN, THAT
12 WAS THE MAJORITY OF THE WORK THAT EACH OF THE DOCTORS
13 HAD TO DO THERE.

14 Q. NOW, IN ADDITION TO THE FORENSIC EVALUATION
15 WORK, DO YOU DO ANY CLINICAL WORK? DO YOU TREAT ANY
16 PEOPLE?

17 A. I DO.

18 Q. AND WHAT IS THE MAIN SOURCE FOR THE
19 PATIENTS WHOM YOU TREAT?

20 A. USUALLY THESE INDIVIDUALS ARE INVOLVED IN
21 THE LEGAL SYSTEM SOMEHOW.

22 Q. ARE YOU A PSYCHIATRIST FOR THE LOS ANGELES
23 FREE CLINIC?

24 A. FOR THE HOLLYWOOD-SUNSET FREE CLINIC, YES,
25 I AM.

26 Q. AND ARE YOU A -- WITH YOUR AFFILIATION WITH
27 THE FREE CLINIC, ARE YOU TREATING PEOPLE WHO COME INTO
28 THE FREE CLINIC? IS THERE A PATIENT GROUP?

-15081

1 A. THAT'S A VOLUNTEER JOB THAT I'VE HAD SINCE
2 MEDICAL SCHOOL, REALLY, ON THROUGH MY INTERNSHIP, AND
3 THEN I BECAME A PSYCHIATRIST, AND OVER THE YEARS I HAVE
4 BEEN MAINLY DOING PSYCHIATRY THERE AT THE FREE CLINIC
5 EVERY FRIDAY NIGHT.

6 Q. WERE YOU ORIGINALLY THEIR MEDICAL DOCTOR,
7 OR ONE OF THEIR MEDICAL DOCTORS?

8 A. I WAS ORIGINALLY A MEDICAL STUDENT THERE,
9 AND THEN I GRADUATED TO BEING AN INTERN AND A RESIDENT
10 IN PSYCHIATRY. WHEN YOU'RE A RESIDENT IN PSYCHIATRY,
11 YOU CANNOT TREAT PSYCHIATRIC PATIENTS. THAT'S ONE OF
12 THE RULES. YOU'RE NOT TO TELL PEOPLE YOU ARE A
13 PSYCHIATRIST.

14 Q. YOU'RE NOT YET --

15 A. YOU'RE NOT YET -- YOU'RE NOT COOKED YET,
16 YOU'RE NOT BAKED YET. SO I WAS SEEING GENERAL MEDICAL
17 PATIENTS THERE UNTIL I FINISHED MY PSYCHIATRIC TRAINING
18 IN 1977.

19 Q. AND HOW MANY OTHER PSYCHIATRISTS TREAT
20 PEOPLE AT THE HOLLYWOOD-SUNSET FREE CLINIC?

21 A. THERE AREN'T ANY OTHER PSYCHIATRISTS AT THE
22 HOLLYWOOD-SUNSET FREE CLINIC, AND THERE ARE NOT ANY
23 OTHER PSYCHIATRISTS THAT ARE TREATING AND PRESCRIBING
24 MEDICATION IN LOS ANGELES COUNTY AT ANY FREE CLINIC.

25 Q. SO YOU ARE THE ONLY ONE?

26 A. I AM THE BOTTOM OF THE DRAIN IN THE MENTAL
27 HEALTH SYSTEM IN THE COUNTY, WHICH IS ON MELTDOWN.

28 Q. AND YOU DO THIS FOR NOTHING?

-15080

1 A. UNFORTUNATELY, THAT'S TRUE.

2 Q. WELL, BUT THAT HASN'T DETERRED YOU ALL
3 THESE YEARS FROM DOING IT FOR NOTHING; IS THAT CORRECT?

4 A. NO.

5 Q. NOW, ARE YOU A JAIL PSYCHIATRIST,
6 DR. VICARY?

7 A. NO, I AM NOT. THAT'S VERY EXCEPTIONAL WHEN
8 I WOULD ACTUALLY PICK UP A PATIENT AT THE JAIL AND
9 ATTEMPT TO TREAT THEM THERE.

10 Q. IS THERE A PSYCHIATRIST PERMANENTLY
11 ASSIGNED TO THE LOS ANGELES COUNTY JAIL WHO IS A JAIL
12 PSYCHIATRIST?
13 A. THERE IS MORE THAN ONE FULL-TIME
14 PSYCHIATRIST AT THE JAIL. THERE IS ABOUT HALF A DOZEN
15 PSYCHIATRISTS AT THE JAIL WHO ARE ON STAFF THERE WHO ARE
16 PAID, AND WHO GENERALLY DO NOT DO FORENSIC EVALUATIONS,
17 THEY DO TREATMENT OF PRISONERS.
18 Q. INMATES?
19 AND ARE YOU AWARE -- WELL, FIRST OF ALL,
20 YOU DO KNOW ERIK MENENDEZ, DO YOU NOT?
21 A. I DO.
22 Q. AND HOW LONG HAVE YOU KNOWN HIM?
23 A. SINCE JUNE OF 1990.
24 Q. IS HE ONE OF THE EXCEPTIONS -- IS HE A
25 PATIENT OF YOURS WHO YOU HAVE BOTH EVALUATED AND
26 TREATED?
27 MR. CONN: OBJECTION. IRRELEVANT, BEYOND THE
28 SCOPE OF THIS EXAMINATION.

-15079

1 THE COURT: OVERRULED.
2 YOU CAN ANSWER THAT QUESTION YES OR NO.
3 THE WITNESS: YES.
4 Q. BY MS. ABRAMSON: AND ARE YOU AWARE OF
5 HIS -- THE CONTENT OF HIS JAIL MEDICAL RECORDS?

6 A. YES.

7 Q. AND ARE YOU THE FIRST PERSON WHO PRESCRIBED
8 MEDICATION FOR HIM AT THE JAIL?

9 A. YES.

10 Q. AND ARE YOU AWARE OF WHETHER OR NOT ONE OF
11 THE HALF DOZEN OF JAIL PSYCHIATRISTS IS TREATING HIM AS
12 WELL?

13 A. YES.

14 Q. AND WHO IS THE PSYCHIATRIST AT THE JAIL WHO
15 TREATS HIM?

16 A. IT THE CHIEF PSYCHIATRIST, EUGENE KUNZMAN.

17 Q. AND HAVE YOU CONSULTED WITH DR. KUNZMAN
18 OVER THE MONTHS AND YEARS CONCERNING MR. MENENDEZ'
19 CONDITION AND HIS MEDICATION?

20 A. YES.

21 Q. NOW, YOU SAID THAT YOU FIRST CAME IN
22 CONTACT WITH ERIK MENENDEZ IN JUNE OF 1990. DID YOU FOR
23 A SIGNIFICANT PERIOD OF TIME SEE HIM ON A REGULAR BASIS?

24 A. YES.

25 Q. AND DID YOU MAKE ANY NOTES CONCERNING HIS
26 PSYCHIATRIC AND EMOTIONAL CONDITION DURING THE PERIOD
27 THAT YOU SAW HIM ON A REGULAR BASIS?

28 A. YES.

-15078

1 Q. FOR HOW LONG A PERIOD OF TIME DID YOU SEE

2 HIM ON A REGULAR BASIS?

3 A. FOR ABOUT A YEAR AND A HALF.

4 Q. AND OVER THE COURSE OF THAT YEAR AND A
5 HALF, DID YOU CHANGE FROM TIME TO TIME HIS MEDICATION?

6 A. YES, I DID.

7 Q. AND HAVE YOU SEEN HIM FROM THAT PERIOD -- I
8 GUESS A YEAR AND A HALF WOULD BE JUNE OF '90 THROUGH
9 WHEN WERE YOU SEEING HIM.

10 IS THAT WEEKLY YOU SAW HIM?

11 A. YES.

12 Q. AND WHEN DID YOU STOP SEEING HIM WEEKLY?

13 A. WELL, THEREAFTER I WOULD SEE HIM EVERY
14 OTHER WEEK, AND THEN AFTER SIX MONTHS I WOULD SEE HIM
15 PERHAPS ONCE A MONTH, AND THEN ANOTHER SIX MONTHS OR A
16 YEAR WENT BY AND I WOULD SEE HIM EVERY COUPLE OF MONTHS,
17 AND THAT'S THE WAY IT'S BEEN UNTIL THE PRESENT.

18 Q. I UNDERSTAND THAT YOU'VE CONTINUED TO SEE
19 HIM TO THE PRESENT, AND -- BUT I'M TRYING TO FIGURE OUT
20 WHEN THE ONE-AND-A-HALF YEARS WAS OVER WHEN YOU WERE
21 SEEING HIM EVERY WEEK REGULARLY.

22 A. MY MEMORY IS THAT THAT WOULD TRACK BACK TO
23 ABOUT SIX MONTHS BEFORE THE FIRST TRIAL, WHEN I STARTED
24 TO SLOW DOWN MY VISITS WITH HIM.

25 Q. AND SINCE THE COMPLETION OF THE FIRST TRIAL
26 IN JANUARY OF 1994, HAVE YOU STILL SEEN HIM
27 PERIODICALLY?

28 A. YES.

1 Q. AND DID YOU CHANGE HIS MEDICATION AGAIN
2 AFTER THE FIRST TRIAL?

3 A. YES.

4 Q. WHAT MEDICATION IS HE ON NOW?

5 A. HE IS ON THREE MEDICATIONS NOW.

6 Q. AND WHAT ARE THEY?

7 A. HE'S ON AN ANTI-DEPRESSANT, AND
8 ANTI-ANXIETY MEDICATION CALLED PAMELOR.

9 Q. AND WHAT'S HIS DOSAGE?

10 MR. CONN: OBJECTION. IRRELEVANT.

11 THE COURT: SUSTAINED.

12 Q. BY MS. ABRAMSON: IS HE ON A HIGH DOSE OR A
13 LOW DOSE?

14 MR. CONN: OBJECTION, YOUR HONOR.

15 MS. ABRAMSON: I AM GOING TO LAY A FOUNDATION FOR
16 THIS, YOUR HONOR, TO TIE IT IN WITH G.A.D..

17 THE COURT: WELL, AGAIN, IN THE GENERAL SENSE?

18 MS. ABRAMSON: YES.

19 THE COURT: OKAY. OVERRULED.

20 Q. BY MS. ABRAMSON: WHAT'S THE DOSAGE OF
21 PAMELOR?

22 A. A HUNDRED MILLIGRAMS A DAY.

23 Q. AND WHAT ELSE IS HE ON?

24 A. XANAX.

25 Q. AND WHAT'S HIS DOSAGE OF XANAX?

26 A. IT'S .25.

27 Q. AND WHAT'S THE XANAX FOR?
28 A. IT'S .25 MILLIGRAMS TWICE A DAY.

-15076

1 Q. SO IT'S .5 FOR A DAY?
2 A. TOTAL, YES.
3 Q. .25 IS THE LOWEST DOSAGE OF XANAX?
4 A. IT IS.
5 Q. AND WHAT'S THE XANAX SPECIFICALLY FOR?
6 WHAT DOES IT TREAT?
7 A. IT'S AN ANTI-ANXIETY MEDICATION WHICH ALSO
8 HAS SOME ANTI-DEPRESSANT EFFECTS.
9 Q. WHY WOULD ONE NEED BOTH -- IN A GENERAL
10 SENSE, WHY WOULD YOU GIVE A PATIENT PAMELOR AND XANAX IF
11 THEY BOTH ARE FOR THE SAME THINGS?
12 A. IT'S A QUESTION OF HOW SERIOUSLY ILL THEY
13 ARE, THE EXTENT OF THEIR SYMPTOMS. MOST PATIENTS WOULD
14 RESPOND ONLY TO AN AGENT LIKE XANAX AND YOU WOULDN'T
15 NEED ANYTHING ELSE. THE SICKER PEOPLE NEED STRONGER
16 MEDICATIONS, OR A HIGHER DOSE OF THE XANAX.
17 Q. SO INSTEAD OF GIVING A VERY HIGH DOSE OF
18 XANAX, YOU WOULD PRESCRIBE PAMELOR IN ADDITION;
19 IS WHY YOU HAVE BOTH, WHEN YOU PRESCRIBE BOTH?
20 A. YES.
21 Q. AND WHAT IS THE THIRD MEDICATION THAT ERIK
22 MENENDEZ IS ON?

23 A. INDERAL.

24 Q. AND WHAT IS INDERAL?

25 A. INDERAL IS PRIMARILY FOR BLOOD PRESSURE.

26 HOWEVER, IT'S ALSO COMMONLY USED FOR ANXIETY, BECAUSE

27 THAT'S ONE OF ITS EFFECTS.

28 Q. ONE OF WHAT'S EFFECTS?

-15075

1 A. THAT IT REDUCES ANXIETY.

2 Q. IS HIGH BLOOD PRESSURE SOMETIMES A PRODUCT

3 OF ANXIETY?

4 A. YES.

5 Q. SO ACTUALLY, HE'S ON THREE DIFFERENT

6 MEDICATIONS TO DEAL WITH ANXIETY?

7 A. YES.

8 Q. AND HAVE YOU TRIED VARIOUS COMBINATIONS OF

9 MEDICATIONS OVER THE PAST FIVE YEARS WITH HIM TO SEE

10 WHICH ONES BRING DOWN HIS SYMPTOMS THE MOST?

11 MR. CONN: OBJECTION. IRRELEVANT.

12 THE COURT: SUSTAINED.

13 Q. BY MS. ABRAMSON: ARE YOU AWARE OF -- WELL,

14 FIRST OF ALL, WAS ERIK MENENDEZ ON ALL THREE OF THESE

15 MEDICATIONS -- I'M SORRY.

16 WHAT'S THE DOSAGE OF INDERAL THAT HE'S

17 RECEIVING?

18 A. 20 MILLIGRAMS DAY.

19 Q. NOW, IS A HUNDRED MILLIGRAMS OF PAMELOR A
20 HIGH DOSE?

21 A. THE MAXIMUM YOU CAN GIVE A PATIENT IS
22 THREE -- IS 150, AND HE'S ON A HUNDRED, SO HE IS ON A
23 MODERATE DOSAGE.

24 Q. WAS ERIK MENENDEZ RECEIVING ALL THREE OF
25 THESE MEDICATIONS IN THE DOSAGES YOU'VE INDICATED ON THE
26 DAYS JANUARY 27TH AND 28, AND FEBRUARY 1ST OF THIS YEAR?

27 A. YES, HE WAS.

28 Q. AND YOU UNDERSTAND THOSE ARE THE DAYS WHEN

-15074

1 DR. DIETZ WAS INTERVIEWING MR. MENENDEZ?

2 A. YES.

3 Q. AND DID YOU VIEW THE VIDEOTAPES OF
4 DR. DIETZ' INTERVIEWS WITH MR. MENENDEZ?

5 A. YES, I DID.

6 Q. AND COULD YOU DETERMINE, FROM SEEING
7 MR. MENENDEZ IN THOSE VIDEOTAPES, THAT HE HAD TAKEN HIS
8 MEDICATION THAT DAY?

9 MR. CONN: OBJECTION. CALLS FOR SPECULATION.

10 THE COURT: SUSTAINED.

11 Q. BY MS. ABRAMSON: DID HE APPEAR TO BE AS HE
12 HAS APPEARED TO YOU WHEN HE'S ON HIS MEDICATION?

13 MR. CONN: OBJECTION. IRRELEVANT.

14 THE COURT: OVERRULED.

15 YOU CAN ANSWER THE QUESTION YES OR NO.

16 THE WITNESS: YES.

17 Q. BY MS. ABRAMSON: DOES HE APPEAR

18 DIFFERENTLY WHEN HE IS NOT ON HIS MEDICATION?

19 A. HE DOES.

20 Q. DRAMATICALLY DIFFERENTLY?

21 MR. CONN: OBJECTION. IRRELEVANT.

22 THE COURT: SUSTAINED.

23 Q. BY MS. ABRAMSON: NOW, IN YOUR CAREER,

24 DR. VICARY, AS A FORENSIC PSYCHIATRIST DOING EVALUATIONS

25 FOR COURT PURPOSES, APPROXIMATELY HOW MANY TIMES HAVE

26 YOU EVALUATED AN INDIVIDUAL WHO WAS CHARGED WITH

27 HOMICIDE?

28 MR. CONN: OBJECTION. IRRELEVANT.

-15073

1 THE COURT: OVERRULED.

2 THE WITNESS: EVERY WEEK SINCE 1977.

3 Q. BY MS. ABRAMSON: DO YOU EVER TAKE

4 VACATIONS?

5 A. YES, I DO.

6 Q. SO DO YOU -- YOU DON'T EVALUATE WHEN YOU'RE

7 ON VACATION, DO YOU?

8 A. NO, I DON'T.

9 Q. SO WHEN YOU SAY "EVERY WEEK," EVERY WEEK

10 THAT YOU'RE WORKING?

11 A. CORRECT. ABOUT 50 WEEKS A YEAR.
12 Q. OKAY. THAT WAS MY NEXT QUESTION.
13 AND RATHER THAN TELL IT IN THOSE TERMS, IF
14 YOU CAN GIVE ME SOME IDEA OF HOW MANY HOMICIDE CASES YOU
15 HAVE DONE EVALUATIONS IN?
16 A. PROBABLY ABOUT A THOUSAND.
17 Q. AND HAVE YOU DONE EVALUATIONS IN SO-CALLED
18 PARRICIDE CASES, CASES INVOLVING CHILDREN WHO KILL -- A
19 CHILD OR CHILDREN WHO KILL ONE OR MORE PARENTS?
20 MR. CONN: OBJECTION. IRRELEVANT.
21 THE COURT: OVERRULED.
22 YOU CAN ANSWER THAT QUESTION.
23 THE WITNESS: YES.
24 Q. BY MS. ABRAMSON: AND HOW MANY PARRICIDE
25 CASES HAVE YOU BEEN INVOLVED IN?
26 A. PROBABLY 150, MAYBE 200.
27 Q. DO YOU KNOW WHO PARK DIETZ IS?
28 A. I DO.

-15072

1 Q. HAVE YOU BEEN INVOLVED IN SOME CASES WHERE
2 HE WAS ALSO INVOLVED AS A FORENSIC PSYCHIATRIST?
3 MR. CONN: OBJECTION. IRRELEVANT.
4 THE COURT: OVERRULED.
5 THE WITNESS: YES, I HAVE.
6 Q. BY MS. ABRAMSON: ARE YOU AWARE OF ANY

7 PARRICIDE CASES THAT DR. DIETZ WAS INVOLVED IN?

8 A. NO, I'M NOT.

9 Q. NOW, DID YOU -- OVER THE COURSE OF THE FIVE
10 YEARS AND EIGHT MONTHS IN WHICH YOU HAVE BEEN SEEING
11 ERIK MENENDEZ, DID YOU MAINTAIN A SET OF NOTES
12 INDICATING -- WELL, FIRST OF ALL, DID YOU MAINTAIN A SET
13 OF NOTES?

14 A. YES, I DID..

15 Q. AND AT THE TIME OF THE FIRST TRIAL, DO YOU
16 REMEMBER HOW MANY PAGES OF NOTES YOU HAD?

17 A. YES.

18 Q. HOW MANY WERE THERE AT THAT TIME?

19 A. 101 PAGES.

20 Q. AND AT THE TIME OF THE FIRST TRIAL, HOW
21 MANY HOURS HAD YOU SPENT WITH ERIK MENENDEZ?

22 A. 88 HOURS.

23 Q. NOW, SINCE THE FIRST TRIAL YOU HAVE
24 CONTINUED TO SEE HIM ON A SOMEWHAT MORE SPORADIC BASIS?

25 A. YES.

26 Q. AND HOW MANY ADDITIONAL HOURS HAVE YOU
27 SPENT WITH HIM SINCE THE TIME OF THE FIRST TRIAL?

28 A. APPROXIMATELY 25 HOURS.

-15071

1 Q. SO YOU HAVE SEEN HIM FOR A TOTAL OF
2 APPROXIMATELY 113 HOURS?

3 A. IN TERMS OF VISITS, YES. I HAVE ACTUALLY
4 SEEN HIM MORE FREQUENTLY, BECAUSE I RUN INTO HIM AT THE
5 JAIL BECAUSE I AM RUNNING AROUND LOOKING FOR OTHER
6 PRISONERS, AND I WILL SEE HIM IN THE HALL OR WHATEVER,
7 SO I CAN TALK TO HIM FOR A FEW MINUTES BECAUSE HE
8 HAPPENS TO BE IN HIS HALL, OR HE IS ON HIS WAY TO THE
9 SHOWER, OR SOMETHING LIKE THAT.

10 Q. SO YOU CAN CHECK WITH HIM CONCERNING HIS
11 CONDITION IN BRIEF CONTACTS?

12 A. RIGHT.

13 Q. BUT WITH RESPECT TO 113 HOURS, THAT'S TIME
14 YOU ACTUALLY SPENT IN A FORMAL -- EITHER THERAPY SESSION
15 OR INTERVIEW SESSIONS WITH HIM?

16 A. YES.

17 Q. AND WERE YOUR NOTES, THE FIRST 101 PAGES OF
18 THEM, TURNED OVER TO THE PROSECUTION AT THE TIME OF THE
19 FIRST TRIAL?

20 A. YES.

21 Q. AND WERE YOUR NOTES -- HAVE YOU ADDED TO
22 THOSE NOTES BASED ON ANY SIGNIFICANT INCIDENTS THAT
23 OCCURRED IN ANY OF THE INTERVIEWS OR SESSIONS THAT YOU
24 HAD WITH MR. MENENDEZ SINCE THE FIRST TRIAL?

25 A. YES.

26 Q. AND HOW MANY ADDITIONAL PAGES OF NOTES HAVE
27 YOU ADDED?

28 A. WELL, THERE'S A TOTAL NOW OF A 110, SO IT'S

1 110 MINUS 88. I BELIEVE THAT WOULD BE --

2 THE COURT: THAT'S 101.

3 MS. ABRAMSON: NO.

4 THE WITNESS: I'M SORRY, THAT'S RIGHT. I'M
5 GETTING THE VISITS MIXED UP WITH THE PAGES.

6 IT'S ONLY NINE MORE PAGES, THEN.

7 MS. ABRAMSON: ALL RIGHT.

8 Q. AND HAS MR. MENENDEZ' CONDITION BECOME MORE
9 OR LESS STABLE SINCE THE FIRST TRIAL?

10 MR. CONN: OBJECTION. IRRELEVANT.

11 THE COURT: OVERRULED.

12 YOU CAN ANSWER THAT QUESTION YES OR NO.

13 THE WITNESS: YES, WITH EXCEPTIONS.

14 Q. BY MS. ABRAMSON: THERE ARE SOME TIMES WHEN
15 HE'S IN A DIFFERENT EMOTIONAL STATE THAN USUAL?

16 A. IN GENERAL HE'S BECOME PRETTY STABLE. IN
17 FACT, HE'S ACTUALLY GOTTEN BETTER AS EACH MONTH GOES BY.
18 BUT HE'S HAD SOME PERIODS WHERE HE'S GOTTEN WORSE AND
19 HE'S HAD A SLUMP, OR HE'S GONE INTO A DOWNWARD PHASE.
20 ONE WAS AFTER THE FIRST TRIAL.

21 MR. CONN: I WOULD OBJECT. NONRESPONSIVE. CALLS
22 FOR A NARRATIVE.

23 THE COURT: ALL RIGHT. HE'S ANSWERED THE
24 QUESTION.

25 YOUR NEXT QUESTION, PLEASE.

26 Q. BY MS. ABRAMSON: WOULD SOME OF THOSE
27 PERIODS WHEN HE'S GONE INTO A DOWNWARD SLUMP CAUSE YOU

-15069

1 A. I WOULD, OR DR. KUNZMAN WOULD.

2 Q. SO DR. KUNZMAN IS MONITORING HIS HIGHS AND
3 LOWS ALSO, CORRECT?

4 A. I WOULD THINK THAT DR. KUNZMAN IS MORE HIS
5 TREATING DOCTOR NOW, ALTHOUGH WE'VE BEEN WORKING
6 TOGETHER ON THIS.

7 Q. NOW, TO YOUR KNOWLEDGE, WERE YOUR NOTES
8 FROM THAT FIRST YEAR AND A HALF TURNED OVER TO DR. JOHN
9 WILSON?

10 MR. CONN: OBJECTION. IRRELEVANT.

11 THE COURT: OVERRULED.

12 THE WITNESS: YES.

13 Q. BY MS. ABRAMSON: NOW, DR. VICARY, DID YOU
14 READ ALL THE TESTIMONY THAT DR. WILSON GAVE IN THIS
15 TRIAL?

16 MR. CONN: OBJECTION. IRRELEVANT.

17 THE COURT: SUSTAINED.

18 MS. ABRAMSON: WELL, JUST HAVING TO DO WITH HIS
19 NOTES, YOUR HONOR.

20 THE COURT: WELL, HE SAID HE GAVE THEM TO
21 DR. WILSON, SO THAT'S --

22 MS. ABRAMSON: OKAY.

23 Q. DID YOU READ THE TESTIMONY OF DR. DIETZ IN

24 THIS TRIAL?

25 MR. CONN: OBJECTION. IRRELEVANT.

26 THE COURT: OVERRULED.

27 YOU CAN ANSWER THAT YES OR NO.

28 THE WITNESS: YES.

-15068

1 Q. BY MS. ABRAMSON: DID YOU ATTEND A MEETING
2 ON FEBRUARY 5TH IN THE DISTRICT ATTORNEY'S OFFICE WITH
3 DR. DIETZ?

4 A. YES.

5 Q. DID YOU AT THE TIME OF THAT MEETING RECEIVE
6 A PACKET OF RESEARCH MATERIALS PREPARED FOR DR. DIETZ BY
7 THE PROSECUTION?

8 MR. CONN: OBJECTION. IRRELEVANT.

9 THE COURT: SUSTAINED.

10 MS. ABRAMSON: WELL, YOUR HONOR, I WOULD LIKE TO
11 BE HEARD ON THAT.

12 THE COURT: OKAY. LET'S MOVE ON.

13 MS. ABRAMSON: YES, I JUST WANT TO NOTE IT. ONE
14 OF THOSE RED FLAGS.

15 THE COURT: OKAY.

16 Q. BY MS. ABRAMSON: ARE YOU FAMILIAR,
17 DR. VICARY, WITH THE CONTENTS OF THE DSM-IV, THE
18 DIAGNOSTIC AND STATISTICAL MANUAL?

19 A. YES.

20 Q. AND DO YOU USE IT EVERY DAY IN YOUR
21 PRACTICE?

22 A. YES.

23 Q. AND DOES IT CONTAIN A SECTION DEALING WITH
24 SO-CALLED ANXIETY DISORDERS?

25 A. YES.

26 Q. NOW, AS SOMEONE WHO HAS TRAINED IN THE
27 FIELD OF FORENSIC EVALUATION AS WELL AS SOMEONE WHO HAS
28 BEEN PERFORMING FORENSIC EVALUATION SINCE 1982, IF YOU

-15067

1 WERE TO COME UPON A PERSON THAT YOU'RE TO EVALUATE AND
2 YOU HAD SOME REASON TO BELIEVE THAT THEY MIGHT BE
3 SUFFERING FROM AN ANXIETY DISORDER, IS THERE A
4 PARTICULAR PROTOCOL OF WHAT KIND OF INFORMATION YOU
5 WOULD WANT TO HAVE AVAILABLE TO YOU IN ORDER TO RENDER A
6 DIAGNOSIS CONCERNING AN ANXIETY DISORDER?

7 MR. CONN: OBJECTION. IRRELEVANT.

8 THE COURT: OVERRULED.

9 THE WITNESS: YES.

10 Q. BY MS. ABRAMSON: AND WHAT IS THE KIND OF
11 INFORMATION -- WELL, STRIKE THAT.

12 WOULD THAT BE TRUE NO MATTER WHICH ANXIETY
13 DISORDER YOUR PRELIMINARY OPINION WAS?

14 IN OTHER WORDS, EVEN IF IN THE BEGINNING
15 YOU'RE NOT SURE WHAT, IF ANY, ANXIETY DISORDER THE

16 PERSON MIGHT HAVE, WOULD YOU GO ABOUT THE SAME PROTOCOL
17 BEFORE YOU WOULD RENDER A DIAGNOSIS OF ANY OF THE
18 ANXIETY DISORDERS?

19 A. YES.

20 Q. AND WHAT IS THE ACCEPTED PROTOCOL IN THE
21 FIELD OF FORENSIC PSYCHIATRY FOR RENDERING A DIAGNOSIS
22 OF ANXIETY DISORDER OF ANY KIND?

23 A. TO HAVE A COMPLETE COMPILATION OF ALL THE
24 MEDICAL RECORDS, PSYCHIATRIC RECORDS, AND ALL OTHER
25 INFORMATION THAT CAN BE OBTAINED BY THE PATIENT DATING
26 BACK AS FAR AS POSSIBLE.

27 Q. AND WOULD THAT INCLUDE SUCH THINGS AS
28 SCHOOL RECORDS?

-15066

1 A. YES.

2 Q. WOULD IT INCLUDE THE STATEMENTS OF SCHOOL
3 TEACHERS?

4 A. YES.

5 Q. FAMILY MEMBERS?

6 A. VERY IMPORTANT.

7 Q. SPORTS COACHES, IF ANY?

8 A. YES.

9 Q. FRIENDS OF THE FAMILY?

10 A. YES.

11 Q. IF YOU HAD ANY REASON TO BELIEVE THAT THE

12 ANXIETY DISORDER MIGHT HAVE BEEN CAUSED OR CONTRIBUTED
13 TO BY THE NATURE OF FAMILIAL RELATIONS, INTERACTION WITH
14 FAMILY MEMBERS, WOULD YOU WANT AS MUCH INFORMATION AS
15 POSSIBLE ABOUT THOSE FAMILY MEMBERS AS WELL?

16 A. OF COURSE.

17 Q. WOULD YOU WANT, THEREFORE, INFORMATION
18 ABOUT THE FAMILY MEMBERS' MENTAL HEALTH TREATERS, IF
19 ANY?

20 A. THAT'S ONE OF THE VERY FIRST THINGS YOU DO
21 IN EVERY SINGLE CASE.

22 Q. AND IF THE PERSON WHO YOU HAD A SUSPICION
23 WAS PERHAPS SUFFERING FROM AN ANXIETY DISORDER HAD
24 TESTIFIED UNDER OATH FOR 10 DAYS CONCERNING HIS LIFE
25 HISTORY, WOULD YOU WANT TO READ IT?

26 MR. CONN: OBJECTION. ASSUMES FACTS NOT IN
27 EVIDENCE, AND IRRELEVANT.

28 THE COURT: REPHRASE THE QUESTION.

-15065

1 Q. BY MS. ABRAMSON: IF YOU HAD AVAILABLE TO
2 YOU SWORN TESTIMONY FROM THE PERSON YOU WERE BEING ASKED
3 TO EVALUATE IN WHICH THEY DISCUSSED THEIR CHILDHOOD OR
4 INTERACTION WITH FAMILY MEMBERS AND OTHERS, WOULD IT BE
5 SIGNIFICANT FOR YOUR EVALUATION PROCESS TO READ IT?

6 MR. CONN: OBJECTION. ASSUMES FACTS NOT IN
7 EVIDENCE.

8 THE COURT: OVERRULED.

9 THE WITNESS: YES. I THINK THAT KIND OF
10 INFORMATION WOULD BE ESSENTIAL.

11 Q. BY MS. ABRAMSON: AND WOULD IT BE JUST AS
12 ESSENTIAL IF YOU WERE CONSIDERING RENDERING A DIAGNOSIS
13 OF GENERALIZED ANXIETY DISORDER AS IF YOU WERE
14 CONSIDERING RENDERING ONE OF POST-TRAUMATIC STRESS
15 DISORDER?

16 A. YES.

17 Q. CAN YOU THINK OF ANY SITUATION IN WHICH YOU
18 WERE CONSIDERING RENDERING A DIAGNOSIS CONCERNING AN
19 ANXIETY DISORDER WHERE IT WOULD BE APPROPRIATE TO IGNORE
20 BACKGROUND INFORMATION ON THE PATIENT?

21 A. NO, I CANNOT.

22 Q. IS THE DSM-IV, THE DIAGNOSTICAL AND
23 STATISTICAL MANUAL, A BOOK THAT INSTRUCTS MENTAL HEALTH
24 PROFESSIONALS TO FORM WHAT'S KNOWN AS A DIFFERENTIAL
25 DIAGNOSIS?

26 A. YES.

27 Q. WHAT IS A DIFFERENTIAL DIAGNOSIS?

28 A. WHEN YOU EXAMINE A PATIENT, YOU STUDY

-15064

1 WHATEVER OTHER INFORMATION YOU CAN OBTAIN. USUALLY IF
2 YOU HAVE EXPERIENCE IN TREATING PATIENTS, YOU HAVE A
3 PRETTY SOLID IDEA AS TO WHAT IS THE MOST LIKELY

4 DIAGNOSIS, WHETHER OR NOT IT WOULD BE SCHIZOPHRENIA OR

5 GENERAL ANXIETY DISORDER.

6 HOWEVER, SINCE MEDICINE AND PSYCHIATRY IS

7 NOT AN EXACT SCIENCE, LIKE PHYSICS OR CHEMISTRY, YOU

8 HAVE TO BE CAUTIOUS, BECAUSE YOU COULD BE WRONG. AND IF

9 YOU HAD MORE INFORMATION, YOU MIGHT HAVE A BETTER

10 DIAGNOSIS.

11 SO WHAT YOU'RE ENCOURAGED TO DO IS TO SAY,

12 "I THINK IT'S THIS, BUT IT COULD ALSO BE THE FOLLOWING

13 OTHER THINGS," BECAUSE THEY ALSO HAVE SUPPORT WITH SOME

14 OF THE INFORMATION.

15 SO YOU MAKE A LIST. YOU SAY, "HERE'S WHAT

16 I THINK IT IS, BUT HERE ARE THE OTHER THINGS THAT ARE

17 SIMILAR THAT IT COULD BE."

18 Q. NOW, DOES THE BOOK ITSELF, THE DSM-IV,

19 INSTRUCT YOU IF YOU'RE GOING TO MAKE A CERTAIN DIAGNOSIS

20 THAT YOU BETTER RULE OUT OTHER THINGS THAT MIGHT HAVE

21 SIMILAR SYMPTOMS?

22 A. YES.

23 Q. AND WITH RESPECT PARTICULARLY TO

24 GENERALIZED ANXIETY DISORDER, DOES THE DSM-IV DIRECT ONE

25 TO NOT MAKE THAT DIAGNOSIS IF POST-TRAUMATIC STRESS

26 DISORDER IS PRESENT?

27 A. YES.

28 Q. IS THE TREATMENT DIFFERENT FOR

1 POST-TRAUMATIC STRESS DISORDER VERSUS GENERALIZED

2 ANXIETY DISORDER?

3 A. YES.

4 Q. AND IF YOU WERE NOT -- IF YOU WERE TO TREAT

5 SOMEONE WHO ACTUALLY HAD POST-TRAUMATIC STRESS DISORDER

6 AS IF THEY HAD GENERALIZED ANXIETY DISORDER, IS IT LESS

7 LIKELY THAT THEY WOULD GET BETTER?

8 A. YES.

9 Q. WHEN YOU'RE TREATING SOMEONE WITH

10 POST-TRAUMATIC STRESS DISORDER, DO YOU HAVE TO ADDRESS

11 IN TREATMENT THE SOURCE, THE TRAUMATIC EVENT THAT CAUSED

12 THE POST-TRAUMATIC STRESS DISORDER?

13 MR. CONN: OBJECTION. IRRELEVANT.

14 THE COURT: SUSTAINED.

15 Q. BY MS. ABRAMSON: WOULD YOU MEDICATE PEOPLE

16 DIFFERENTLY BASED ON WHETHER YOU DIAGNOSED

17 POST-TRAUMATIC STRESS DISORDER VERSUS GENERALIZED

18 ANXIETY DISORDER?

19 A. I THINK IN TERMS OF THE MEDICATION, THE

20 TREATMENT WOULD BE VERY SIMILAR.

21 Q. WOULD YOU GIVE AS MUCH -- AS HIGH A DOSAGE

22 FOR GENERALIZED ANXIETY DISORDER AS YOU WOULD FOR

23 P.T.S.D.?

24 A. IN GENERAL, THE PATIENTS THAT HAVE P.T.S.D.

25 TEND TO HAVE MORE SYMPTOMS AND THEIR SYMPTOMS ARE MORE

26 SEVERE, SO THAT THEY REQUIRE MORE MEDICATION.

27 Q. IS IT APPROPRIATE, IN YOUR OPINION,

28 DR. VICARY, TO LABEL SOMEONE AS HAVING GENERAL ANXIETY

1 DISORDER SIMPLY BECAUSE YOU ARE RELUCTANT TO DECIDE WHAT
2 THE ORIGINATING TRAUMA IS FOR A P.T.S.D. DIAGNOSIS?

3 A. AS A FORENSIC PSYCHIATRIST, THAT'S YOUR
4 JOB. YOU ARE ASKED TO ANSWER THE QUESTION WHY. NOT
5 JUST WHAT'S THERE, BUT WHY.

6 Q. NOT JUST WHAT ARE THE SYMPTOMS, BUT WHAT
7 CAUSED THEM?

8 A. YES.

9 Q. SO IS IT UNTRUE FOR SOMEONE TO SAY THAT A
10 FORENSIC PSYCHIATRIST SHOULD NEVER DECIDE P.T.S.D.,
11 BECAUSE IN SO DECIDING HE IS GIVING AN OPINION AS TO
12 WHETHER THE ORIGINATING TRAUMA ACTUALLY OCCURRED?

13 A. THAT'S A VERY UNUSUAL POSITION. IN ALMOST
14 EVERY CASE THAT I'VE BEEN ASSOCIATED WITH, THAT I AM
15 FAMILIAR WITH, AND ALL THE RESEARCH AND WRITING THAT'S
16 DONE IN THIS AREA, INDICATES THAT OUR JOB IS TO TELL YOU
17 WHAT IT IS THAT THE PATIENT'S GOT, WHY DO THEY HAVE IT.
18 THEY EITHER HAVE P.T.S.D. OR THEY DON'T, RIGHT? THE
19 PICTURE IS CONSISTENT, CORROBORATED, SUPPORTED BY
20 ADEQUATE DATA OR THE PERSON IS A PHONY, HE IS A FAKE, OR
21 HE'S GOT SOMETHING ELSE.

22 YOU CAN'T HIDE YOUR HEAD IN THE SAND AND
23 SAY, "WELL, YOU KNOW, IT COULD BE. I DON'T KNOW, YOU
24 KNOW. I DON'T WANT TO TOUCH THAT."

25 MR. CONN: OBJECTION. CALLS FOR A NARRATIVE.

26 THE COURT: HE IS ANSWERING THE QUESTION.
27 Q. BY MS. ABRAMSON: UNLESS YOU ARE GETTING
28 PAID \$40,000 NOT TO AGREE WITH THE DEFENSE, THOUGH, TO

-15061

1 DO THAT, DON'T YOU THINK?
2 MR. CONN: OBJECTION. ARGUMENTATIVE.
3 THE COURT: SUSTAINED.
4 Q. BY MS. ABRAMSON: YOU READ DR. DIETZ'
5 TESTIMONY THAT HE DIDN'T THINK IT WAS THE APPROPRIATE
6 ROLE FOR A FORENSIC PSYCHIATRIST TO EVER DIAGNOSE
7 P.T.S.D.?
8 MR. CONN: OBJECTION. MISSTATES THE TESTIMONY.
9 THE COURT: REPHRASE THE QUESTION.
10 Q. BY MS. ABRAMSON: DID YOU READ DR. DIETZ'
11 STATEMENT ABOUT THAT HE -- HE CAN'T DIAGNOSIS P.T.S.D.
12 BECAUSE THEN HE'D BE INVADING THE JURY'S PROVINCE BY
13 DECIDING THAT THERE WAS ORIGINATING TRAUMA?
14 DO YOU REMEMBER HIM TESTIFYING TO THAT?
15 A. YES.
16 Q. IS IT AN INVASION -- FIRST OF ALL, IS THAT
17 AN IMPROPER ROLE FOR A FORENSIC PSYCHIATRIST TO DO, TO
18 DECIDE WHETHER OR NOT --
19 THE COURT: REPHRASE THE QUESTION.
20 MS. ABRAMSON: ALL RIGHT.
21 Q. DO FORENSIC PSYCHIATRISTS ROUTINELY AND

22 ETHICALLY AND PROPERLY DAILY DIAGNOSIS PEOPLE WITH
23 P.T.S.D.?
24 A. AS HAVING IT OR NOT HAVING IT, YES.
25 Q. AND IN READING DR. DIETZ' TESTIMONY, DID
26 YOU NOTE HE NEVER SAID THAT ERIK MENENDEZ DID NOT HAVE
27 IT?
28 MR. CONN: OBJECTION. CALLS FOR HEARSAY AND

-15060

1 IRRELEVANT.
2 THE COURT: SUSTAINED.
3 Q. BY MS. ABRAMSON: ARE YOU AWARE OF ANY
4 OPINION OF DR. DIETZ' EXPRESSED IN THIS COURTROOM OR IN
5 THE MEETING THAT WE HAD WHERE HE SAID HE HAD AN OPINION
6 THAT ERIK MENENDEZ DID NOT HAVE P.T.S.D.?
7 THE COURT: REPHRASE THE QUESTION AS TO IF HE
8 EVER HAD ANY CONVERSATION WITH HIM ON THAT SUBJECT,
9 BECAUSE THE JURY HAS HEARD HIS TESTIMONY.
10 Q. BY MS. ABRAMSON: WELL, WE DID HAVE A
11 MEETING AND THAT SUBJECT WAS DISCUSSED BY HIM, WAS IT
12 NOT?
13 A. YES.
14 Q. AND IN THE MEETING, DID HE EVER SAY THAT HE
15 FORMED OPINION THAT ERIK MENENDEZ DID NOT HAVE P.T.S.D.?
16 MR. CONN: OBJECTION. IRRELEVANT.
17 THE COURT: OVERRULED.

18 THE WITNESS: NO.

19 Q. BY MS. ABRAMSON: NOW, AS A GENERAL

20 PROPOSITION, DR. VICARY, IF A PERSON IS SUFFERING FROM

21 EITHER POST-TRAUMATIC STRESS DISORDER OR GENERALIZED

22 ANXIETY DISORDER, CAN THAT AFFECT THEIR MENTAL STATE AT

23 THE TIME OF AN OFFENSE?

24 A. YES.

25 MR. CONN: OBJECTION. IMPROPER, BEYOND THE SCOPE

26 OF THE HEARING, AND COMPOUND.

27 THE COURT: WELL, BREAK IT DOWN. THE ANSWER IS

28 STRICKEN.

-15059

1 Q. BY MS. ABRAMSON: OKAY.

2 CAN THE FACT THAT SOMEONE SUFFERS FROM

3 P.T.S.D. HAVE AN EFFECT ON THEIR MENTAL STATE AT THE

4 TIME OF A CRIME?

5 THE COURT: THAT'S BEYOND THE SCOPE, SO WHY DON'T

6 YOU GO ON.

7 MS. ABRAMSON: WELL, I WANT TO SHOW THAT THEY'RE

8 THE SAME, YOUR HONOR.

9 THE COURT: WHY DON'T YOU GO AHEAD.

10 Q. BY MS. ABRAMSON: ARE YOU FAMILIAR WITH

11 DR. DIETZ' TESTIMONY THAT THE FACT THAT SOMEONE SUFFERS

12 FROM POST-TRAUMATIC STRESS DISORDER CAN HAVE AN EFFECT

13 ON THEIR MENTAL STATE AT THE TIME OF THE CRIME?

14 MR. CONN: OBJECTION. BEYOND THE SCOPE.

15 THE COURT: SUSTAINED.

16 MS. ABRAMSON: WELL, I'D LIKE TO BE HEARD, YOUR
17 HONOR. IT'S JUST IMPOSSIBLE TO WALK ON ONE FOOT. I
18 TRY.

19 THE COURT: YES, OKAY. WELL, YOU CAN LIMP OVER
20 HERE AND WE WILL TALK ABOUT IT.

21 (THE FOLLOWING PROCEEDINGS WERE
22 HELD IN CAMERA OUT OF THE PRESENCE
23 OF THE JURY:)

24

25 MS. ABRAMSON: THE POINT IS, YOUR HONOR, THE
26 POINTS THAT DR. VICARY WISHES TO MAKE AS AN EXPERT IS
27 THAT THERE'S NO DIFFERENCE IF SOMEONE HAS P.T.S.D. OR IF
28 SOMEONE HAS GENERALIZED ANXIETY DISORDER. BOTH CAN

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1 AFFECT, FOR THE EXACT SAME REASONS, SOMEONE'S MENTAL
2 STATE AT THE TIME OF THE CRIME.

3 AND DR. DIETZ IS TRYING TO DRAW A
4 DISTINCTION THAT P.T.S.D. MIGHT, AND GENERALIZED ANXIETY
5 DISORDER WOULDN'T, IS NOT VALID IN THE SCIENTIFIC
6 RESEARCH.

7 THE COURT: OKAY. BUT AGAIN, THIS -- THE
8 PURPOSE, AND I HAVE GIVEN YOU GREAT LATITUDE TO GO INTO
9 HIS INTERACTION WITH THE DEFENDANT, BUT THE PURPOSE OF

10 THE TESTIMONY, AS I OUTLINED IT, WAS TO REFUTE NEW

11 MATTER --

12 MS. ABRAMSON: I KNOW.

13 THE COURT: -- THAT WAS BROUGHT OUT, AND THE NEW

14 MATTER HAS TO DO WITH THIS GENERAL ANXIETY DISORDER, NOT

15 GOING BACK OVER P.T.S.D. AND WHETHER IT DOES OR NOT.

16 MS. ABRAMSON: I AM ONLY TALKING ABOUT DIETZ.

17 I'M NOT GOING BACK TO WILSON. BUT DIETZ TRIED TO DRAW A

18 DISTINCTION, SAYING GENERALIZED ANXIETY DISORDER IS

19 DIFFERENT. IT ISN'T. THAT'S THE POINT OF HIS

20 TESTIMONY.

21 THE COURT: ALL HE HAS TO DO THEN IS DESCRIBE IN

22 GENERAL HOW GENERALIZED ANXIETY DISORDER AFFECTS

23 INDIVIDUALS, IN HIS OPINION. THE JURY CAN ANALYZE THAT

24 IN RELATIONSHIP TO WHAT HAS BEEN SAID ABOUT P.T.S.D.

25 BUT IT'S NOT NEW MATTER AS FAR AS ANYTHING

26 TO DO WITH P.T.S.D.

27 MS. ABRAMSON: WE HAVE TO MAKE THINGS COHERENT.

28 WHETHER THEY'RE BRAND NEW OR NOT, THEY STILL HAVE TO

-15057

1 MAKE SENSE SO THE JURY UNDERSTANDS THEM.

2 THE COURT: UNFORTUNATELY, THAT'S THE SCOPE OF

3 THIS SURREBUTTAL, IS TO DEAL WITH NEW MATTERS, NOT

4 MATTERS THAT HAVE ALREADY BEEN COVERED.

5 MR. CONN: I AM GOING TO ASK COUNSEL NOT TO MAKE

6 REFERENCE TO MENTAL STATE AT THE TIME OF THE CRIME. IT
7 IS MY KNOWLEDGE HE IS ONLY HERE TO TESTIMONY TO THE --

8 MS. ABRAMSON: HE IS HERE TO TESTIFY TO
9 GENERALIZED ANXIETY DISORDER, AS TO ALL TYPES.

10 THE COURT: NOT AS TO THIS DEFENDANT'S MENTAL
11 STATE. FIRST OF ALL, I HAVE TO HEAR THE QUESTIONS AND
12 WHAT THE QUESTIONS ARE. BUT IT'S NOT TO DEAL WITH ANY
13 MORE THAN THE GENERALIZED APPROACH OF GENERALIZED
14 ANXIETY DISORDER, NOT AS TO THE MENTAL STATE OF THIS
15 DEFENDANT.

16 MS. ABRAMSON: RIGHT.

17 THE COURT: OR UNDER ANY SET OF CIRCUMSTANCES
18 THAT WOULD RELATE TO THIS.

19 MS. ABRAMSON: EXCEPT UNDER AROUSAL
20 CIRCUMSTANCES. THAT'S ALL THE QUESTIONS TO DIETZ HAD
21 BEEN.

22 THE COURT: I'LL HAVE TO HEAR WHAT YOU'RE ASKING,
23 BUT DIETZ' QUESTIONS WERE DETAILED TO THIS CASE, WHEREAS
24 THIS WITNESS IS A GENERALIST.

25 MS. ABRAMSON: BUT HE IS A GENERALIST ON
26 GENERALIZED ANXIETY DISORDER UNDER CIRCUMSTANCES OF
27 AROUSAL.

28 THE COURT: WELL, I HAVE TO HEAR WHAT THE

2 OBJECTIONS AND I SUSTAIN THEM.

3 MS. ABRAMSON: I'LL BE SHOCKED, JUDGE.

4 (THE FOLLOWING PROCEEDINGS WERE

5 HELD IN OPEN COURT IN THE PRESENCE

6 OF THE JURY:)

7

8 MS. ABRAMSON: OH, YES, REMINDING ME. WE SHOULD

9 ADDRESS THIS AS WELL, JUDGE.

10 THE COURT: IS THIS SOMETHING THAT HAS TO BE

11 ADDRESSED NOW, OR CAN WE GO ON TO SOMETHING ELSE?

12 MS. ABRAMSON: I CAN KEEP GOING AS LONG AS I

13 DON'T FORGET ALL TOGETHER.

14 Q. NOW, DR. VICARY, ARE YOU FAMILIAR WITH THE

15 SYMPTOMS AND MANIFESTATIONS AND EFFECTS OF GENERALIZED

16 ANXIETY DISORDER?

17 A. YES.

18 Q. AND HAVE YOU YOURSELF EVER RENDERED THAT

19 DIAGNOSIS IN A FORENSIC CASE?

20 A. YES.

21 Q. DO YOU REMEMBER DR. DIETZ TESTIFYING THAT

22 THE COMMON WISDOM IS THAT GENERAL ANXIETY DISORDER IS

23 CAUSED BY GENETICS OR BIOLOGY?

24 MR. CONN: OBJECTION. MISSTATES THE TESTIMONY.

25 THE COURT: ASSUMING THAT WAS HIS TESTIMONY AS

26 THE BASIS FOR THIS NEXT QUESTION. JUST ASSUME THAT.

27 Q. BY MS. ABRAMSON: DO YOU REMEMBER HIM

28 SAYING HE THINKS IT RUNS IN FAMILIES AND IS BASICALLY

1 INHERITED?

2 THE COURT: WITHOUT GETTING THE WITNESS TO
3 AUTHENTICATE WHAT IT WAS THAT WAS TESTIFIED TO, IF YOU
4 CAN JUST ASK HIM IN A HYPOTHETICAL SENSE, IT MAKES IT
5 MOVE FORWARD QUICKER.

6 Q. BY MS. ABRAMSON: LET ME ASK YOU THAT FLAT
7 OUT.

8 IS THAT RIGHT, IS IT THE GENERAL
9 UNDERSTANDING THAT GENERALIZED ANXIETY DISORDER IS
10 BIOLOGICAL, INHERITED, OR RUNS IN FAMILIES?

11 A. NO. IT SAYS THAT RIGHT IN THE DIAGNOSTIC
12 MANUAL.

13 Q. WHAT PAGE?

14 A. PAGE 434, UNDER "GENERALIZED ANXIETY
15 DISORDER."

16 Q. AND WHAT DOES IT SAY WITH RESPECT TO THAT
17 FACT IN THE DIAGNOSTIC AND STATISTICAL MANUAL?

18 A. THAT MOST OF THE INVESTIGATION AND RESEARCH
19 FAILS TO FIND A SPECIFIC FAMILIAL AGGREGATION.

20 Q. AND WHAT DOES A SPECIFIC FAMILIAL
21 AGGREGATION MEAN IN ENGLISH?

22 A. IT DOESN'T SEEM TO RUN IN FAMILIES.

23 Q. SO IT DOESN'T SEEM TO BE GENETIC?

24 MR. CONN: OBJECTION. CALLS FOR SPECULATION.

25 THE COURT: OVERRULED.

26 THE WITNESS: CORRECT.

27 Q. BY MS. ABRAMSON: IT DOESN'T SEEM TO BE
28 SOMETHING SOMEONE IS BORN WITH EITHER, DOES IT?

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1 MR. CONN: OBJECTION. LEADING.

2 THE COURT: SUSTAINED.

3 Q. BY MS. ABRAMSON: DOES THE RESEARCH
4 INDICATE THAT IT'S SOMETHING THAT SOMEONE IS BORN WITH
5 OR SOMETHING THAT IS CAUSED FROM THE ENVIRONMENT?

6 A. THE RESEARCH THAT WE HAVE SO FAR SEEMS TO
7 INDICATE THAT IT'S MUCH MORE RELATED TO ENVIRONMENTAL
8 EXPERIENCE THAN IT IS TO SOMETHING THAT YOU ARE BORN
9 WITH.

10 Q. THEREFORE, THESE SYMPTOMS CAN BE CAUSED BY
11 THINGS THAT ARE HAPPENING IN CHILDHOOD?

12 A. IN SOME CASES, YES.

13 Q. NOW, IS IT TRUE THAT, AS DR. DIETZ
14 TESTIFIED, THAT THE PREVALENCE OF GENERALIZED ANXIETY
15 DISORDER IN THE GENERAL POPULATION IS 15 PERCENT?

16 A. NO, THAT'S NOT TRUE. IT SAYS RIGHT IN THE
17 DIAGNOSTIC MANUAL THAT THE STUDIES INDICATE THAT THE
18 PREVALENCE RATE; THAT IS TO SAY, HOW MANY PEOPLE OUT OF
19 A HUNDRED WOULD HAVE THIS DISORDER WOULD RUN ABOUT
20 THREE, OR THREE PERCENT.

21 Q. SO ONLY THREE PERCENT OF THE POPULATION
22 HAVE THIS DISORDER?

23 A. CORRECT.

24 Q. NOW, FOR YOUR PURPOSES -- WELL, STRIKE
25 THAT.

26 FOR LEGITIMATE FORENSIC PURPOSES,
27 DR. VICARY, IF ONE SUSPECTED, GIVEN THE FACT THAT
28 GENERALIZED ANXIETY DISORDER DOES NOT APPEAR TO BE

-15053

1 SOMETHING PEOPLE ARE BORN WITH, IF AS A FORENSIC
2 EVALUATOR YOU SUSPECTED THAT SOMEONE WAS SUFFERING FROM
3 GENERALIZED ANXIETY DISORDER, WOULD YOU STILL WANT TO
4 KNOW WHAT CAUSED IT?

5 MR. CONN: OBJECTION. IRRELEVANT.

6 THE COURT: IT'S VAGUE AS TO WHY HE WOULD WANT TO
7 KNOW WHAT CAUSED IT, SO REPHRASE THE QUESTION.

8 Q. BY MS. ABRAMSON: WOULD IT BE IMPORTANT FOR
9 YOU TO TRY TO DETERMINE WHAT CAUSED THE GENERALIZED
10 ANXIETY DISORDER?

11 THE COURT: FOR WHAT PURPOSE?

12 MS. ABRAMSON: FOR ANY PURPOSE. THEN I AM GOING
13 TO ASK HIM WHY.

14 MR. CONN: OBJECTION. IRRELEVANT THEN.

15 THE COURT: REPHRASE THE QUESTION.

16 MS. ABRAMSON: OKAY.

17 Q. WELL, WOULD YOU WANT TO TRY TO DETERMINE
18 WHETHER OR NOT SOMEONE SUFFERING FROM -- WELL, WHAT THE

19 CAUSE OF SOMEONE'S SYMPTOMS OF GENERALIZED ANXIETY
20 DISORDER WERE FOR THE PURPOSE OF MAKING A FORENSIC
21 EVALUATION?

22 A. YOU BET.

23 Q. AND WHY IS IT IMPORTANT TO KNOW THE CAUSE
24 OF AN ANXIETY DISORDER, SUCH AS GENERALIZED ANXIETY
25 DISORDER, FOR MAKING A FORENSIC EVALUATION?

26 A. IT'S ELEMENTARY IN SCIENCE OR MEDICINE THAT
27 IF YOU KNOW THE CAUSE OF SOMETHING THAT YOU ARE BETTER
28 ABLE TO TREAT IT.

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1 Q. WELL, APART FROM TREATMENT PURPOSES, IF
2 YOU'RE BEING ASKED TO RENDER AN OPINION ON WHETHER OR
3 NOT A DISORDER INTERACTED WITH A PERSON'S FUNCTIONING SO
4 AS TO AFFECT THEIR MENTAL STATE AT THE TIME OF THE
5 PARTICULAR CRIME, IS THE CAUSE OF THE ANXIETY STATE
6 SIGNIFICANT?

7 MR. CONN: OBJECTION. IRRELEVANT.

8 THE COURT: OVERRULED.

9 YOU CAN ANSWER THE QUESTION.

10 THE WITNESS: I THINK IT'S ALWAYS SIGNIFICANT,
11 ESPECIALLY IN SOME CASES WHERE YOU MIGHT HAVE A
12 SITUATION WHERE THE PERSON IS IN THE LEGAL SYSTEM
13 BECAUSE THEY WERE IN AN ANXIETY-PROVOKING SITUATION.

14 Q. BY MS. ABRAMSON: AND IF THEY'RE IN AN

15 ANXIETY-PROVOKING -- HYPOTHETICALLY IF ONE IS IN AN
16 ANXIETY-PROVOKING SITUATION, IS IT IMPORTANT TO KNOW
17 WHETHER OR NOT THAT SITUATION MIRRORS ANXIETY-PRODUCING
18 SYMPTOMS FROM THEIR PAST?

19 A. YES.

20 Q. WHY IS THAT, DR. VICARY?

21 A. IF THE CAUSE OF THE ANXIETY DISORDER IS THE
22 SAME ENVIRONMENTAL SITUATION THAT THE PERSON IS IN AT
23 THE TIME OF THE CRIME OR THE ACCIDENT, WHATEVER WE ARE
24 DEALING WITH IN THE LEGAL SETTING, THEN THAT WOULD BE A
25 MUCH MORE CONTINUOUS AND TRAUMATIC EXPERIENCE FOR THE
26 INDIVIDUAL THAN SOME OTHER KIND OF ANXIETY SITUATION.

27 Q. IN OTHER WORDS, IF SOMEONE IS SUFFERING
28 FROM GENERALIZED ANXIETY DISORDER, FOR EXAMPLE, BECAUSE

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1 THEY WERE, LET'S SAY, ROUTINELY BEATEN UP BY A GUY AT
2 WORK AND THEY FIND THEMSELF IN A SITUATION WHERE THEY'RE
3 THREATENED TO BE BEATEN UP BY THAT SAME GUY, WOULD YOU
4 EXPECT THAT THEY WOULD HAVE A MUCH MORE INTENSE
5 EMOTIONAL REACTION THAN IF THEY WERE, SAY, THREATENED BY
6 SOMEONE THEY HAD NEVER SEEN BEFORE, HAD NEVER HARMED
7 THEM BEFORE?

8 A. YES.

9 Q. AND IF SOMEONE -- IN GENERAL TERMS,
10 DR. VICARY, DO PEOPLE REACT WITH GREATER AROUSAL AND

11 EMOTION TO A THREAT WHEN THEY HAVE BEEN THREATENED

12 SIMILARLY IN THE PAST?

13 MR. CONN: OBJECTION. IRRELEVANT AND BEYOND THE
14 SCOPE OF THIS HEARING.

15 THE COURT: SUSTAINED.

16 Q. BY MS. ABRAMSON: ARE PEOPLE WITH
17 GENERALIZED ANXIETY DISORDER, OR ANY OF THE ANXIETY
18 DISORDER THE ONLY KIND OF PEOPLE WHO GET FRIGHTENED?

19 MR. CONN: OBJECTION. IRRELEVANT.

20 THE COURT: SUSTAINED.

21 Q. BY MS. ABRAMSON: IS IT UNDERSTOOD IN
22 PSYCHIATRY THAT NORMAL PEOPLE CAN BE EMOTIONALLY
23 AROUSED?

24 MR. CONN: OBJECTION. IRRELEVANT.

25 THE COURT: SUSTAINED.

26 MS. ABRAMSON: YOUR HONOR, IT'S A FUNDAMENTAL
27 QUESTION SO WE CAN WORK OUR WAY UP THE FOOD CHAIN, IF
28 YOU WILL.

-15050

1 THE COURT: YOU'VE GOT TO GET TO THE TOP.

2 MS. ABRAMSON: YOU WON'T LET ME GET TO THE TOP.
3 YOU ONLY LET ME STOP AT THE MIDDLE.

4 THE COURT: GET THERE. GET TO THE BOTTOM OF WHAT
5 IT IS YOU'RE ASKING.

6 Q. BY MS. ABRAMSON: WOULD A PERSON WITH

7 GENERALIZED ANXIETY DISORDER WHO IS ENGAGED IN A SIMILAR
8 ENVIRONMENT TO THAT WHICH CAUSED THE ANXIETY DISORDER BE
9 LIKELY TO REACT TO A PERCEIVED THREAT WITH INTENSE
10 EMOTION?

11 MR. CONN: OBJECTION. IRRELEVANT AND CALLS FOR
12 SPECULATION. NO FOUNDATION.

13 THE COURT: YOU'RE ASKING IN GENERAL ALL PEOPLE
14 WHO SUFFER FROM --

15 MS. ABRAMSON: YES, YES.

16 THE COURT: -- THIS DIAGNOSIS?

17 MS. ABRAMSON: YES.

18 THE COURT: DO YOU HAVE AN OPINION ON THAT?

19 MS. ABRAMSON: THAT'S WHAT I JUST ASKED.

20 THE WITNESS: YES, I DO.

21 THE COURT: OKAY. WHAT IS YOUR ANSWER?

22 THE WITNESS: YES.

23 Q. BY MS. ABRAMSON: AND WOULD THEY BE LIKELY
24 TO REACT WITH AN INTENSER LEVEL OF EMOTION THAN PEOPLE
25 WHO DON'T SUFFER FROM AN ANXIETY DISORDER?

26 A. YES.

27 Q. AND DOES THAT MEAN THAT PEOPLE WHO DON'T
28 SUFFER FROM ANY ANXIETY DISORDERS DON'T REACT TO -- TO

-15049

1 THREATENING EVENTS?

2 A. NO.

3 Q. DOES EVERYBODY REACT TO THREATENING EVENTS?

4 A. IN GENERAL, YES.

5 Q. AND DO PEOPLE WITH ANXIETY DISORDERS REACT
6 MORE THAN ORDINARY PEOPLE?

7 MR. CONN: OBJECTION. IRRELEVANT.

8 THE COURT: OVERRULED.

9 YOU CAN ANSWER THE QUESTION.

10 THE WITNESS: YES.

11 Q. BY MS. ABRAMSON: AND DO PEOPLE WITH
12 GENERALIZED ANXIETY DISORDER HAVE A TENDENCY TO REACT
13 MUCH FASTER AND WITH GREATER AROUSAL TO STIMULUS THAN
14 PEOPLE WHO DON'T HAVE GENERALIZED ANXIETY DISORDER?

15 A. YES.

16 Q. AND DO YOU AGREE, THEREFORE, WITH
17 DR. DIETZ' TESTIMONY TO THAT EFFECT?

18 A. YES.

19 Q. NOW, IN DIAGNOSING SOMEONE WITH GENERAL
20 ANXIETY DISORDER, IS DEPRESSION A FEATURE OF GENERALIZED
21 ANXIETY DISORDER?

22 A. IN SOME CASES IT CAN BE A SPILLOVER, OR IT
23 CAN BE THE RESULT OF THE PROBLEMS THAT ARE CAUSED BY THE
24 ANXIETY DISORDER.

25 Q. WELL, IS DEPRESSION MORE TYPICALLY
26 ACCOMPANYING POST-TRAUMATIC STRESS DISORDER THAN GENERAL
27 ANXIETY DISORDER, OR DO THEY BOTH TEND TO HAVE
28 DEPRESSION AS A SIDE FEATURE, IF YOU WILL, OR AS A

1 RELATED FEATURE?

2 A. IT'S MORE COMMON IN POST-TRAUMATIC STRESS
3 DISORDER.

4 Q. IF YOU WERE FACED WITH EVALUATING SOMEONE
5 WHERE THERE WAS A CLEAR HISTORY OF DEPRESSION, WOULD IT
6 BE APPROPRIATE TO IGNORE THAT HISTORY AND REJECT --
7 WELL, STRIKE THAT.

8 IS IT APPROPRIATE TO IGNORE A HISTORY OF
9 DEPRESSION WHEN YOU'RE TRYING TO DETERMINE WHETHER
10 SOMEONE'S MAIN DISORDER IS AN ANXIETY DISORDER?

11 A. OF COURSE NOT.

12 Q. IS IT APPROPRIATE TO ASSUME -- WELL, IS IT
13 APPROPRIATE TO DIAGNOSIS GENERAL ANXIETY DISORDER WHEN
14 THE SYMPTOMS OF POST-TRAUMATIC STRESS DISORDER AND
15 DEPRESSION ARE PRESENT?

16 A. I THINK YOU'RE TALKING ABOUT A SITUATION IN
17 WHICH THE PATIENT HAS TOO MANY SYMPTOMS, AND THE
18 SYMPTOMS ARE TOO SEVERE.

19 Q. TOO MANY AND TOO SEVERE FOR WHAT?

20 A. TO PUT THEM IN THE CATEGORY OF A
21 GENERALIZED ANXIETY DISORDER.

22 Q. IF THERE ARE THAT MANY SYMPTOMS AND THEY'RE
23 THAT SEVERE, IS THE APPROPRIATE DIAGNOSIS P.T.S.D.?

24 A. THAT OR SOME OTHER TYPE OF DIAGNOSIS.

25 Q. SUCH AS?

26 A. A MAJOR DEPRESSION.

27 Q. NOW LET'S TALK ABOUT THIS GENERALIZED

-15047

1 DOES IT MERELY MEAN THAT SOMEONE'S NERVOUS?

2 A. NO, IT DOESN'T.

3 Q. WHAT DOES IT MEAN?

4 A. LIKE ALL THE CATEGORIES IN THIS BOOK, IT
5 HAS A SPECIFIC LIST OF SYMPTOMS THAT YOU HAVE TO
6 FULFILL. YOU KNOW, SOMETIMES I GET NERVOUS. THE USC
7 TROJANS ARE FACING NORTHWESTERN IN THE ROSE BOWL, AND I
8 AM REAL NERVOUS ABOUT THAT.

9 Q. ROOTING FOR NORTHWESTERN?

10 A. ROOTING FOR NORTHWESTERN OR ROOTING FOR
11 USC. OBVIOUSLY I DON'T HAVE GENERALIZED ANXIETY
12 DISORDER. I AM JUST NERVOUS ABOUT AN EVENT. ALL RIGHT.

13 A LOT OF US GET NERVOUS ABOUT A JOB
14 PROMOTION OR A DATE OR A SPORTING EVENT, GOING ON
15 VACATION. THAT'S NOT WHAT THE BOOK TALKS ABOUT.

16 THE BOOK TALKS ABOUT PEOPLE THAT HAVE MAJOR
17 PROBLEMS AND SERIOUS SYMPTOMS OF NERVOUSNESS AND
18 PROBLEMS WITH THEIR CONCENTRATION AND DIFFICULTY
19 SLEEPING. THESE ARE THE KIND OF SYMPTOMS THAT ARE SO
20 INTENSE AND THAT PERSIST OVER SUCH A LONG PERIOD OF TIME
21 THAT IT BEGINS TO INTERFERE WITH A PERSON'S FUNCTIONING,
22 EITHER VOCATIONALLY OR EDUCATIONALLY OR INTERPERSONALLY.

23 Q. NOW, IF SOMEONE WERE TO REPORT TO YOU,

24 DR. VICARY, IN AN EVALUATION THAT ONE OF THE THINGS THEY
25 WERE CONSISTENTLY ANXIOUS OR FRIGHTENED OR WORRIED ABOUT
26 DURING THIS PERIOD OF TIME WHEN THEY SUPPOSEDLY HAVE
27 GENERALIZED ANXIETY DISORDER, IF THEY WERE TO TELL YOU
28 THE THING THEY'RE MOST CONCERNED ABOUT IS OTHER PEOPLE'S

-15046

1 TREATMENT OF THEM, IS THAT A SUGGESTION THAT GENERALIZED
2 ANXIETY DISORDER IS NOT AN APPROPRIATE DIAGNOSIS?

3 MR. CONN: OBJECTION. IRRELEVANT.

4 THE COURT: SUSTAINED.

5 Q. BY MS. ABRAMSON: IS BEING ABUSED BY
6 ANOTHER PERSON THE KIND OF ENVIRONMENTAL EVENT THAT
7 COULD CAUSE SYMPTOMS OF GENERALIZED ANXIETY DISORDER?

8 A. YES.

9 Q. IF SOMEONE WERE TO REPORT CONCERNS ABOUT
10 TREATMENT -- WELL, IF SOMEONE WERE TO REPORT FEARS ABOUT
11 THEIR TREATMENT FROM ANOTHER PERSON, WOULD YOU INCLUDE
12 THOSE IN A DESCRIPTION OF THE EFFECTS OF GENERALIZED
13 ANXIETY DISORDER ON THAT PERSON; IN OTHER WORDS, THAT
14 IT'S INTERFERING WITH OR THAT IT'S CAUSING CONCERNS
15 ABOUT THAT RELATIONSHIP OR THOSE RELATIONSHIPS?

16 MR. CONN: OBJECTION. IRRELEVANT.

17 THE COURT: SUSTAINED.

18 Q. BY MS. ABRAMSON: DID YOU READ THE NOTES
19 THAT DR. DIETZ COMPILED FOR HIS 16 HOURS OF INTERVIEW

20 WITH MR. MENENDEZ?

21 MR. CONN: OBJECTION. IRRELEVANT.

22 THE COURT: OVERRULED.

23 YOU MAY ANSWER THE QUESTION.

24 THE WITNESS: YES.

25 Q. BY MS. ABRAMSON: AND DO YOU REMEMBER

26 DR. DIETZ' TESTIMONY CONCERNING -- WELL, STRIKE THAT.

27 YOU FIND, DO YOU NOT, ACCORDING TO THE

28 DSM-IV, THAT GENERALIZED ANXIETY DISORDER SOMEHOW

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1 INTERFERES WITH YOUR FUNCTIONING IN LIFE, CORRECT?

2 A. YES.

3 Q. AND YOU ALSO HAVE TO FIND THAT THERE ARE

4 SYMPTOMS THAT SHOW EXCESSIVE CONSISTENT WORRY ABOUT A

5 VARIETY OF ASPECTS OF LIFE?

6 A. YES.

7 Q. AND DID YOU NOTE DR. DIETZ' TESTIMONY THAT

8 HE LEFT OUT -- YOU HAVE HIS DESCRIPTION OF THE THINGS

9 THAT ERIK MENENDEZ TOLD HIM HE WAS CONSTANTLY WORRIED

10 ABOUT, THE INFORMATION THAT HE WAS CONSTANTLY WORRIED

11 ABOUT HIS PARENTS' TREATMENT OF HIM?

12 MR. CONN: OBJECTION. IRRELEVANT.

13 THE COURT: SUSTAINED.

14 Q. BY MS. ABRAMSON: IS IT APPROPRIATE TO MAKE

15 A DIAGNOSIS OF GENERALIZED ANXIETY DISORDER AND LEAVE

16 OUT OF IT THE THING THE PERSON IS MOST ANXIOUS ABOUT?

17 MR. CONN: OBJECTION. IRRELEVANT AND VAGUE.

18 THE COURT: SUSTAINED.

19 Q. BY MS. ABRAMSON: IF A PERSON IS ANXIOUS --

20 MOST ANXIOUS ABOUT BEING HARMED BY ANOTHER PERSON, IS IT

21 APPROPRIATE IN FORMING A DIAGNOSIS OF AN ANXIETY DISORDER

22 TO MAKE NO REFERENCE TO THAT SET OF FEARS?

23 MR. CONN: OBJECTION. VAGUE AND IRRELEVANT.

24 THE COURT: SUSTAINED.

25 MS. ABRAMSON: I WANT TO BE HEARD, YOUR HONOR.

26 THE COURT: OKAY. DO YOU WANT TO BE HEARD NOW ON

27 THAT SUBJECT?

28 MS. ABRAMSON: YES, I WANT TO BE HEARD NOW,

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1 BECAUSE THERE IS NO POINT IN GOING ON.

2 THE COURT: THEN WE WILL SEE IF WE CAN RESOLVE

3 THIS ISSUE. IT MAY BE EASIER FOR EVERYBODY IF THE JURY

4 WOULD GO -- AT LEAST EASIER FOR US, I DON'T KNOW ABOUT

5 YOU, WE WILL HAVE YOU GO INTO THE JURY ROOM AND TAKE

6 SHORT BREAK.

7 (THE JURY ENTERED THE JURY ROOM

8 AND THE FOLLOWING PROCEEDINGS

9 WERE HELD:)

10

11 THE COURT: YES.

12 MS. ABRAMSON: WELL, YOUR HONOR, I THINK I SHOULD
13 BE ENTITLED TO SHOW THAT THERE IS A FLAW IN DR. DIETZ'
14 METHOD OF DIAGNOSING MY CLIENT WITH GENERALIZED ANXIETY
15 DISORDER.

16 I WENT OVER HIS TESTIMONY VERY CAREFULLY,
17 AND HE INDICATED WHAT IT WAS THAT HE CLAIMED MY CLIENT
18 TOLD HIM HE WAS AFRAID OF. AND WHAT HE COMPLETELY LEFT
19 OUT, AND THIS IS IN HIS NOTES, WHICH IS ON THE VIDEOTAPE
20 WHICH DR. VICARY HAS SEEN, IS MY CLIENT TELLING HIM THAT
21 HE WAS CONTINUOUSLY WORRIED ABOUT HIS PARENTS' MOODS,
22 CONTINUOUSLY WORRIED ABOUT HIS FATHER COMING INTO HIS
23 ROOM, CONSTANTLY WORRIED ABOUT PUNISHMENTS THAT HE WOULD
24 RECEIVE FROM THEM.

25 NOW, WE'RE JUST WITHIN THE CONTEXT OF
26 GENERALIZED ANXIETY DISORDER.

27 THE COURT: THAT WOULD HAVE BEEN PROPER TO BRING
28 OUT DURING THE CROSS-EXAMINATION OF DR. DIETZ, NOT

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1 THROUGH THE TESTIMONY OF THIS WITNESS.

2 MS. ABRAMSON: WELL, IF THIS WITNESS IS PERMITTED
3 TO TALK ABOUT WHAT ARE THE CRITERIA FOR DIAGNOSING
4 GENERALIZED ANXIETY DISORDER AND WHAT IS PROPER FORENSIC
5 PRACTICE, THE FACT THAT SOMEONE LEAVES THAT OUT -- AND I
6 ASKED IT IN A GENERAL WAY AFTER THE OBJECTION WAS
7 SAID -- I SHOULD BE ABLE TO INDICATE IN A GENERAL WAY

8 THAT IT WOULD BE INAPPROPRIATE TO LEAVE THOSE THINGS
9 OUT.

10 THE COURT: THE ONLY WAY TO ESTABLISH THAT IT WAS
11 LEFT OUT IS TO HAVE DR. DIETZ TESTIFY ABOUT IT.

12 MS. ABRAMSON: GOOD. WELL, WE CAN HAVE DR. DIETZ
13 COME BACK TO DO THAT.

14 THE COURT: NO. HE'S BEEN EXCUSED, AND THIS
15 SHOULD HAVE BEEN BROUGHT OUT DURING HIS
16 CROSS-EXAMINATION.

17 MS. ABRAMSON: WELL, AT THAT POINT I WAS RELYING
18 ON THE LAST MOOD SWING IN THE COURTROOM, WHICH WAS I
19 WOULD BE ABLE TO CALL HIM.

20 THE COURT: I BEG YOUR PARDON? WERE YOU RELYING
21 UPON YOUR MISINTERPRETATION OF THE LAW; IS THAT WHAT
22 YOU'RE SAYING?

23 MS. ABRAMSON: YES. MY INCOMPETENCE, YOUR HONOR,
24 YOU'RE CORRECT.

25 THE COURT: KEEP IT UP. WE'LL SEE WHERE THE
26 RECORD GOES.

27 DO YOU HAVE ANY MORE QUESTIONS YOU WANT TO
28 ASK OF THIS WITNESS?

-15042

1 MS. ABRAMSON: YES, SEVERAL.

2 THE COURT: WHAT ARE THEY?

3 MS. ABRAMSON: FIRST OF ALL, I WOULD LIKE TO BE

4 ABLE TO SHOW AGAIN, WITH RESPECT TO SHOWING THAT
5 DR. DIETZ NOT FOLLOW THE GENERAL METHODOLOGY OF FORENSIC
6 PSYCHIATRISTS; THAT WE WERE PROVIDED WITH THE SUPPOSED
7 RESEARCH THAT HE WAS RELYING ON, AND THAT RESEARCH
8 COMPLETELY CONTRADICTS HIS TESTIMONY CONCERNING LEARNED
9 HELPLESSNESS AND HYPERVIGILANCE, AND THAT'S ALL I WOULD
10 SAY ABOUT THAT. I WON'T GO INTO THAT. THIS IS THE
11 RESEARCH WE WERE GIVEN BY DR. DIETZ AT THE MEETING THAT
12 WE HAD ON FEBRUARY 5TH. IT IS CONTRARY TO THE
13 DESCRIPTION OF LEARNED HELPLESSNESS AND THE DESCRIPTION
14 OF HYPERVIGILANCE THAT HE GAVE DURING THIS TRIAL.

15 THE COURT: THAT WOULD HAVE BEEN APPROPRIATE TO
16 BRING UP DURING HIS CROSS-EXAMINATION.

17 MS. ABRAMSON: WELL, I DON'T SEE WHY I CAN'T
18 BRING IT UP, WHETHER HE'S CROSS-EXAMINED ON IT OR NOT.

19 THE COURT: BECAUSE THE PROPER WAY OF DEALING
20 WITH THIS WOULD HAVE BEEN TO ASK HIM ABOUT IT, NOT TO
21 ASK THIS WITNESS. IT WAS A MATTER THAT WAS THERE FOR
22 YOU TO ASK DURING THE --

23 MS. ABRAMSON: HIS DEFINITION OF LEARNED
24 HELPLESSNESS IS DEFINITELY A NEW MATTER.

25 THE COURT: I BEG YOUR PARDON. WE WERE TALKING
26 AT THE SAME TIME. I WASN'T ABLE TO HEAR WHAT YOU WERE
27 SAYING.

28 WHAT WERE YOU SAYING?

1 MS. ABRAMSON: I WAS SAYING HIS DEFINITION OF
2 LEARNED HELPLESSNESS WAS A NEW MATTER. IT WAS SO
3 COMPLETELY DIFFERENT THAN WHAT THE LITERATURE DESCRIBES.

4 THE COURT: REGARDLESS OF THAT, WHAT YOU'RE
5 TALKING ABOUT IS A MATTER THAT YOU COULD HAVE COVERED ON
6 CROSS-EXAMINATION, AND YOU CHOSE FOR WHATEVER REASON YOU
7 HAVE, NOT TO.

8 MS. ABRAMSON: WELL, THE REASON WAS, IT APPEARED
9 TO ME FROM THE DISCUSSION WE HAD HAD THAT I WOULD BE
10 PERMITTED TO CALL DR. VICARY TO TESTIFY IN A MORE
11 MEANINGFUL WAY, CASE SPECIFICALLY, CONCERNING THESE
12 MATTERS.

13 THE COURT: WELL, WE HAVE BEEN THROUGH THAT, AND
14 I TOLD YOU --

15 MS. ABRAMSON: I KNOW. THAT'S THE REASON --

16 THE COURT: WAIT. AND I TOLD YOU YOU WERE
17 ALLOWED TO QUESTION DR. VICARY ABOUT NEW MATTER, AND NEW
18 MATTER ONLY, AND NOT MATTER THAT YOU COULD HAVE COVERED
19 AND CROSS-EXAMINED WHEN YOU HAD THE WITNESS THERE TO BE
20 EVALUATED BY THE JURY. YOU HAD ALL THIS MATERIAL THERE,
21 AND YOU, FOR WHATEVER REASON, ELECTED TO HOLD BACK ON
22 IT, AND THAT WAS NOTHING BUT YOUR DECISION.

23 NOW WHAT ELSE DID YOU WANT TO COVER?

24 MS. ABRAMSON: WELL, LET ME JUST GO BACK TO THAT
25 ONE, BECAUSE HERE I AM LOOKING AT THE NEXT QUESTION,
26 WHICH IS VERY SIMILAR TO THAT ONE.

27 I WOULD LIKE TO ASK THIS WITNESS A
28 HYPOTHETICAL QUESTION, "IF YOU WERE TOLD THAT SOMEONE'S

1 GREATEST ANXIETY WAS NOT ABOUT HIS SCHOOL PERFORMANCE OR
2 HIS TESTS OR HIS SPORTS, BUT ABOUT THE ACTIONS OF PEOPLE
3 AROUND HIM, WOULD THAT SUGGEST THAT GENERALIZED ANXIETY
4 DISORDER" -- WELL, "WOULD THAT BE CONSISTENT OR
5 INCONSISTENT WITH A DIAGNOSIS OF GENERAL ANXIETY
6 DISORDER?"

7 AND THAT'S WHAT MY CLIENT TESTIFIED TO.

8 THE COURT: TESTIFIED ABOUT WHAT?

9 MS. ABRAMSON: ABOUT WHAT HE WAS FEARFUL OF
10 DURING THE COURSE OF HIS LIFE. HE DIDN'T TESTIFY THAT
11 HE WAS FEARFUL OF TESTS; HE WAS FEARFUL OF HIS PARENTS
12 SHOULD HE NOT PASS TESTS. HE WASN'T FEARFUL OF SPORTS
13 OR SPORTS PERFORMANCE; HE WAS FEARFUL OF WHAT HIS
14 PARENTS WOULD SAY TO HIM.

15 AND DR. DIETZ DID SAY THAT HE READ MY
16 CLIENT'S TESTIMONY IN THIS TRIAL, AND THAT BECAUSE IT
17 WAS SWORN TESTIMONY, HE DID RELY UPON IT, AND THAT WAS
18 HIS TESTIMONY.

19 SO FORGETTING ABOUT DR. DIETZ' NOTES, WE
20 ARE TALKING ABOUT THE TESTIMONY MY CLIENT GAVE IN THIS
21 TRIAL, AND THE FACT THAT DR. DIETZ DID RELY ON THAT
22 TESTIMONY IN FORMING HIS OPINION AND DIAGNOSIS.

23 SO I THINK I HAVE A RIGHT TO GO INTO
24 WHETHER GENERALIZED ANXIETY DISORDER IS AN APPROPRIATE
25 DIAGNOSIS WHEN A PERSON HAS INDICATED THAT THE THING

26 THEY'VE BEEN MOST FEARFUL OF OVER THE COURSE OF THEIR
27 LIFE WAS NOT THESE THINGS, BUT THE TREATMENT AT THE
28 HANDS OF PARENTS.

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1 THE COURT: AND WHAT IS THE PEOPLE'S RESPONSE TO
2 THAT?

3 MR. CONN: WE WOULD OBJECT TO THAT. ONCE AGAIN,
4 THAT GETS INTO THE SPECIFIC DISORDER IN THIS CASE RATHER
5 THAN THE GENERAL ANXIETY DISORDER IN GENERAL. THEY HAVE
6 HAD DR. WILSON TO TESTIFY TO THE EFFECTS OF SUCH A
7 BACKGROUND AND TO LINK IT TO A DIAGNOSIS, AND I WOULD
8 ASK THAT THIS WITNESS NOT BE PERMITTED TO DO THE SAME.

9 MS. ABRAMSON: WELL, IT'S VERY HARD TO CRITIQUE
10 DR. DIETZ UNTIL DR. DIETZ TESTIFIES. I THINK WE CAN ALL
11 AGREE TO THAT.

12 DR. DIETZ IS THE ONE WHO'S COME UP WITH
13 THIS GENERALIZED ANXIETY DISORDER DIAGNOSIS. I
14 UNDERSTAND THAT THAT'S WHAT'S NEW. THE GENERALIZED
15 ANXIETY DISORDER DIAGNOSIS IN THE FACE OF THE EVIDENCE
16 IN THIS CASE IS NEW.

17 SO I THINK WE SHOULD HAVE A RIGHT TO SHOW
18 WHY THE GENERALIZED ANXIETY DISORDER DIAGNOSIS IS
19 PROBABLY WRONG, GIVEN WHAT THE INFORMATION IS THAT DR.
20 DIETZ SAID HE RELIED ON.

21 THE COURT: AFTER THAT QUESTION, WHAT ELSE DID

22 YOU PROPOSE TO ASK ON THAT SUBJECT?

23 MS. ABRAMSON: THEN THAT WAS THE ONLY THING ON
24 THAT SUBJECT.

25 THEN I WAS GOING TO ASK ABOUT GENERALIZED
26 ANXIETY DISORDER AND HOW -- I AM JUST GOING TO TRACK
27 THINGS THAT DR. DIETZ SAID SPECIFICALLY ABOUT
28 GENERALIZED ANXIETY DISORDER IN THE GENERAL PART OF HIS

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1 EXAMINATION. HE MADE CERTAIN CLAIMS THAT PEOPLE WITH
2 GENERAL ANXIETY DISORDER CANNOT BE RENDERED LESS
3 RATIONAL; THAT PEOPLE WITH GENERALIZED ANXIETY DISORDER
4 COULD NOT INTERFERE WITH THEIR ABILITY TO MAKE CHOICES,
5 MAKE DECISIONS, ALL THAT GENERAL STUFF HE SAID ABOUT HOW
6 GENERAL ANXIETY DISORDER DOESN'T AFFECT THINGS. I AM
7 GOING TO ASK THIS WITNESS ABOUT THAT.

8 MR. CONN: AND AGAIN --

9 MS. ABRAMSON: DR. DIETZ WENT VERY FAR CLAIMING
10 THAT GENERALIZED ANXIETY DISORDER COULD NEVER CAUSE
11 ANYONE TO LOSE THE ABILITY TO UNDERSTAND OR ANALYZE A
12 SITUATION, COULD NOT MAKE SOMEONE INCAPABLE OF MAKING
13 CHOICES, COULD NOT EVER INTERFERE WITH REFLECTIVE
14 THOUGHT, COULD NOT -- COULDN'T BE LESS RATIONAL,
15 COULDN'T BE INCAPABLE OF REFLECTIVE THOUGHT, COULDN'T BE
16 IMPAIRED IN THE ABILITY TO CONTROL IMPULSES, COULD NOT
17 BE IMPAIRED IN THE HIGHER CORTICAL FUNCTIONS. NONE OF

18 THAT IS IMPAIRED BY ANXIETY. THAT'S HOW FAR HE WENT,
19 ANY ANXIETY.
20 HE SAID IT IS NOT WITHIN THE POWER OF
21 ANXIETY TO MAKE A PERSON INCAPABLE -- THIS IS WHEN HE
22 WAS TALKING ABOUT GENERALIZED ANXIETY DISORDER AND WHY
23 IN HIS OPINION IT COULD NOT HAVE AFFECTED MENTAL STATE
24 AT THE TIME OF THE OFFENSE, EXCEPT TO MAKE A PERSON MORE
25 NERVOUS.

26 WHAT HE SAID WAS IT WAS NOT WITHIN THE
27 POWER OF GENERAL ANXIETY DISORDER, ANXIETY TO MAKE A
28 PERSON INCAPABLE OF REFLECTIVE THOUGHT. IT COULD ONLY

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1 MAKE A PERSON EXERCISE POOR JUDGMENT OR ACT HASTILY. HE
2 SAID IT CAN'T MAKE THEM INCAPABLE OF THINKING.

3 HE SAID THIS KIND OF ANXIETY DOESN'T IMPAIR
4 THE HIGHER CORTICAL FUNCTION. IT DOESN'T IMPAIR
5 DECISION MAKING. IT DOESN'T IMPAIR VIEWING ONE'S SELF.
6 IT DOESN'T IMPAIR CONSIDERING OPTIONS, MAKING CHOICES OR
7 REASONING.

8 THAT WAS DR. DIETZ' DESCRIPTION OF WHAT
9 GENERALIZED ANXIETY DISORDER CANNOT DO.

10 WE TAKE EXCEPTION TO THAT. AND HE WAS
11 TALKING GENERALLY, AND WE WILL BE TALKING GENERALLY.

12 THE COURT: AND THIS WITNESS WILL CONTRADICT ALL
13 OF THOSE STATEMENTS OF DR. DIETZ?

14 MS. ABRAMSON: YOU BET.
15 THE COURT: ON THOSE SUBJECTS?
16 MS. ABRAMSON: YES. HE WILL CONTRADICT THOSE
17 STATEMENTS, AND HE WILL AGREE THAT GENERALIZED ANXIETY
18 DISORDER MAY MAKE ONE MORE PRONE TO POST-TRAUMATIC
19 STRESS DISORDER. IT WILL ALSO MAKE ONE MORE PRONE TO
20 MISDIAGNOSE POST-TRAUMATIC STRESS DISORDER AS GENERAL
21 ANXIETY DISORDER IF YOU DO NOT LOOK AT SOURCE MATERIAL.
22 I THINK HE'S PRETTY MUCH ALREADY SAID THAT.
23 HE WILL AGREE WITH DR. DIETZ THAT CHILD
24 ABUSE CAN CAUSE BOTH P.T.S.D. AND GENERALIZED ANXIETY
25 DISORDER, ALTHOUGH THE RESEARCH SHOWS IT IS MORE LIKELY
26 TO CAUSE P.T.S.D. THAN GENERALIZED ANXIETY DISORDER.
27 HE WILL INDICATE THAT SOMEONE WITH
28 GENERALIZED ANXIETY DISORDER IS, AS DR. DIETZ INDICATED,

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1 MORE LIKELY TO BE MORE REACTIVE TO STIMULI AND LIKELY TO
2 RESULT -- I THINK DR. DIETZ PUT IT -- SOMEONE WITH
3 GENERALIZED ANXIETY DISORDER HAS A GREATER READINESS TO
4 RESPOND. THEY ARE ALREADY PRONE TO ANXIETY. THEY HAVE
5 A HIGHER BASELINE OF ANXIETY -- A HIGHER BASELINE OF
6 ANXIETY. SO IN THE FACE OF STIMULANTS, THEY ARE LIKELY
7 TO KICK INTO A HIGHER OVERALL ANXIETY STATE; THAT SUCH
8 PEOPLE WHEN -- LET ME SEE.
9 THAT WHEN PEOPLE WITH GENERALIZED ANXIETY

10 DISORDER FIND THEMSELVES IN A FIGHT OR FLIGHT SITUATION,
11 THEY'RE NOT -- WELL, I DON'T WANT TO PUT IT IN A
12 NEGATIVE SENSE.

13 WHEN SUCH PEOPLE FIND THEMSELVES IN A FIGHT
14 OR FLIGHT SITUATION, THEY GENERALLY ARE NOT MAKING
15 DELIBERATIVE DECISIONS, BUT ARE ACTING BASED ON THE
16 OVERWHELMING EMOTION, MORE SO THAN ORDINARY PEOPLE
17 WOULD.

18 AND I COULD -- WE COULD GO FARTHER, BUT YOU
19 WON'T LET ME, WHICH IS JUST LIKE WHAT PEOPLE WITH
20 P.T.S.D. DO.

21 BUT WHAT WE WANT TO SHOW HERE IS THAT
22 DR. DIETZ' DESCRIPTION THAT GENERAL ANXIETY DISORDER
23 CAN'T POSSIBLY AFFECT ALL THESE CORTICAL FUNCTIONS OR
24 REFLECTIVE THOUGHT IS SIMPLY NOT SO, AND WE'RE JUST
25 TALKING IN A GENERAL SENSE.

26 THE COURT: OKAY. AND WHAT IS THE PEOPLE'S
27 RESPONSE TO THAT?

28 MR. CONN: I THINK IT CERTAINLY DEPENDS ON THE

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1 QUESTIONS COUNSEL ASKS.

2 HOWEVER, I WOULD ASK THAT COUNSEL REFRAIN
3 FROM CONSTANTLY SUGGESTING, "DID YOU HEAR DR. DIETZ'
4 TESTIMONY IN SO FAR AS HE TESTIFIED TO THE FOLLOWING,"
5 BECAUSE I HAVE -- I FOUND THAT I DISAGREE WITH COUNSEL'S

6 CHARACTERIZATION OF DR. DIETZ' TESTIMONY. I DISAGREE
7 WITH HER CHARACTERIZATION HERE AS SHE IS MAKING AN OFFER
8 OF PROOF TO THE COURT THAT IT DOESN'T IMPAIR JUDGMENT.
9 HE DIDN'T SAY THAT. HE SAID IT CAN AFFECT JUDGMENT.
10 THE QUESTION HE WAS ASKED WAS DOES IT STOP A PERSON FROM
11 EXERCISING RATIONAL THOUGHT, FOR EXAMPLE. I THINK THAT
12 IS THE WAY I PHRASED THE QUESTION TO HIM.

13 SO I ASK THAT COUNSEL, TO THE EXTENT THAT
14 SHE IS PERMITTED TO INQUIRE INTO THESE AREAS, NOT BASE
15 IT UPON HER OWN MISCHARACTERIZATION OF THE TESTIMONY OF
16 DR. DIETZ.

17 MS. ABRAMSON: WELL, I HAVE WRITTEN DOWN THE
18 TESTIMONY OF DR. DIETZ CHAPTER AND VERSUS.

19 MR. CONN: SO HAVE I, AND I ASK THAT COUNSEL NOT
20 MISCHARACTERIZE THE TESTIMONY.

21 MS. ABRAMSON: THE QUESTION WAS INCAPABLE,
22 COUNSEL. YOU KEPT ASKING CAPACITY QUESTIONS, IS ONE
23 INCAPABLE OF THIS OR INCAPABLE OF THAT?

24 THE COURT: LET'S NOT TALK TO COUNSEL. TALK TO
25 THE COURT.

26 MS. ABRAMSON: YOUR HONOR, THAT WAS THE FORM OF
27 THE QUESTION, IS SOMEONE INCAPABLE OF THIS AND INCAPABLE
28 OF THAT.

1 THE COURT: AS I INDICATED, WHEN YOU START

2 PHRASING QUESTIONS ALONG THE LINE OF DID YOU HEAR WHAT
3 SOMEONE TESTIFIED OR WHAT THEY SAID, YOU GET INTO
4 DISPUTES ABOUT WHETHER THEY DID OR DIDN'T SAY THAT. SO
5 IF YOU REFER TO IT IN A HYPOTHETICAL SENSE AND NOT AS
6 SOMEONE'S FORMER TESTIMONY, IT MAKES IT MOVE MORE
7 QUICKLY WITH FEWER DEBATES.

8 AND AS FAR AS THAT ONE QUESTION YOU
9 INDICATED YOU WOULD BE ASKING IN REFERENCE TO THE
10 DEFENDANT'S TESTIMONY --

11 MS. ABRAMSON: YES.

12 THE COURT: -- I WILL PERMIT THAT ONE QUESTION.

13 AND AS I INDICATED TO YOU ALSO, WE HAVE A
14 JUROR WHO HAS TO LEAVE AT 3:30, SO LET'S SEE HOW QUICKLY
15 WE CAN MOVE HERE.

16 LET'S GETS THE JURY OUT.

17 (THE JURY ENTERED THE COURTROOM

18 AND THE FOLLOWING PROCEEDINGS

19 WERE HELD:)

20

21 THE COURT: THE JURY IS BACK.

22 YOU MAY CONTINUE YOUR EXAMINATION.

23 MS. ABRAMSON: THANK YOU, YOUR HONOR.

24 Q. DR. VICARY, IF YOU, AS A FORENSIC

25 EVALUATOR, WERE PRESENTED WITH A SITUATION WHERE THE

26 EVIDENCE, THE SWORN TESTIMONY OF THE PERSON YOU'RE

27 EVALUATING, INDICATED THAT THEIR GREATEST ANXIETY WAS

28 NOT ABOUT SCHOOL PERFORMANCE OR TEST RESULTS OR SPORTS,

1 BUT ABOUT VIOLENCE AND HOSTILITY AND SEXUAL ASSAULT AND
2 PUNISHMENTS FROM HIS PARENTS, OKAY, IF THAT WAS THE
3 THING HE WAS SUPPOSEDLY MOST ANXIOUS AND WORRIED ABOUT,
4 IS IT APPROPRIATE UNDER THOSE -- WITH THOSE FACTS TO
5 DIAGNOSE GENERALIZED ANXIETY DISORDER?

6 A. IT COULD BE, BUT THAT PROBABLY WOULD BE
7 MORE CONSISTENT WITH SOMEBODY THAT WAS HAVING SYMPTOMS
8 OF P.T.S.D.

9 Q. WOULD IT BE APPROPRIATE TO DIAGNOSE
10 GENERALIZED ANXIETY DISORDER AND IGNORE THAT INFORMATION
11 ABOUT WHAT THE PERSON'S MOST PERSISTENT FEARS WERE?

12 MR. CONN: OBJECTION. ASSUMES FACTS NOT IN
13 EVIDENCE.

14 THE COURT: SUSTAINED.

15 Q. BY MS. ABRAMSON: IF YOU HAD -- IF AN
16 EVALUATOR HAS TAKEN INTO CONSIDERATION THE FACT THAT A
17 PERSON'S MOST PERSISTENT FEARS WERE CAUSED BY THE
18 BEHAVIOR OF ANOTHER PERSON, IS IT STANDARD PROCEDURE TO
19 LIST THAT AS ONE OF THE BASES OR SUPPORTS FOR YOUR
20 DIAGNOSIS OF GENERALIZED ANXIETY DISORDER, IF THAT'S THE
21 DIAGNOSIS YOU CAME TO?

22 MR. CONN: OBJECTION. VAGUE. LIST WHERE?

23 THE COURT: SUSTAINED.

24 Q. BY MS. ABRAMSON: WELL, TO STATE, IF YOU
25 ARE ASKED WHAT YOU'RE BASING SUCH A DIAGNOSIS ON, WOULD
26 IT BE APPROPRIATE -- I MEAN, WOULD YOU BE REQUIRED TO

27 STATE THAT THAT'S ONE OF THE BASES, IF INDEED YOU HAVE
28 CONSIDERED IT?

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1 A. YES.

2 Q. NOW, IN YOUR OPINION, DR. VICARY, CAN --

3 LET'S ASSUME SOMEONE IS SUFFERING FROM GENERALIZED
4 ANXIETY DISORDER.

5 IN YOUR OPINION, CAN THAT FACT AFFECT A
6 PERSON'S MENTAL STATE AT THE TIME OF A PRE-EXISTING
7 EVENT?

8 MR. CONN: OBJECTION. IRRELEVANT.

9 THE COURT: OVERRULED.

10 THE WITNESS: YES.

11 Q. BY MS. ABRAMSON: AND COULD THE FACT THAT
12 SOMEONE WAS SUFFERING FROM GENERALIZED ANXIETY DISORDER
13 AFFECT THEIR MENTAL STATE AT THE TIME OF THE EVENT, EVEN
14 IF IT DOES NOT CAUSE THEM TO GO INTO A STATE OF ALTERED
15 REALITY, SUCH AS DISSOCIATION?

16 A. YES.

17 Q. CAN A STATE OF AROUSAL LESS THAN
18 DISSOCIATION NEVERTHELESS AFFECT SOMEONE'S MENTAL STATE
19 AT THE TIME OF AN EVENT?

20 A. IT CAN.

21 Q. NOW, IF SOMEONE HAS GENERALIZED ANXIETY
22 DISORDER AND IF IT'S OF A SORT WHERE IT WAS CAUSED BY

23 MISTREATMENT OR ABUSE OR VIOLENCE OR BEHAVIOR OF ANOTHER
24 PERSON, AND THEY ARE AROUSED -- WELL, STRIKE THAT.
25 IF SOMEONE SUFFERS FROM GENERALIZED ANXIETY
26 DISORDER CAUSED BY MISTREATMENT AT THE HANDS OF ANOTHER
27 PERSON OR PERSONS, AND THAT PERSON FINDS THEMSELVES IN A
28 SITUATION WHERE THEY BELIEVE -- WELL, A SITUATION WHERE

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1 THEY ARE IN AN EMOTIONAL CONDITION CONSISTENT WITH
2 PANIC, OKAY?

3 A. MM-HMM.

4 Q. CAN THE FACT THAT THE PERSON SUFFERS FROM
5 GENERALIZED ANXIETY DISORDER AND IS IN A STATE
6 CONSISTENT WITH PANIC -- I PUT MYSELF IN A GRAMMATICAL
7 BOX. I'VE GOT TO GET OUT OF THIS GRAMMATICAL BOX.

8 OKAY. DOES THE FACT THAT THE PERSON HAS
9 GENERALIZED ANXIETY DISORDER AND THEY ARE IN A STATE
10 CONSISTENT WITH PANIC MEAN THAT THEIR ABILITY TO ENGAGE
11 IN REFLECTIVE THOUGHT CAN BE AFFECTED, OR IS AFFECTED?

12 MR. CONN: OBJECTION. PENAL CODE SECTION 29.

13 THE COURT: ARE YOU TALKING IN GENERAL CAN IT
14 HAPPEN?

15 MS. ABRAMSON: YES, YOUR HONOR.

16 THE COURT: ALL RIGHT.

17 THE WITNESS: YES.

18 Q. BY MS. ABRAMSON: HOW DOES THE FACT THAT

19 SOMEONE SUFFERS FROM GENERALIZED ANXIETY DISORDER, HOW
20 CAN THAT RESULT IN THE PERSON'S ABILITY TO ENGAGE IN
21 REFLECTIVE THOUGHT BE IMPAIRED?

22 A. WELL, TO PUT IT SIMPLY, ONE CAN BE SO
23 OVERCOME WITH EMOTION, ANXIETY, FEAR, TERROR --

24 MR. CONN: I WOULD OBJECT AS NONRESPONSIVE AND
25 BEYOND THE SCOPE OF THIS HEARING.

26 THE COURT: SUSTAINED.

27 THE ANSWER IS STRICKEN. REPHRASE THE
28 QUESTION.

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1 Q. BY MS. ABRAMSON: WELL, LET'S TALK ABOUT
2 THOSE THINGS.

3 DOES FEAR AND TERROR, SUCH AS TO BE
4 CONSISTENT, LET'S SAY, WITH A PANIC STATE, INTERFERE
5 WITH A PERSON'S ABILITIES TO ENGAGE IN REFLECTIVE
6 THOUGHT?

7 MR. CONN: OBJECTION. IRRELEVANT.

8 THE COURT: SUSTAINED.

9 REPHRASE IT ALONG THE LINES OF THE
10 DIAGNOSIS TO BEGIN WITH.

11 Q. BY MS. ABRAMSON: WE ARE ASSUMING
12 THROUGHOUT WE HAVE A PERSON WHO'S BEEN DIAGNOSED WITH
13 GENERALIZED ANXIETY DISORDER, OKAY?

14 A. YES.

15 Q. BY MS. ABRAMSON: ALL RIGHT. THAT'S THE
16 ASSUMPTION. WE HAVE THAT DIAGNOSIS NOW, ALL RIGHT.
17 NOW, CAN THAT -- IF YOU HAVE A PERSON WITH
18 GENERALIZED ANXIETY DISORDER AND THEY ARE EXPERIENCING
19 THE FEAR, THE TERROR THAT IS CONSISTENT WITH PANIC, IS
20 THEIR CAPACITY TO ENGAGE IN REFLECTIVE THOUGHT AFFECTED?
21 MR. CONN: OBJECTION. IMPROPER EXPERT OPINION.
22 THE COURT: CAN IT BE AFFECTED IS THE QUESTION?
23 THE WITNESS: YES, IT CAN.
24 MS. ABRAMSON: OKAY.
25 Q. NOW, HOW WOULD IT BE AFFECTED?
26 A. THE SIMPLE ANSWER IS THAT THE EMOTION CAN
27 OVERWHELM THE THINKING AND REFLECTION. THERE'S PARTS OF
28 ONE'S INTELLECTUAL ABILITY -- SEE, WE'RE A MIXTURE. WE

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1 HAVE THINKING, WE HAVE ACTIONS, AND WE HAVE EMOTION.
2 SOME PEOPLE HAVE MORE OF ONE OR THE OTHER RATHER THAN A
3 NICE BALANCE, BUT WE ALL HAVE ALL THREE.
4 IF YOU TAKE ANY ONE OF THESE AND YOU PUSH
5 IT TO THE MAXIMUM, IT TENDS TO OBLITERATE THE OTHER
6 FUNCTIONS. WHAT WE'RE TALKING ABOUT IS AN EMOTION THAT
7 BECOMES SO INTENSE, SO STRONG, THAT IT'S THE DOMINANT,
8 CONTROLLING FORCE AND IT'S PUSHING OUT THE ABILITY TO
9 THINK AND WEIGH AND CONSIDER.
10 Q. ALL RIGHT. LET'S SEE IF WE CAN FOCUS ON

11 SOME OF THIS.

12 NOW, IS IT ACCEPTED THAT PEOPLE WITH
13 GENERALIZED ANXIETY DISORDER DO -- STRIKE THAT.

14 IS IT ACCEPTED THAT PEOPLE WITH GENERALIZED
15 ANXIETY DISORDER -- FIRST OF ALL, ARE THEY OPERATING AT
16 A HIGHER BASELINE OF ANXIETY THAN PEOPLE WITHOUT AN
17 ANXIETY DISORDER?

18 A. IN GENERAL THEY ARE.

19 Q. DO THEY HAVE A GREATER READINESS BECAUSE OF
20 THAT HIGHER BASELINE OF ANXIETY TO RESPOND TO CUES OR
21 STIMULUS OF DANGER?

22 A. YES.

23 Q. SINCE THEY ARE ALREADY PRONE TO ANXIETY
24 WHEN THEY DO RESPOND, DO THEY TEND TO RESPOND AT A MUCH
25 HIGHER LEVEL OF EMOTIONAL AROUSAL THAN PEOPLE WITHOUT
26 GENERALIZED ANXIETY DISORDER?

27 A. YES.

28 Q. IS IT UNDERSTOOD THAT EVEN PEOPLE WITHOUT

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1 GENERALIZED ANXIETY DISORDER CAN BE AROUSED TO AN
2 EMOTIONAL STATE THAT INTERFERES WITH CAREFUL, CONSIDERED
3 THINKING?

4 A. YES.

5 Q. THEREFORE, DO PEOPLE WITH GENERALIZED
6 ANXIETY DISORDER, WHEN THEY ARE AROUSED, DOES THAT

7 INTERFERE EVEN MORE WITH THE ABILITY TO ENGAGE IN
8 CAREFUL, CONSIDERED, THOUGHTFUL, WEIGHING-TYPE THINKING?

9 A. IT DOES.

10 Q. AND WHAT DOES REFLECTIVE THOUGHT MEAN IN
11 THE PSYCHIATRIC COMMUNITY, AT LEAST FOR YOU? WHEN YOU
12 USE THAT TERM, WHAT DO YOU MEAN "REFLECTIVE THOUGHT"?

13 A. CONSIDERING THE BROADER PICTURE, THE RISKS
14 AND BENEFITS OF ONE COURSE OF ACTION VERSUS THE OTHER,
15 WHETHER THE PERCEIVED DANGER IS REAL OR WHETHER IT'S
16 EXAGGERATED.

17 MR. CONN: OBJECTION. MOTION TO STRIKE,
18 NONRESPONSIVE.

19 THE COURT: THE LAST PORTION OF THE ANSWER IS
20 STRICKEN AS NONRESPONSIVE.

21 Q. BY MS. ABRAMSON: IS REFLECTIVE THOUGHT IN
22 THE CONTEXT OF A PERSON WITH -- WELL, ANY PERSON
23 BELIEVING THEY ARE IN DANGER, DOES REFLECTIVE THOUGHT
24 MEAN THINKING ABOUT WHETHER OR NOT THEY REALLY ARE IN
25 DANGER?

26 MR. CONN: OBJECTION. NO FOUNDATION, CALLS FOR
27 SPECULATION AND IRRELEVANT.

28 THE COURT: SUSTAINED. SUSTAINED.

-15027

1 YOU ALREADY HAVE A DEFINITION OF REFLECTIVE
2 THOUGHT.

3 MS. ABRAMSON: WELL I DON'T THINK I HAVE THE
4 COMPLETE DEFINITION, BECAUSE I THINK IT WAS INTERFERED
5 WITH.

6 THE COURT: YOU DO. YOU DO.

7 Q. BY MS. ABRAMSON: DOES REFLECTION INDICATE
8 A WEIGHING PROCESS?

9 MR. CONN: OBJECTION. ASKED AND ANSWERED.

10 THE COURT: HE'S ALREADY GIVEN HIS ANSWER.

11 YOUR NEXT QUESTION.

12 MS. ABRAMSON: OKAY.

13 Q. IS IT COMMONLY ACCEPTED IN PSYCHIATRY THAT
14 WHEN PEOPLE ARE IN A HYPER-AROUSSED STATE SUCH AS THOSE
15 WHO HAVE GENERALIZED ANXIETY DISORDER WOULD BE IN, THAT
16 BECAUSE OF THE EMOTIONAL AROUSAL THEY ARE NOT AS CAPABLE
17 OF WEIGHING AND REFLECTING AND CONSIDERING OPTIONS AS
18 THOSE WHO ARE NOT IN A HYPER-AROUSSED STATE?

19 MR. CONN: OBJECTION. IRRELEVANT, BEYOND THE
20 SCOPE OF THIS HEARING.

21 THE COURT: OVERRULED.

22 THE WITNESS: YES.

23 Q. BY MS. ABRAMSON: NOW, YOU'RE FAMILIAR WITH
24 THE CONCEPT OF FIGHT OR FLIGHT, CORRECT?

25 A. YES.

26 Q. THAT'S A CONCEPT THAT APPLIES TO EVERYBODY,
27 DOES IT NOT?

28 A. YES.

1 Q. ANYBODY CAN FIND THEMSELVES IN A SITUATION
2 WHERE THEY ARE IN THAT BIOLOGICAL AND BEHAVIORAL MODE
3 CALLED FIGHT OR FLIGHT?

4 A. YES.

5 Q. AND PEOPLE WITH GENERALIZED ANXIETY
6 DISORDER, IF THEY ARE IN A SITUATION -- AN EMOTIONAL
7 STATE CONSISTENT WITH FIGHT OR FLIGHT, CAN THEIR LEVEL
8 OF EMOTIONAL AROUSAL INTERFERE WITH THEIR ABILITY TO
9 ENGAGE IN REFLECTIVE THOUGHT?

10 MR. CONN: OBJECTION. CALLS FOR SPECULATION,
11 BEYOND THE SCOPE OF THIS HEARING AND IRRELEVANT.

12 THE COURT: OVERRULED.

13 YOU CAN ANSWER THE QUESTION.

14 THE WITNESS: YES.

15 Q. BY MS. ABRAMSON: NOW, IS THERE A
16 DIFFERENCE IN THE QUALITY OF THINKING -- WELL, STRIKE
17 THAT.

18 CAN PEOPLE WHO ARE ABSOLUTELY TERRIFIED
19 THINK?

20 A. EXCEPT IN THE MOST EXTREME CASE, YES.

21 MR. CONN: OBJECTION. NO QUESTION PENDING.

22 MS. ABRAMSON: EXCUSE ME?

23 MR. CONN: MOTION TO STRIKE, NONRESPONSIVE.

24 MS. ABRAMSON: THERE WAS A QUESTION PENDING.

25 THE COURT: LET'S NOT ARGUE IT. OVERRULED.

26 YOU MAY ASK YOUR NEXT QUESTION. YOUR NEXT
27 QUESTION, PLEASE.

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1 THE QUALITY OF THOUGHTS THAT PEOPLE ARE CAPABLE OF
2 HAVING -- WELL, STRIKE THAT.

3 IS THERE A RANGE OF TYPES OF THOUGHTS THAT
4 PEOPLE HAVE?

5 MR. CONN: OBJECTION. IMPROPER EXPERT OPINION.

6 THE COURT: IT'S VAGUE.

7 Q. BY MS. ABRAMSON: IS IT ACCEPTED IN THE
8 PSYCHIATRIC COMMUNITY THAT THERE IS A DIFFERENCE IN THE
9 QUALITY OF THINKING, THE LEVEL OF THINKING --

10 MR. CONN: OBJECTION. VAGUE.

11 MS. ABRAMSON: I HAVEN'T FINISHED THE QUESTION.

12 THE COURT: ALL RIGHT. IT SOUNDS LIKE YOU HAD,
13 BUT WHY DON'T YOU REPHRASE IT IN A DIFFERENT WAY.

14 MS. ABRAMSON: WELL, I AM TRYING TO REPHRASE IT
15 OVER AND OVER AGAIN.

16 THE COURT: WHY DON'T YOU TRY IT AGAIN ONCE MORE.
17 WHY DON'T YOU TRY AND DO IT IN ANOTHER WAY.

18 Q. BY MS. ABRAMSON: WOULD YOU AGREE,
19 DR. VICARY, THAT EVEN PEOPLE WHO ARE IN A HIGHLY
20 AROUSED -- PEOPLE WITH GENERALIZED ANXIETY DISORDER IN A
21 HIGHLY AROUSED STATE ARE CAPABLE OF HAVING A THOUGHT?

22 A. YES.

23 Q. IS HAVING A THOUGHT THE SAME AS REFLECTIVE

24 THINKING?

25 MR. CONN: OBJECTION. VAGUE AND IRRELEVANT.

26 THE COURT: DO YOU UNDERSTAND THE QUESTION?

27 THE WITNESS: I THINK I DO.

28 THE COURT: OKAY. WHAT IS YOUR ANSWER?

-15024

1 THE WITNESS: HAVING AN IDEA OR A THOUGHT IS NOT

2 THE SAME AS REFLECTIVE THOUGHT.

3 Q. BY MS. ABRAMSON: OKAY. DOES IT -- CAN

4 PEOPLE GO ON THINKING, IN THE SIMPLEST USE OF THE WORD,

5 HAVING A THOUGHT AND NEVERTHELESS NOT BE CAPABLE OF

6 ENGAGING IN REFLECTIVE THOUGHT?

7 MR. CONN: OBJECTION. IRRELEVANT.

8 THE COURT: OVERRULED.

9 THE WITNESS: YES.

10 Q. BY MS. ABRAMSON: NOW, IS REFLECTIVE

11 THOUGHT A HIGHER LEVEL OR HIGHER QUALITY THINKING THAN

12 THE TERM RATIONAL THOUGHT CONVEYS?

13 MR. CONN: OBJECTION. CALLS FOR SPECULATION, NO

14 FOUNDATION.

15 THE COURT: SUSTAINED.

16 Q. BY MS. ABRAMSON: ARE YOU FAMILIAR WITH

17 DR. DIETZ' TESTIMONY THAT PEOPLE WITH ANXIETY DISORDERS

18 WOULDN'T LOSE RATIONAL THOUGHT WHEN THEY ARE

19 HYPERAROUSSED?

20 A. YES.

21 Q. AND IS THERE A DIFFERENCE BETWEEN RATIONAL
22 THOUGHT AND REFLECTIVE, DELIBERATE, WEIGHING THOUGHT?

23 A. YES.

24 Q. NOW, ARE PEOPLE WITH GENERALIZED ANXIETY
25 DISORDER, IN YOUR OPINION, MORE PRONE TO BE AROUSED INTO
26 A STATE OF PANIC BY A CUE OR A STRESSOR THAT CAUSES THEM
27 FEAR OF BODILY INJURY OR DEATH?

28 MR. CONN: OBJECTION. CALLS FOR SPECULATION.

-15023

1 THE COURT: OVERRULED.

2 THE WITNESS: YES.

3 Q. BY MS. ABRAMSON: IS THERE A DIFFERENCE,
4 DR. VICARY, BETWEEN THE TERMS "PANIC STATE" OR "IN A
5 PANIC" AND "PANIC ATTACK"?

6 A. YES.

7 Q. IS PANIC ATTACK A VERY SPECIFIC PSYCHIATRIC
8 PHENOMENA, PSYCHIATRICALY-NOTED PHENOMENA?

9 MR. CONN: OBJECTION. IRRELEVANT.

10 THE COURT: OVERRULED.

11 THE WITNESS: YES, IT IS.

12 Q. BY MS. ABRAMSON: IS A PANIC STATE
13 SOMETHING THAT ANYBODY CAN EXPERIENCE?

14 A. YES.

15 Q. AND IF PEOPLE ARE IN A PANIC STATE, WHAT DO

16 YOU UNDERSTAND THAT TO MEAN AS FAR AS THE LEVEL OF
17 EMOTION?

18 A. THE LEVEL OF EMOTION IS USUALLY EXTREMELY
19 HIGH.

20 Q. AND IS THE LEVEL -- IS THE LEVEL OF EMOTION
21 WITH SOMEONE HAVING A PANIC ATTACK ALSO VERY HIGH?

22 A. YES.

23 Q. SO IF SOMEONE INDICATED THAT SOMEONE'S --
24 WELL, IF A PSYCHIATRIST TESTIFIED THAT A PERSON'S
25 CONDITION WAS CONSISTENT WITH A PANIC ATTACK, WOULD YOU
26 AT LEAST ASSUME THAT TO MEAN A VERY HIGH LEVEL OF
27 EMOTION?

28 A. VERY HIGH, YES.

-15022

1 Q. AND IS THE EMOTION OF PANIC, WHETHER IT'S A
2 PANIC STATE OR PANIC ATTACK, IS THE EMOTION TERROR?

3 MR. CONN: OBJECTION. CALLS FOR SPECULATION, NO
4 FOUNDATION.

5 THE COURT: SUSTAINED.

6 Q. BY MS. ABRAMSON: IS THE TERM PANIC USED IN
7 THE PSYCHIATRIC COMMUNITY TO MEAN INTENSE LEVEL OF
8 TERROR OR FEAR?

9 A. YES.

10 Q. NOW, IS THERE ANYTHING IN THE PSYCHIATRIC
11 LITERATURE THAT INDICATES THAT A PERSON WHO IS IN A

12 PANIC STATE -- NOT A PANIC ATTACK, BUT IN A PANIC
13 STATE -- WOULD NEVER RUN TOWARDS THE DANGEROUS SITUATION
14 OR GO TO THE DANGEROUS SITUATION IN ORDER TO RESOLVE IT?
15 MR. CONN: OBJECTION. BEYOND THE SCOPE OF THIS
16 HEARING.
17 THE COURT: REPHRASE THE QUESTION.
18 MS. ABRAMSON: OKAY.
19 Q. IS THERE ANYTHING IN THE PSYCHIATRIC
20 LITERATURE THAT INDICATES THAT PEOPLE IN A PANIC,
21 EXPERIENCING THIS INTENSE LEVEL OF FEAR OR TERROR, HAS
22 TO RUN AWAY?
23 MR. CONN: OBJECTION. IRRELEVANT.
24 THE COURT: OVERRULED.
25 THE WITNESS: NO.
26 Q. BY MS. ABRAMSON: DOES THE WHOLE NOTION OF
27 FIGHT OR FLIGHT MEAN THAT PEOPLE CAN EITHER DEAL WITH
28 THE FEARFUL THING OR FLEE FROM THE FEARFUL THING?

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1 A. YES.
2 Q. AND IS FIGHT OR FLIGHT, THE OPTION OF FIGHT
3 OR FLIGHT, UNDERSTOOD TO BE BIOLOGICALLY DETERMINED?
4 A. IT'S HOW AN ORGANISM SURVIVES.
5 Q. AND THE NOTION OF WHETHER A PERSON IS
6 FIGHTING OR FLEEING, IS IT UNDERSTOOD THAT THAT'S NOT A
7 INTELLECTUAL DECISION, BUT AN EMOTIONAL DECISION, THAT'S

8 WHAT PEOPLE FIND THEMSELVES DOING, EITHER FIGHTING OR

9 FLEEING?

10 MR. CONN: OBJECTION. ARGUMENTATIVE.

11 THE COURT: SUSTAINED.

12 Q. BY MS. ABRAMSON: DO YOU REMEMBER

13 DR. DIETZ' TESTIMONY THAT FIGHT OR FLIGHT IS DETERMINED

14 BY A PERSON'S FEELINGS?

15 MR. CONN: OBJECTION. IT MISSTATES THE

16 TESTIMONY.

17 THE COURT: REPHRASE THE QUESTION.

18 Q. BY MS. ABRAMSON: DO YOU REMEMBER HIS

19 TESTIMONY --

20 THE COURT: AGAIN, LET'S NOT GET INTO HOW PEOPLE

21 TESTIFIED.

22 Q. BY MS. ABRAMSON: WOULD YOU AGREE THAT

23 UNDER AN ACUTELY STRESSFUL SITUATION A PERSON FEELS LIKE

24 FIGHTING OR FLEEING?

25 A. THAT IS WHAT'S GOING ON. IT'S AN EMOTIONAL

26 CONDITION. IT'S A PERSON THAT IS REACTING ON STRONG,

27 OVERPOWERING EMOTION.

28 Q. AND IT ISN'T AN INTELLECTUAL DECISION,

-15020

1 "GEE, I THINK I'LL FIGHT NOW"; "GEE, I THINK I'LL FLEE

2 NOW"; IS THAT HOW IT'S UNDERSTOOD?

3 A. IN THE MOST EXTREME CASE IT'S ALMOST

4 AUTOMATIC. VERY LITTLE THINKING INVOLVED.

5 Q. AND NOT REFLECTIVE THINKING, IS IT?

6 A. IT'S --

7 MR. CONN: OBJECTION. CALLS FOR SPECULATION, NO

8 FOUNDATION. BEYOND THE SCOPE OF THIS HEARING.

9 THE COURT: SUSTAINED AS TO THE LAST QUESTION AND

10 ANSWER.

11 Q. BY MS. ABRAMSON: YOU SAID IT'S ALMOST

12 AUTOMATIC, VERY LITTLE THINKING.

13 THE COURT: HE'S ALREADY SAID THAT.

14 YOUR NEXT QUESTION, PLEASE.

15 Q. BY MS. ABRAMSON: WHAT DO YOU MEAN BY

16 THINKING?

17 A. THINKING CAN GO FROM JUST HAVING AN IDEA OR

18 JUST BEING AWARE OF THE KIND OF ACTIONS THAT ARE

19 OCCURRING, ALL THE WAY TO DEBATING WITH ONE'S SELF

20 WHETHER YOU'RE DOING THE RIGHT THING; WHAT ARE THE RISKS

21 INVOLVED HERE, WHAT'S GOING TO HAPPEN TO ME IF I'M

22 WRONG, THAT KIND OF THING. THAT'S REFLECTIVE THINKING.

23 THAT'S VERY UNLIKELY TO OCCUR WHEN SOMEBODY IS IN A

24 PANIC.

25 Q. AND I THINK THE ULTIMATE QUESTION -- OR

26 RATHER THE LAST QUESTION ALONG THIS LINE, IS THERE

27 ANYTHING IN THE LITERATURE THAT INDICATES THAT PEOPLE IN

28 A PANIC WHO ARE NOT ENGAGED IN THIS REFLECTIVE THINKING

1 WILL FLEE RATHER THAN FIGHT?

2 A. NO.

3 Q. NOW LET'S TALK ABOUT A PERSON THAT'S BEEN

4 SUFFERING FROM GENERALIZED ANXIETY DISORDER FOR, IF NOT

5 ALL, THEN MOST OF THEIR LIFE.

6 IS ONE OF THE FEATURES OF GENERALIZED

7 ANXIETY DISORDER IS THAT A PERSON CANNOT COME UP WITH

8 TECHNIQUES TO COPE WITH THE ANXIETY?

9 MR. CONN: OBJECTION. IRRELEVANT. BEYOND THE

10 SCOPE OF THIS HEARING.

11 THE COURT: SUSTAINED.

12 MS. ABRAMSON: WELL, YOUR HONOR, I THINK THAT'S

13 ONE OF THE DIAGNOSTIC CRITERIA. THAT'S ALL I AM ASKING.

14 THE COURT: WHY DON'T YOU ASK IT THAT WAY.

15 Q. BY MS. ABRAMSON: IS ONE OF THE DIAGNOSTIC

16 CRITERIA OF GENERALIZED ANXIETY DISORDER THAT THE PERSON

17 IS UNABLE TO COME UP WITH WAYS OF COPING WITH THE FEAR

18 AND THE ANXIETY AND THE NERVOUSNESS?

19 A. IF THEY COULD, THEY WOULDN'T HAVE THE

20 DISORDER.

21 Q. SO IS THAT YES?

22 A. YES.

23 Q. HOW LIKELY IS IT THAT A PERSON WITH --

24 WELL, IS IT LIKELY AT ALL THAT A PERSON WITH GENERALIZED

25 ANXIETY DISORDER WHO'S IN THE MIDST OF A PANICKED STATE

26 CONSISTENT WITH FIGHT OR FLIGHT COULD SUDDENLY OVERCOME

27 THE ANXIETY?

28 MR. CONN: OBJECTION. CALLS FOR SPECULATION AND

1 BEYOND THE SCOPE OF THIS HEARING.

2 THE COURT: YOU'RE ASKING A GENERAL QUESTION?

3 MS. ABRAMSON: RIGHT.

4 THE COURT: WHY DON'T YOU REPHRASE SO IT'S MORE

5 GENERAL.

6 MS. ABRAMSON: FIRST OF ALL -- WELL, IT IS

7 GENERAL.

8 THE COURT: NO, NOT THE WAY YOU PHRASED IT.

9 MS. ABRAMSON: ALL RIGHT.

10 THE COURT: YOU SAID IS IT LIKELY.

11 MS. ABRAMSON: OH.

12 Q. DO YOU BELIEVE, DOCTOR, BASED ON YOUR

13 EXPERTISE, DR. VICARY, THAT A PERSON WHO SUFFERED FROM

14 GENERALIZED ANXIETY DISORDER WHO IS IN A STATE

15 CONSISTENT WITH PANIC, CONSISTENT WITH FIGHT OR FLIGHT,

16 CAN -- IS CAPABLE OF SIMPLY OVERCOMING THE ANXIETY AT

17 THE MOMENT OF THEIR GREATEST AROUSAL?

18 A. ANYTHING IS POSSIBLE. I THINK THAT WOULD

19 BE EXTREMELY UNLIKELY.

20 Q. HAVE YOU EVER -- ARE YOU AWARE OF ANY

21 SITUATIONS IN WHICH YOU KNOW THAT'S OCCURRED, THAT

22 SOMEONE WITH AN ANXIETY DISORDER WHO'S IN AN EXTREMELY

23 ANXIOUS STATE SUDDENLY FOUND A MAGIC WAY TO OVERCOME THE

24 ANXIETY?

25 A. I CAN'T THINK OF A CASE THAT I'VE DONE

26 MYSELF OR THAT I'VE SEEN IN THE LITERATURE LIKE THAT.

27 Q. NOW, IF A PERSON WITH GENERALIZED ANXIETY

28 DISORDER IS AROUSED TO A STATE CONSISTENT WITH FIGHT OR

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1 FLIGHT, CONSISTENT WITH A PANIC STATE, WOULD THEIR

2 ABILITY TO UNDERSTAND OR ANALYZE THE SITUATION THAT THEY

3 ARE IN BE IMPAIRED BY THE EMOTIONALITY OF THAT MENTAL

4 STATE?

5 A. YES.

6 Q. IF A PERSON IS SUFFERING FROM GENERALIZED

7 ANXIETY DISORDER AND IS IN A CONDITION CONSISTENT WITH A

8 PANIC STATE, CONSISTENT WITH FIGHT OR FLIGHT, IS THE

9 HIGH EMOTIONALITY OF THAT STATE CAPABLE OF INTERFERING

10 WITH THAT PERSON'S ABILITY TO MAKE CHOICES?

11 A. YES, IT CAN.

12 Q. WOULD YOU AGREE WITH DR. DIETZ' STATEMENT

13 THAT IT'S VERY DIFFICULT TO MAKE DECISIONS UNDER STRESS?

14 A. OF COURSE.

15 Q. WOULD YOU AGREE WITH DR. DIETZ' TESTIMONY

16 THAT WHEN A PERSON IS AROUSED TO FEAR, IT IS NOT THE

17 CALMEST OF TIMES?

18 A. YES.

19 Q. IS THERE A PSYCHOLOGICAL CONSEQUENCE TO

20 STRESS AND LACK OF CALMNESS? WELL, STRIKE THAT.

21 DOES THE FACT THAT SOMEONE IS IN AN AROUSED

22 STATE, THEY'RE NOT CALM, THEY'RE UNDER STRESS, TEND TO
23 INTERFERE WITH THEIR ABILITY TO WEIGH AND JUDGE AND
24 DECIDE OPTIONS TO A STRESSFUL SITUATION?
25 A. ESPECIALLY SO IF IT'S THE MORE EXTREME
26 SITUATION.
27 Q. WHAT DO YOU MEAN BY "THE MORE EXTREME
28 SITUATION"?

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1 A. TO BE A HUMAN BEING AND TO BE IN SOCIETY BY
2 DEFINITION INVOLVES STRESS, INVOLVES CONFLICT. THAT'S
3 JUST A PART OF LIFE.
4 THERE ARE INDIVIDUALS WHO HAVE THESE
5 ANXIETY DISORDERS THAT HAVE MORE DIFFICULTY IN COPING
6 WITH JUST ROUTINE STRESS. WHEN YOU START TO ESCALATE
7 THAT AND INCREASE THE LEVEL OF STRESS, THE QUALITY OF
8 THEIR THINKING DETERIORATES. THE MORE STRESS, THE MORE
9 ANXIETY, THE MORE PANIC, THE LESS QUALITY IS INVOLVED IN
10 THE THINKING.
11 Q. CAN THE GENERALIZED ANXIETY DISORDER HAVE
12 THE EFFECT OF MAKING A PERSON, WHEN HIGHLY AROUSED, LESS
13 RATIONAL, INCAPABLE OF REFLECTIVE THOUGHT, IMPAIRED IN
14 THEIR ABILITY TO CONTROL IMPULSES AND IMPAIRED IN THEIR
15 HIGHER CORTICAL FUNCTIONS?
16 MR. CONN: OBJECTION. COMPOUND.
17 THE COURT: OVERRULED.

18 THE WITNESS: YES.

19 Q. BY MS. ABRAMSON: DO YOU REMEMBER DR. DIETZ

20 TESTIFYING JUST THE OPPOSITE OF THAT, AND CITING AS HIS

21 AUTHORITY A DR. RICHARD RESTAK?

22 MR. CONN: OBJECTION. MISSTATES THE EVIDENCE.

23 THE COURT: REPHRASE THE QUESTION.

24 Q. BY MS. ABRAMSON: DO YOU REMEMBER DR. DIETZ

25 CITING A DR. RICHARD RESTAK FOR THE AUTHORITY THAT BEING

26 IN A HIGHLY AROUSED STATE DOES NOT MAKE ONE LESS

27 RATIONAL, INCAPABLE OF REFLECTIVE THOUGHT, IMPAIRED IN

28 ABILITY TO CONTROL IMPULSES OR IMPAIRED IN HIGHER

-15015

1 CORTICAL FUNCTION?

2 MR. CONN: OBJECTION. IRRELEVANT AND MISSTATES

3 THE EVIDENCE.

4 THE COURT: SUSTAINED.

5 Q. BY MS. ABRAMSON: WOULD YOU AGREE WITH THE

6 FOLLOWING QUOTE FROM DR. RESTAK, DR. VICARY: "NO ONE

7 ACTS REASONABLY WHEN FEELING THREATENED BY DEATH OR

8 SEVERE BODILY HARM. TERROR CAN CAUSE ANCIENT BRAIN

9 STRUCTURES THAT GOVERN RAGE AND AGGRESSION TO OVERWHELM

10 MANY OF THE HIGHER REGIONS GUIDING RATIONALITY."

11 MR. CONN: OBJECTION. ASSUMES FACTS NOT IN

12 EVIDENCE.

13 THE COURT: OVERRULED.

14 THE WITNESS: YES. I THINK THAT'S A REFERENCE TO
15 THE MOST EXTREME TYPE OF SITUATION.
16 Q. BY MS. ABRAMSON: AND IS A PERSON WITH
17 GENERALIZED ANXIETY DISORDER, WHO FEARS DEATH AT THE
18 HANDS OF A PERSON OR PERSONS WHO MAY HAVE CAUSED THAT
19 GENERALIZED ANXIETY DISORDER, ONE OF THE MORE EXTREME
20 SITUATIONS THAT A PERSON WITH AN ANXIETY DISORDER CAN
21 FIND THEMSELVES IN?

22 A. YES.

23 Q. IN YOUR OPINION, DR. VICARY, IS A PERSON
24 WITH GENERALIZED ANXIETY DISORDER SUFFERING THE KIND OF
25 ANXIETY THAT CAN MAKE A PERSON INCAPABLE OF REFLECTIVE
26 THOUGHT?

27 A. YES.

28 Q. CAN IT DO MORE THAN MERELY RESULT IN YOU

-15014

1 EXERCISING POOR JUDGMENT?

2 A. YES.

3 Q. DID YOU AGREE WITH DR. DIETZ' TESTIMONY
4 THAT THERE'S A GREAT DEAL OF OVERLAP BETWEEN THE
5 SYMPTOMATOLOGY OF GENERALIZED ANXIETY DISORDER AND THE
6 SYMPTOMATOLOGY OF POST-TRAUMATIC STRESS DISORDER?

7 A. YES.

8 Q. DID YOU AGREE WITH DR. DIETZ' TESTIMONY
9 THAT GENERALIZED ANXIETY DISORDER MAY MAKE A PERSON MORE

10 PRONE TO DEVELOPING POST-TRAUMATIC STRESS DISORDER?

11 A. YES.

12 Q. DID YOU AGREE WITH DR. DIETZ' TESTIMONY

13 THAT CHILD ABUSE CAN CAUSE POST-TRAUMATIC STRESS

14 DISORDER AND GENERALIZED ANXIETY DISORDER?

15 A. YES.

16 Q. BASED ON THE LITERATURE, WHICH IS THE MORE

17 LIKELY OUTCOME OF CHILD ABUSE, GENERALIZED ANXIETY

18 DISORDER OR POST-TRAUMATIC STRESS DISORDER?

19 MR. CONN: OBJECTION. ASSUMES FACTS -- CALLS FOR

20 SPECULATION.

21 THE COURT: OVERRULED.

22 THE WITNESS: THE MORE EXTENSIVE THE ABUSE, THE

23 MORE LIKELY IT WOULD BE TO BE P.T.S.D. RATHER THAN

24 MERELY GENERALIZED ANXIETY DISORDER.

25 Q. BY MS. ABRAMSON: AND IS SEXUAL MOLESTATION

26 CONSIDERED AN EXTREME FORM OF ABUSE?

27 A. YES, IT IS.

28 Q. ARE YOU FAMILIAR WITH -- WELL, WITH RESPECT

-15013

1 TO THE WAY THE BRAIN FUNCTIONS CAN BE INFLUENCED BY

2 EMOTIONS, WHEN PEOPLE SAY THAT THEY'RE NOT THINKING

3 CLEARLY, THAT DOESN'T MEAN THEY'RE UNCONSCIOUS, DOES IT?

4 A. OF COURSE NOT.

5 Q. WHEN PEOPLE SAY THAT THEY ACTED IN SUCH A

6 RUSH OF EMOTION THAT THEY DIDN'T STOP TO THINK, THAT

7 DOESN'T MEAN THAT THEY'RE UNCONSCIOUS, DOES IT?

8 A. NO.

9 Q. DO THOSE CLICHES, HOWEVER, REFLECT WHAT YOU

10 HAVE BEEN TESTIFYING TO, THAT THERE IS A DIFFERENCE IN

11 THE QUALITY OF THINKING WHEN SOMEONE IS IN A HIGHLY

12 EMOTIONAL, FEARFUL STATE?

13 A. YES. THAT'S THE LAY EXPRESSION THAT YOU

14 ARE DESCRIBING, WHAT WE'RE TALKING ABOUT THIS AFTERNOON.

15 MS. ABRAMSON: I HAVE NOTHING FURTHER, YOUR

16 HONOR.

17 THE COURT: OKAY. CROSS-EXAMINATION.

18 MR. CONN: YES.

19

20 CROSS-EXAMINATION

21 BY MR. CONN:

22 Q. DOCTOR, YOU SPENT HOW MUCH TIME

23 INTERVIEWING ERIK MENENDEZ?

24 A. TOTAL, ACTUAL INTERVIEWS, ABOUT 110 HOURS.

25 Q. AND IS THAT THE NORMAL AMOUNT OF TIME THAT

26 YOU SPEND WITH SOMEONE BEFORE YOU ARE CAPABLE OF

27 DIAGNOSING THEIR MENTAL CONDITION?

28 A. NO.

1 Q. SO HOW MUCH TIME DO YOU NEED FOR A

2 DIAGNOSIS OF A MENTAL CONDITION?

3 MS. ABRAMSON: OBJECTION, YOUR HONOR.

4 IRRELEVANT, UNLESS HE WANTS TO MEAN IN THIS CASE.

5 THE COURT: ARE YOU TALKING IN GENERAL?

6 MR. CONN: YES, IN GENERAL.

7 THE COURT: DO YOU UNDERSTAND THE QUESTION?

8 THE WITNESS: YES, I DO.

9 THE COURT: OKAY.

10 THE WITNESS: NORMALLY A COUPLE OF HOURS OF
11 ACTUAL INTERVIEW, HOPEFULLY WITH ONE OR TWO ADDITIONAL
12 INTERVIEWS ALONG WITH YOUR REVIEW OF ALL THE RECORDS.

13 Q. BY MR. CONN: OKAY. THAT'S ALL YOU NEED IS
14 A COUPLE OF HOURS TO FORM AN OPINION?

15 A. IN THE TYPICAL, UNCOMPLICATED CASE
16 INVOLVING LESS SERIOUS LEGAL MATTERS, THAT IS THE AMOUNT
17 OF TIME THAT A TYPICAL FORENSIC PSYCHIATRIST, RIGHTLY OR
18 WRONGLY, WOULD SPEND ON THE CASE.

19 Q. WELL, WHEN YOU SAY FOR THE LESS SERIOUS
20 LEGAL MATTERS, I AM NOT ASKING YOU ABOUT A CASE THAT IS
21 NECESSARILY EVEN IN COURT. I AM JUST ASKING YOU HOW
22 MUCH TIME DO YOU NEED TO FORM A DIAGNOSIS OF SOMEONE?

23 A. I THOUGHT YOU WERE TALKING ABOUT FORENSIC
24 PSYCHIATRY AS OPPOSED TO GENERAL PSYCHIATRY.

25 IN TERMS OF GENERAL PSYCHIATRY, WHICH I DO
26 LIKE AT THE FREE CLINIC, I CAN OFTEN MAKE A TENTATIVE
27 DIAGNOSIS IN 45 MINUTES.

28 Q. AND IT'S JUST TENTATIVE. HOW MUCH TIME DO

1 YOU NEED TO MAKE A PRETTY SOLID, RELIABLE DIAGNOSIS?

2 A. USUALLY I WOULD SEE THE PATIENT PERHAPS

3 HALF A DOZEN TIMES, A DOZEN TIMES OVER A PERIOD OF WEEKS

4 AND MONTHS.

5 Q. THAT'S WHAT YOU NEED, YOU HAVE TO INTERVIEW

6 A PERSON A HALF DOZEN TIMES IN ORDER TO FORM A DIAGNOSIS

7 OF THEIR MENTAL CONDITION?

8 A. WELL, ACTUALLY, I COULD INTERVIEW YOU FOR

9 30 MINUTES AND TAKE A HISTORY AND GIVE YOU SOME KIND OF

10 LABEL, BUT HOW RELIABLE WOULD THAT BE, YOU SEE? YOU CAN

11 DO IT. THE QUESTION IS HOW CERTAIN, HOW MUCH SUPPORT

12 DOES THE DIAGNOSIS HAVE BEHIND IT.

13 Q. IN THE PAST, HOW MUCH TIME HAVE YOU NEEDED

14 TO FORM A DIAGNOSIS OF A PERSON?

15 A. AS A GENERAL PSYCHIATRIST, IT CAN VARY

16 ANYWHERE FROM 30 MINUTES TO A FEW HOURS TO GET THE FIRST

17 TENTATIVE DIAGNOSIS.

18 Q. SO YOU CAN SOMETIMES FORM A DIAGNOSIS IN AS

19 SHORT A TIME AS 30 MINUTES; IS THAT CORRECT?

20 A. IT'S -- AT THE FREE CLINIC THAT'S PROBABLY

21 ABOUT WHAT YOU HAVE FOR EACH PATIENT.

22 Q. AND DOES THAT INCLUDE A DIAGNOSIS OF

23 GENERALIZED ANXIETY DISORDER?

24 A. IN SOME CASES, YES.

25 Q. AND WERE YOU AWARE THAT DR. DIETZ SPENT 100

26 HOURS WORKING ON THIS CASE?

27 MS. ABRAMSON: OBJECTION, YOUR HONOR. IT'S
28 IRRELEVANT.

-15010

1 THE COURT: SUSTAINED.

2 Q. BY MR. CONN: WERE YOU AWARE OF THE FACT
3 THAT DR. DIETZ SPENT 15 HOURS INTERVIEWING THE
4 DEFENDANT?

5 MS. ABRAMSON: SAME OBJECTION.

6 THE WITNESS: YES.

7 THE COURT: OVERRULED.

8 THE ANSWER WILL STAND.

9 Q. BY MR. CONN: NOW, WAS IT YOUR TESTIMONY IN
10 ALL CASES YOU CANNOT FORM A DIAGNOSIS WITHOUT HAVING
11 REPORTS FROM FAMILY MEMBERS?

12 A. IN A FORENSIC SETTING I THINK THAT IT IS
13 RISKY TO COME TO A DEFINITIVE DIAGNOSIS WITHOUT THAT
14 TYPE OF INFORMATION.

15 Q. ARE YOU SAYING THAT IF A PERSON HAS NO
16 FAMILY AND COMMITS A CRIME AND HE'S NOW IN A FORENSIC
17 SETTING, THAT THERE'S NO WAY THAT YOU CAN DIAGNOSE THAT
18 PERSON?

19 A. NO. JUST BECAUSE THE FAMILY MEMBERS ARE
20 DECEASED DOESN'T MEAN THAT THERE ISN'T INFORMATION ABOUT
21 THE FAMILY MEMBERS FROM PEOPLE THAT KNEW THE FAMILY
22 MEMBERS THAT COULD BE CONTACTED.

23 Q. I AM SAYING MUST YOU HAVE STATEMENTS FROM
24 FAMILY MEMBERS IN ALL CASES IN ORDER TO FORM A DIAGNOSIS
25 OF A MENTAL STATE?

26 A. NO.

27 Q. SO SOMETIMES YOU CAN DO IT JUST BASED UPON
28 INFORMATION GIVEN TO YOU BY THE PATIENT HIMSELF?

-15009

1 A. THAT'S VERY RARE, AND I THINK IT'S ALMOST
2 NEVER DONE IN FORENSIC PSYCHIATRY. IT IS COMMONLY DONE
3 IN GENERAL PSYCHIATRY, BECAUSE THAT'S ALL YOU HAVE IS
4 YOU HAVE THE PATIENT SITTING IN YOUR OFFICE AND YOU HAVE
5 NOTHING ELSE.

6 Q. BUT THERE IS -- AND EVEN IN A FORENSIC
7 SETTING, IF THERE IS NO INFORMATION FROM FAMILY MEMBERS,
8 YOU CAN STILL FORM A DIAGNOSIS WITHOUT SUCH INFORMATION;
9 ISN'T THAT TRUE?

10 A. YOU CAN.

11 Q. AND WHETHER OR NOT YOU NEED ADDITIONAL
12 INFORMATION FROM FAMILY MEMBERS IS GOING TO DEPEND UPON
13 THE CIRCUMSTANCES OF THE CASE; IS THAT CORRECT?

14 A. THE PRIMARY LIMITING FACTOR IS HOW MUCH
15 TIME YOU'VE GOT AND HOW MUCH INFORMATION YOU CAN GET
16 YOUR HANDS ON, BUT YOU'RE RIGHT. SOMETIMES THERE'S VERY
17 LITTLE TIME AND THERE'S VERY LITTLE INFORMATION
18 PROVIDED, BUT THEY STILL EXPECT YOU TO MAKE THE

19 DIAGNOSIS.

20 Q. AND SOMETIMES 15 HOURS WITH A PERSON IS
21 MORE THAN ENOUGH FOR YOU TO FORM A DIAGNOSIS EVEN IN A
22 FORENSIC SETTING WITHOUT BACKGROUND INFORMATION FROM
23 FAMILY MEMBERS; ISN'T THAT CORRECT?

24 A. THAT'S ONE OF THE THINGS IN FORENSIC THAT
25 MAKES IT DIFFERENT FROM THE GENERAL CLINICAL PSYCHIATRY
26 IS THAT IN FORENSIC, I MIGHT SPEND 50 HOURS WITH A
27 PATIENT, BUT I WILL NOT DO A REPORT AND I WILL NOT
28 TESTIFY UNLESS I GET THE POLICE REPORTS AND THE

-15008

1 PROBATION REPORT AND THE TRANSCRIPT OF THE PRELIMINARY
2 HEARING AND ALL THESE OTHER RECORDS. I JUST WON'T DO
3 IT.

4 Q. I AM TALKING ABOUT FAMILY MEMBERS NOW. THE
5 QUESTION I AM ASKING YOU IS IN REGARD TO FAMILY MEMBERS.

6 ARE YOU SAYING THAT IN A FORENSIC SETTING
7 YOU CAN SPEND 15 HOURS WITH A PATIENT AND ANOTHER 85
8 HOURS WORKING ON THE CASE, AND UNLESS YOU GET SPECIFIC
9 REPORTS FROM FAMILY MEMBERS YOU CANNOT FORM A DIAGNOSIS?

10 A. I WOULD BE VERY NERVOUS ABOUT THE ABSENCE
11 OF THAT TYPE OF INFORMATION, ESPECIALLY IN A MAJOR CASE.

12 Q. SO YOU WOULDN'T DO IT, THEN, IS THAT WHAT
13 YOU'RE SAYING?

14 A. I WOULD BE VERY UPSET AND WORRIED AND A

15 VERY UNHAPPY CAMPER ABOUT BEING FORCED TO MAKE A
16 DIAGNOSIS WITHOUT THAT TYPE OF HISTORICAL INFORMATION.

17 Q. SO YOU'RE SAYING THAT IF A PERSON COMMITS A
18 CRIME AND HE HAS NO RELATIVES, NO LIVING RELATIVES, AND
19 YOU HAVE INFORMATION ABOUT HIM, YOU HAVE INFORMATION
20 ABOUT THE SITUATION THAT HE WAS IN, YOU SPENT 15 HOURS
21 INTERVIEWING HIM, YOU'RE TELLING US THAT YOU'RE GOING TO
22 SAY TO HIM, "UNLESS YOU CAN GIVE ME THE NAME OF A SISTER
23 OR A BROTHER OR AN UNCLE OR AN AUNT, I AM NOT GOING TO
24 FORM A DIAGNOSIS IN THIS CASE"?

25 A. NO. WHAT I WOULD USUALLY DO IS TELL THE
26 PROSECUTING ATTORNEY OR THE DEFENSE ATTORNEY THAT WAS
27 WORKING WITH ME, SEND AN INVESTIGATOR BACK TO LOUISIANA
28 OR MICHIGAN, OR WHEREVER IT IS, AND TRACK DOWN PEOPLE

-15007

1 THAT KNEW THIS FAMILY, GET INFORMATION ABOUT THAT.

2 MS. ABRAMSON: I AM GOING TO OBJECT.

3 NONRESPONSIVE, YOUR HONOR, MOTION TO STRIKE.

4 MR. CONN: IT IS RESPONSIVE, YOUR HONOR.

5 THE COURT: ALL RIGHT. BASICALLY YOUR ANSWER IS
6 THAT YOU WOULD NEED MORE INFORMATION; IS THAT WHAT
7 YOU'RE SAYING?

8 THE WITNESS: CORRECT.

9 THE COURT: ALL RIGHT.

10 LET ME ASK DEPUTY WOLF, DO WE STILL NEED A

11 BREAK AT 3:30?

12 THE BAILIFF: YES, SIR.

13 THE COURT: OKAY. THEN WE WILL DO THAT. IT'S

14 3:30, UNFORTUNATELY, AND WE WILL BREAK UNTIL TOMORROW TO

15 ACCOMMODATE THE JUROR'S SCHEDULE, AND WE WILL RESUME

16 TOMORROW AT 8:30. HOPEFULLY WE WILL BE COMPLETED WITH

17 THE TESTIMONY BY NOON TOMORROW. I CAN'T GIVE YOU A

18 GUARANTEE, BUT HOPEFULLY THAT'S WHERE IT WILL BE.

19 DON'T DISCUSS THIS MATTER WITH ANYONE.

20 DON'T FORM ANY FINAL OPINIONS ABOUT IT. DON'T LOOK AT

21 ANY OF THE NEWS COVERAGE, OR PERMIT YOURSELVES TO BE

22 EXPOSED TO ANYTHING OUTSIDE THE COURTROOM, AND WE'LL SEE

23 YOU BACK HERE TOMORROW AT 8:30.

24 (THE JURY EXITS THE COURTROOM

25 AND THE FOLLOWING PROCEEDINGS

26 WERE HELD)

27

28 THE COURT: OKAY. WE WILL WAIT FOR THE JURY TO

-15006

1 LEAVE.

2 AND, DOCTOR, YOU CAN GET YOURSELF OFF THE

3 WITNESS STAND, IF YOU LIKE.

4 OKAY. AS SOON AS THE JURORS LEAVE WE'LL

5 TAKE A 10-MINUTE RECESS, AT WHICH TIME WE WILL RESUME.

6 PROBABLY WHAT WE WILL DO, SINCE THE COURT HAS JUST

7 RECEIVED ALL THE INSTRUCTIONS SUBMITTED BY THE PARTIES,
8 IS GIVE EVERYBODY A CHANCE TO DIGEST WHAT IT IS THAT THE
9 OTHERS HAVE SUBMITTED, AND WE WILL PICK UP THIS
10 AFTERNOON IN 10 MINUTES WITH EXHIBITS AND FINISH THAT
11 OFF, AND ANY OTHER LOOSE ENDS THAT WE CAN DO, EVEN IF IT
12 DOES TOUCH ON JURY INSTRUCTIONS, IF WE HAVE SOME.

13 MR. LEVIN: YOUR HONOR, IS THE COURT GOING PAST
14 4:30?

15 THE COURT: I DON'T KNOW.

16 MR. LEVIN: BECAUSE I HAVE TO LEAVE AT 4:30, IF
17 POSSIBLE.

18 THE COURT: WE'LL SEE HOW WE'RE DOING. 10
19 MINUTES.

20 MS. ABRAMSON: SO WE'RE NOT GOING TO DISCUSS
21 INSTRUCTIONS OR THE MOTIONS THAT ARE PENDING ON
22 INSTRUCTIONS THIS AFTERNOON, JUDGE?

23 THE COURT: WELL, WE MIGHT IF WE HAVE SOME TIME.

24 MS. ABRAMSON: THEN I WILL STICK AROUND. IF IT'S
25 JUST GOING TO BE EXHIBITS, I WOULD HAVE LEFT.

26 THE COURT: I DON'T KNOW YET. WE WILL SEE WHAT
27 THE MOOD IS.

28 MS. ABRAMSON: I THINK WE ALL AGREE ON 1.00, YOUR

-15005

1 HONOR, MAYBE 1.01.

2 THE COURT: ALL RIGHT.

3 (A RECESS WAS TAKEN FROM

4 3:30 P.M. TO 3:50 P.M.)

5

6 THE COURT: ALL RIGHT. WE'LL NOW RESUME WITH THE

7 TRIAL. EVERYONE IS PRESENT, AND WE WILL DEAL WITH

8 EXHIBITS.

9 THE COURT HAS RECEIVED A LIST OF EXHIBITS

10 AND OBJECTIONS TO THEM.

11 FIRST I WILL REFER TO THE LIST OF EXHIBITS

12 OBJECTED TO BY THE PROSECUTION.

13 EXHIBIT NO. 140, THE OBJECTION IS

14 SUSTAINED. IT WILL NOT BE RECEIVED.

15 MR. LEVIN: WHICH ONE, YOUR HONOR?

16 THE COURT: EXHIBIT NO. 140.

17 MR. LEVIN: MAY I HAVE A MOMENT?

18 MS. ABRAMSON: CAN WE HAVE A MOMENT, YOUR HONOR?

19 THE COURT: EXHIBIT NO. 349 AND 350, THE

20 OBJECTION IS OVERRULED. THEY WILL BE RECEIVED.

21 MS. TOWERY: I'M SORRY, YOUR HONOR, I DIDN'T HEAR

22 THOSE NUMBERS.

23 THE COURT: 349 AND 350.

24 MR. LEVIN: I NEED ONE MOMENT, YOUR HONOR.

25 THE COURT: 351 IS NOT OBJECTED TO.

26 MS. NAJERA: CORRECT.

27 THE COURT: 352 AND 353 WILL BE RECEIVED.

28 354, THE OBJECTION IS SUSTAINED.

1 MR. LEVIN: WAIT. I DON'T HAVE THAT. IT'S DOWN
2 HERE.

3 MS. TOWERY: YOUR HONOR, WHAT ABOUT 352-A AND
4 353-A? THOSE WERE THE BLOW-UPS.

5 THE COURT: THOSE WERE THE BLOW-UPS, AND THEY
6 WILL BE RECEIVED.

7 MS. NAJERA: SO WILL THE COURT RECEIVE BOTH THE
8 SMALL AND THE LARGE?

9 THE COURT: YES.

10 354 WAS OBJECTED TO EARLIER, AND THAT
11 OBJECTION IS SUSTAINED.

12 355 WILL BE RECEIVED.

13 362, COUNSEL WILL HAVE TO REFER TO THE
14 SPECIFIC PORTION OF THE TESTIMONY OF THE DEFENDANT
15 IDENTIFYING THIS AS THE ACTUAL WEAPON.

16 MS. ABRAMSON: HE DID.

17 THE COURT: COUNSEL WILL HAVE TO REFER ME TO THE
18 TRANSCRIPT OF THAT.

19 366 IS NOT RECEIVED.

20 369 IS A PORTION OF A TAPE, PORTION OF
21 EXHIBIT 130, AND 370 IS A TRANSCRIPT OF 369.

22 THAT TRANSCRIPT, AS I RECALL, WAS READ. I
23 DON'T RECALL THE TAPE BEING PLAYED. THERE WAS SOME
24 DEFECT IN THAT, IF I AM NOT MISTAKEN, OR SOME PROBLEM
25 DURING THAT WITH MR. LEVIN. I AM NOT SURE IF YOU READ
26 IT OR IF IT WAS PLAYED. I THINK YOU DIDN'T HAVE THE
27 TAPE AND IT WAS JUST READ IS MY RECOLLECTION, MR. LEVIN.

-15003

1 LARGELY INAUDIBLE AND I PLAYED A VERY SMALL PORTION OF
2 IT.

3 THE COURT: AND THEN YOU READ THE TRANSCRIPT?

4 MR. LEVIN: THEN I READ IT, YES.

5 THE COURT: OKAY. THEN 369 AND 370 WILL NOT BE
6 RECEIVED. THEY WERE REFERRED TO DURING THE TESTIMONY OF
7 THE DEFENDANT AND WERE READ TO THE DEFENDANT, AND HE
8 AUTHENTICATED IT.

9 MS. ABRAMSON: JUDGE, IF THE COURT IS GOING TO
10 GIVE AN INSTRUCTION, THOUGH, ABOUT RELYING ON TAPES
11 RATHER THAN TRANSCRIPTS, WE SHOULD MODIFY IT SO THAT
12 WITH RESPECT TO THOSE ITEMS THERE IS NO TRANSCRIPT
13 COMING IN.

14 THE COURT: THERE IS NO TRANSCRIPT COMING IN
15 EITHER. IT WAS JUST READ. IT WAS READ AND THE
16 DEFENDANT AUTHENTICATED IT.

17 SO 369 AND 370 ARE NOT RECEIVED.

18 I AM SKIPPING OVER THOSE OBJECTIONS WHERE
19 THERE ARE NO OBJECTIONS AT THIS POINT, JUST GOING TO
20 THOSE WHERE THERE ARE.

21 392 WILL BE RECEIVED.

22 393 WILL BE RECEIVED.

23 395 THERE WAS OBJECTIONS TO ITS

24 AUTHENTICATION AT ONE POINT. THIS IS A SUMMARY OF
25 RECORDS THAT THE ACTUAL ENTRY THAT WAS OF ANY
26 SIGNIFICANCE WAS REFERRED TO DURING TESTIMONY OF
27 WITNESSES, AND I DON'T RECALL THAT ANY DEBATE ABOUT THAT
28 AUTHENTICATION WAS EVER RESOLVED.

-15002

1 MS. ABRAMSON: YES, IT WAS, YOUR HONOR, BECAUSE
2 THEY ACKNOWLEDGED THAT THEY HAD THE UNDERLYING MEDICAL
3 RECORDS, AND IN FACT THEY TOOK THE UNDERLYING MEDICAL
4 RECORD AND USED IT. THAT'S THE NEXT NUMBER.

5 WE WOULD ASK THAT 395 COME IN, BECAUSE IT'S
6 VERY DIFFICULT TO READ THE UNDERLYING MEDICAL RECORD,
7 AND IF IT NEEDS TO BE MODIFIED SO THAT ONLY THAT ONE
8 ENTRY THAT WAS TESTIFIED TO REMAINS, WE WILL SO MODIFY
9 395.

10 THE COURT: SO 395 IS JUST SOME SECRETARY OR SOME
11 OTHER PERSON WHO HAS WRITTEN OUT WHAT IT IS THAT'S
12 CONTAINED ON 396?

13 MS. NAJERA: THAT'S CORRECT, YOUR HONOR.

14 MS. ABRAMSON: IT WAS TRANSCRIBED SO IT COULD BE
15 LEGIBLE. 396 IS CLASSIC DOCTOR HANDWRITING, VIRTUALLY
16 ILLEGIBLE.

17 THE COURT: AND WHAT IS THE PEOPLE'S POSITION?

18 MS. NAJERA: OUR POSITION, YOUR HONOR, IS THAT
19 395 WAS NEVER AUTHENTICATED. WE DON'T KNOW WHO TYPED IT

20 UP, WHERE IT CAME FROM. IT APPEARED ONE DAY. THE
21 DEFENSE APPARENTLY HAD IT RECREATED, AND IT ISN'T THE
22 MEDICAL RECORD. WE HAVE THE MEDICAL RECORD. THERE IS
23 NO BASIS IN THE EVIDENCE CODE TO LET IN 395.

24 THE COURT: 396 IS THE ACTUAL RECORD; IS THAT
25 CORRECT?

26 MS. NAJERA: THAT'S CORRECT, YOUR HONOR.

27 THE COURT: ALL RIGHT. 395 WILL NOT BE RECEIVED.

28 396 WILL BE.

-15001

1 MS. NAJERA: OKAY.

2 THE COURT: LET ME SEE 407, PLEASE.

3 MS. ABRAMSON: THAT WAS THE SMALL PHOTOGRAPH I
4 BELIEVE THAT THE COURT INDICATED WOULD BE ACCEPTABLE,
5 BECAUSE MRS. CANO IS IN IT, AND IT REFERRED SPECIFICALLY
6 TO A TIME WHEN SHE SAW AN INCIDENT OF PHYSICAL VIOLENCE.
7 I BELIEVE THAT'S WHAT 407 IS.

8 MS. NAJERA: I BELIEVE THE COURT WITHHELD RULING
9 ON 407 AND 409.

10 MS. ABRAMSON: THE COURT SAID 407 COULD BE SHOWN
11 TO THE JURY. I PUT IT UP ON THE BOARD.

12 THE COURT: OKAY. 407 IS RECEIVED, 409 IS NOT.

13 MS. ABRAMSON: 409, YOUR HONOR, IS THE PHOTOGRAPH
14 OF MR. MENENDEZ WITH HIS HANDS IN LYLE MENENDEZ' CROTCH.

15 THE COURT: YES. I HAVE REVIEWED THAT, AND I

16 DON'T FIND THERE IS ANY PROBATIVE VALUE IN THAT
17 PARTICULAR PHOTOGRAPH. IT IS JUST A PHOTOGRAPH SHOWING
18 CERTAIN INDIVIDUALS WHEN THE PHOTOGRAPHER SNAPPED THE
19 PHOTOGRAPH. IT DOESN'T PROVE OR DISPROVE ANYTHING IN
20 DISPUTE IN THIS CASE.

21 SO 409 WILL NOT BE RECEIVED.

22 411 WILL BE RECEIVED.

23 412 WILL BE RECEIVED.

24 413 WILL BE RECEIVED.

25 414 WAS FOR IDENTIFICATION ONLY. IT WILL
26 NOT BE RECEIVED.

27 422 WILL NOT BE RECEIVED.

28 425 WILL NOT BE RECEIVED.

-15000

1 MR. LEVIN: THAT'S THE REPORT THAT CONTAINS --

2 THE COURT: YES.

3 MS. NAJERA: -- A LOT OF HEARSAY.

4 THE COURT: YES. YOU READ WHAT PORTIONS OF IT
5 YOU FELT WAS RELEVANT INTO THE RECORD AND ASKED
6 DETECTIVE ZOELLER ABOUT IT. THERE IS NO NEED FOR THE
7 DOCUMENT ITSELF TO GO IN.

8 MR. LEVIN: WELL, I THINK THE ISSUE, YOUR HONOR,
9 WAS WHETHER OR NOT THE DOCUMENT ITSELF EXISTED, AS
10 OPPOSED TO JUST READING IT AND HAVING THE JURORS
11 SPECULATE THAT PERHAPS I WAS READING IT INAPPROPRIATELY

12 OR NOT ACCURATELY.

13 THE COURT: EVERYONE KNOWS YOU CAN READ
14 ACCURATELY, MR. LEVIN, AND PLUS IT WAS SHOWN TO THE
15 WITNESS, WHO IDENTIFIED IT. THERE WAS NO DISPUTE ABOUT
16 IT. BUT THESE ARTICLES CONTAIN A LOT OF EXTRANEOUS
17 MATERIAL.

18 MS. TOWERY: YOUR HONOR, IF WE REDACTED ALL OF
19 THE EXTRANEOUS MATERIAL AND LEFT IN ONLY THE PORTIONS
20 READ, WOULD THAT BE ACCEPTABLE TO THE COURT?

21 THE COURT: NO. I JUST DON'T SEE ANY REASON TO
22 HAVE IT IN WHEN IT WAS READ. THE MATERIAL WAS READ, AND
23 IT WAS SUBJECT TO QUESTIONING OF DETECTIVE ZOELLER, AND
24 THE ONLY VALUE OF IT IS IN RELATIONSHIP TO HIS
25 TESTIMONY. IT HAS NO OTHER EXTRINSIC VALUE. YOU CAN'T
26 EXPECT THESE ARTICLES TO GO TO THE JURY FOR ANY OTHER
27 PURPOSE OTHER THAN TO REFLECT WHAT IT WAS THAT WAS
28 TESTIFIED TO BY DETECTIVE ZOELLER WHEN HE WAS ASKED

-14999

1 ABOUT IT.

2 MS. ABRAMSON: BUT THE VALUE WASN'T TO SHOW IT
3 WAS SOMETHING READ TO DETECTIVE ZOELLER, BUT THE
4 INFORMATION WAS IN CIRCULATION IN THE LARGEST
5 CIRCULATING NEWSPAPER IN THE COUNTY, AND IF THE STUFF
6 THAT WASN'T RELEVANT THAT WAS REDACTED OUT. IT WOULD
7 REMIND THE JURY THAT IT WAS THERE, AND IT HAD TO DO WITH

8 CRAIG CIGNARELLI.

9 THE ISSUE IS WHETHER OR NOT THE JURY WILL
10 EVEN REMEMBER WHETHER THERE WAS -- THIS INFORMATION WAS
11 PRESENTED THROUGH THE TESTIMONY OF DETECTIVE ZOELLER IF
12 THEY DON'T ACTUALLY SEE THE NEWSPAPER ARTICLE.

13 THE COURT: OKAY. THAT ALL HAS BEEN COVERED BY
14 MY REMARKS.

15 427 AGAIN IS NOT OFFERED, SINCE IT WAS NOT
16 REFERRED TO.

17 428 AND 499 WILL BE WITHDRAWN.

18 MS. NAJERA: YOUR HONOR, I THINK YOU SKIPPED 426.

19 THE COURT: IF I DID, 425, 426 AND 427 ARE NOT
20 RECEIVED. 428 AND 429 WERE WITHDRAWN.

21 MR. LEVIN: YOUR HONOR, CAN YOU REFRESH MY
22 MEMORY?

23 THE COURT: THE ADD REGARDING "HURLEY-BURLEY" IS
24 428, AND 429 IS SOME ARTICLE ON WHAT IT WAS.

25 MS. NAJERA: A REVIEW.

26 THE COURT: THE PEOPLE WITHDREW THEM. I THINK
27 THE CLERK HAS THEM.

28 430 IS AN ENVELOPE WITH WORK RECORDS OF

-14998

1 MS. PISARCIK, BUT I DON'T RECALL THE CONTENTS EVER BEING
2 GONE INTO.

3 MS. NAJERA: THEY WEREN'T.

4 THE COURT: OTHER THAN HAVING SHOWN THEM TO HER.
5 I DON'T SEE HOW IT HAS ANY RELEVANCE THAT COULD OVERCOME
6 THE POTENTIAL FOR CONFUSION. SO IT WILL NOT BE
7 RECEIVED.

8 MS. ABRAMSON: THE CHART, HOWEVER, 431, SIMPLY
9 INDICATED THE DATES WHEN SHE WAS NOT AVAILABLE. WE
10 WOULD ASK --

11 THE COURT: SHE WAS CONFRONTED WITH THAT.

12 MS. ABRAMSON: RIGHT.

13 THE COURT: AND ACKNOWLEDGED AWARENESS OF IT
14 DURING THE -- HER TESTIMONY. SO THAT WILL BE RECEIVED.

15 OKAY. THERE HAVE BEEN EXHIBITS MARKED
16 SINCE THE PEOPLE SUBMITTED THEIR LIST HERE, AND AFTER
17 THE DEFENSE SUBMITTED ITS LIST, SO LET'S GO THROUGH
18 THOSE, AND THEN WE'LL GO BACK THROUGH THE DEFENSE
19 EXHIBITS.

20 DIETZ' EXHIBIT -- OR C.V., 432 WILL BE
21 RECEIVED.

22 MS. ABRAMSON: I WILL OBJECT TO RECEIPT OF HIS
23 C.V.

24 THE COURT: OKAY. AND THE NATURE OF THAT
25 OBJECTION?

26 MS. ABRAMSON: WELL, IT'S HEARSAY. WE DIDN'T GO
27 INTO ALL OF IT. IT WAS JUST USED AS REFERENCE FOR A FEW
28 THINGS THAT HAVE BEEN DISCUSSED.

1 THE COURT: WE HAVE BEEN RECEIVING ALL C.V.'S,
2 AND THIS ONE WILL BE TREATED IN THE SAME FASHION.

3 433 WILL NOT BE RECEIVED.

4 MS. TOWERY: I'M SORRY, YOUR HONOR. YOU SAID 433
5 IS RECEIVED?

6 THE COURT: 433 WILL NOT BE RECEIVED.

7 MS. ABRAMSON: WHAT IS IT?

8 MS. NAJERA: IT'S THE PEOPLE'S MOTION TO EXCLUDE
9 EXPERTS.

10 THE COURT: 434 IS A LIST OF MATERIALS SENT TO
11 DR. DIETZ.

12 MS. ABRAMSON: I AM NOT OFFERING THAT, YOUR
13 HONOR.

14 THE COURT: IT WILL NOT BE RECEIVED.

15 435 WILL NOT BE RECEIVED. THAT'S A
16 PEOPLE'S MOTION ALSO SENT TO DR. DIETZ.

17 436 WILL BE RECEIVED.

18 437 WILL BE RECEIVED.

19 MS. ABRAMSON: DOES ANYBODY WANT TO TELL ME WHAT
20 THEY ARE?

21 THE COURT: 438 IS --

22 MR. LEVIN: YOUR HONOR, WE DID NOT CONFER ON
23 THESE.

24 THE COURT: WELL, I ASSUME YOU'RE OFFERING THEM.

25 MS. ABRAMSON: I DON'T EVEN KNOW WHAT THEY ARE.

26 THE COURT: THERE IS NO MYSTERY HERE, IF SOMEONE
27 KEEPS TRACK OF THE EXHIBITS.

28 MS. NAJERA: I DO, YOUR HONOR. I CAN TELL THEM.

1 THE COURT: 436 WAS A FLORIDA DRIVER'S LICENSE.

2 437 WAS A BIRTH CERTIFICATE.

3 438 WAS A REPLACEMENT OR RENEWAL OF THE
4 DRIVER'S LICENSE. I ASSUME YOU'RE OFFERING THOSE.

5 439 IS A WEATHER REPORT OR A CHART.

6 MS. ABRAMSON: EXCUSE ME, YOUR HONOR. 438 WE
7 WOULD LIKE TO OFFER -- NEVER MIND. WE WILL WITHDRAW
8 THAT.

9 THE COURT: 439 IS RECEIVED.

10 440 IS THE CONTRACT WITH MR. CIGNARELLI.

11 WHAT IS THE POSITION OF THE PARTIES IN
12 REGARD TO THAT?

13 MS. ABRAMSON: I AM OFFERING THAT.

14 THE COURT: AND WHAT IS THE PEOPLE'S POSITION?

15 MS. NAJERA: MY CONCERN WITH THAT, YOUR HONOR,
16 AND I WANT TO LOOK AT IT AGAIN, IS I AM NOT SURE IF
17 THERE IS STUFF IN THERE THAT PERHAPS WOULDN'T BE
18 APPROPRIATE TO GO TO THE JURY, AND IF I COULD HAVE A
19 MINUTE, BECAUSE WE HAVEN'T HAD A CHANCE TO REVIEW THAT
20 ONE. WHY DON'T WE HOLD THAT ONE IN ABEYANCE.

21 THE COURT: PRIOR TO DOING THAT, WHY DON'T WE GO
22 TO THE DEFENSE EXHIBITS THEY HAVE OBJECTED TO.

23 MS. NAJERA: YOUR HONOR, BEFORE WE GO TO THAT,
24 THERE WAS A LIST PUT ON THE LIST THAT I GAVE YOU OF WHAT
25 I BELIEVE WERE PREVIOUSLY EXCLUDED ITEMS, AND I JUST

26 WANT TO MAKE SURE THAT I AM RIGHT. IT SHOULD BE AT THE
27 BOTTOM OF OUR LIST.
28 THE COURT: LET'S DOUBLE CHECK THOSE.

-14995

1 354 IS NOT RECEIVED.
2 360, OBJECTION WAS SUSTAINED AT THE TIME IT
3 WAS MARKED FOR IDENTIFICATION. IT WAS NOT RECEIVED.
4 361 WAS LIKEWISE SUBJECT TO DISCUSSION AT
5 THE TIME, AND RULING BY THE COURT. IT WILL NOT BE
6 RECEIVED.
7 363, THE OBJECTION TO THAT EXHIBIT BY THE
8 PROSECUTION WAS SUSTAINED BY THE COURT. IT WILL NOT BE
9 RECEIVED.
10 402 WAS NOT USED. IT WILL NOT BE RECEIVED.
11 403 THE SAME, IT WILL NOT BE RECEIVED.
12 408, THE COURT RULED IT NOT ADMISSIBLE ON
13 JANUARY THE 29TH. IT WILL NOT BE RECEIVED.
14 MS. NAJERA: I THINK THAT'S IT.
15 THE COURT: OKAY. AND LET'S GO TO THE DEFENSE
16 LIST.
17 MS. ABRAMSON: YOUR HONOR --
18 THE COURT: 36 WAS PREVIOUSLY DISCUSSED AND HAS
19 NEVER BEEN IDENTIFIED, ACCORDING TO MY NOTES. IT WILL
20 NOT BE RECEIVED.
21 MS. NAJERA: THAT'S CORRECT.

22 THE COURT: THE DEFENSE OBJECTION IS SUSTAINED.

23 60 IS THE DECEMBER 11TH TAPE, AND WE'LL

24 DISCUSS THAT IN A MOMENT. I ASSUME THE DEFENSE IS

25 MAKING ITS OBJECTION FOR THE RECORD AT THIS POINT.

26 MS. ABRAMSON: YES, YOUR HONOR.

27 THE COURT: TO PRESERVE IT.

28 MS. ABRAMSON: RIGHT.

-14994

1 THE COURT: OKAY. WITH THE UNDERSTANDING THAT

2 THE TAPE IS RECEIVED, AND THE ISSUE RELATES TO THE

3 TRANSCRIPT, EXHIBIT 60 WILL BE RECEIVED BASED UPON THE

4 PREVIOUS RULINGS OF THE COURT -- OR 60 IS A TRANSCRIPT,

5 I AM SORRY. 59 IS A TAPE. 59 HAS BEEN RECEIVED AND 60

6 IS A TRANSCRIPT THAT WE'LL REVIEW. LET'S SEE. WE HAVE

7 SOME OBJECTIONS BY THE DEFENSE TO SPECIFIC ITEMS HERE.

8 YOU'RE OBJECTING TO 404, MR. LEVIN?

9 MR. LEVIN, ARE YOU OBJECTING TO 404?

10 MR. LEVIN: YES, YOUR HONOR. THAT WAS THE

11 PROSECUTION LIST OF SYMPTOMS THAT WAS PRESENTED TO

12 DR. WILSON THAT THERE WAS DISPUTE AS TO WHETHER IT

13 CONFORMED WITH THE DSM.

14 THE COURT: AND ULTIMATELY THE WITNESS SAID IT

15 DID EXCEPT FOR THE TITLE, SO IT'LL BE RECEIVED.

16 405-A AND B, DR. WILSON'S NOTES REGARDING

17 STATEMENTS MADE BY THE DEFENDANT REGARDING THE LICENSE,

18 THAT'LL BE RECEIVED.

19 MS. ABRAMSON: WELL, WE WOULD TO OBJECT TO IT,
20 YOUR HONOR. IT'S IN THE SAME CATEGORY. IT CONTAINS
21 LOTS OF OTHER THINGS, TOO. IT'S IN THE SAME CATEGORY AS
22 THE NEWSPAPER ARTICLE. IT WAS READ TO THE WITNESS, AND
23 HE EXPLAINED IT, AND IT IS NO DIFFERENT THAN ANY OTHER
24 WRITTEN DOCUMENTS OR TRANSCRIPT THAT WAS ALREADY READ TO
25 THE WITNESS OR EXPLAINED TO THE WITNESS.

26 THE COURT: OKAY. I WILL AUTHORIZE THAT IT BE
27 RECEIVED WITH IT BEING REDACTED TO ALL ENTRIES OTHER
28 THAN THAT WHICH WAS THE SUBJECT OF THE DISCUSSION,

-14993

1 BECAUSE ITS PLACEMENT AND THE WAY HE WROTE IT IS OF
2 SIGNIFICANCE. NOT JUST THE DOCUMENT, THAT IT'S A
3 NEWSPAPER ARTICLE, BUT IT HAS SOME SIGNIFICANCE AS TO
4 HOW IT WAS WRITTEN.

5 THAT'S 405-A AND B.

6 MS. ABRAMSON: I WANT TO TAKE A LOOK AT THOSE,
7 YOUR HONOR, BECAUSE I THINK IT IS UNDULY -- IF I AM
8 CORRECT ABOUT WHAT IT IS, IT WILL UNDULY HIGHLIGHT THAT
9 PORTION OF HIS NOTES, WHERE THERE WAS ANOTHER PAGE OF
10 HIS NOTES WHERE IT WAS DISCUSSED, AND THE DEFENDANT'S
11 STATEMENTS ABOUT IT INDICATED HE DIDN'T HAVE A LICENSE,
12 AND EVEN IF HE DID, HE WOULDN'T HAVE USED IT.

13 SO JUST HAVING THAT ONE PART AND NOT THE

14 OTHER PART, IF THAT'S INDEED WHAT THE EXHIBIT IS, JUST
15 THE OTHER PART, IS UNDULY HIGHLIGHTING ONE STATEMENT OF
16 THE DEFENDANT WHILE IGNORING THE OTHER, AND SINCE
17 THEY'RE BOTH WRITTEN BY DR. WILSON, THEY'RE BOTH IN THE
18 RECORD FOR THE JURY TO CONSIDER.

19 THE COURT: WELL, I WILL CONSIDER THAT AFTER
20 YOU'VE LOOKED AT THE DOCUMENT.

21 MS. ABRAMSON: YES, YOUR HONOR.

22 THE COURT: 423 IS A DOCUMENT THAT NEEDS
23 REDACTING TO INCLUDE ONLY THAT PORTION WHICH RELATES TO
24 THIS CASE.

25 MS. ABRAMSON: IS THAT THE CIGNARELLI NOTEBOOK
26 PAGE?

27 MR. LEVIN: YES.

28 THE COURT: AS REDACTED, IT WILL BE RECEIVED.

-14992

1 MS. ABRAMSON: HERE IT IS.

2 THE COURT: ALL OTHER EXHIBITS, AS I UNDERSTAND
3 IT, UNLESS I HEAR OTHERWISE FROM EITHER SIDE, ARE BEING
4 OFFERED AND WILL BE RECEIVED WITHOUT OBJECTION, UNLESS
5 THERE IS SOMETHING HERE THAT IS BEING OBJECTED TO THAT
6 HASN'T ALREADY BEEN REFERRED TO.

7 THERE ARE A FEW EXHIBITS THAT MY NOTES
8 DON'T INDICATE HAVE BEEN RULED UPON THAT WE HAVE
9 PREVIOUSLY GONE THROUGH. EITHER THE CLERK OR COUNSEL

10 CAN ASSIST ME.

11 211, I DON'T INDICATE THAT THAT HAS BEEN
12 RECEIVED.

13 MS. TOWERY: IT HASN'T, YOUR HONOR. I HAVE THE
14 SAME INDICATION.

15 MS. ABRAMSON: WHAT IS IT?

16 THE COURT: IS IT BEING OFFERED?

17 MS. ABRAMSON: WHAT IS IT?

18 THE COURT: IT'S A PHOTO OF A WOUND BROUGHT IN BY
19 DR. LAWRENCE.

20 MS. ABRAMSON: OH, YES.

21 THE COURT: SHOWING A BULLET WOUND. IT'S BEEN
22 REFERRED TO AT GREAT LENGTH DURING THE TESTIMONY. I
23 ASSUME SOMEBODY WOULD OFFER IT.

24 MS. ABRAMSON: I AM OFFERING IT BECAUSE OF THE
25 TESTIMONY OF DR. WECHT AND DR. FACKLER.

26 THE COURT: IT WILL BE RECEIVED.

27 MS. TOWERY: YOUR HONOR, IN THAT SAME LIST OF
28 NUMBERS, I DON'T SHOW WHAT HAPPENED WITH 207.

-14991

1 THE COURT: I JUST NOTICED THAT MYSELF. MY NOTES
2 INDICATE IT'S HEARSAY. IT WAS A TWO-PAGE REPORT.

3 MS. ABRAMSON: YES.

4 THE COURT: POSSIBLY FROM THE SHERIFF'S
5 DEPARTMENT.

6 MS. ABRAMSON: YES. WE ARE NOT OFFERING IT. IT

7 SHOULD BE WITHDRAWN. IT WAS OUR EXHIBIT.

8 THE COURT: OKAY. IT'LL BE WITHDRAWN, 207.

9 MS. ABRAMSON: THANK YOU, YOUR HONOR.

10 THE COURT: AND LET'S SEE.

11 279 THROUGH 291 I DON'T SHOW HAVE BEEN

12 RULED UPON, AND THEY WERE NOT IN ANYBODY'S LIST THAT WAS

13 GIVEN TO ME MOST RECENTLY. THESE WERE THE SHOT PATTERNS

14 PREPARED BY DR. MC CARTHY.

15 MS. NAJERA: I AM SORRY, YOUR HONOR. WHAT NUMBER

16 DID YOU JUST SAY?

17 THE COURT: 279 THROUGH 291. WERE THOSE OFFERED

18 AND RECEIVED ALREADY?

19 MS. TOWERY: I DON'T THINK WE LITIGATED THOSE.

20 MS. NAJERA: NO.

21 MS. TOWERY: I THINK THAT, ACCORDING TO MY

22 RECOLLECTION, I THINK THAT MIGHT HAVE BEEN THE DAY

23 MS. ABRAMSON WASN'T HERE.

24 MS. ABRAMSON: THOSE WERE THE PATTERNS THAT HE

25 DID THAT I MARKED.

26 THE COURT: SOME OF THEM WERE WINCHESTER AND SOME

27 WERE --

28 MS. ABRAMSON: THEY'RE ALL THE WRONG AMMUNITION.

-14990

1 THE COURT: I DON'T RECALL -- I KNOW THEY WERE

2 MARKED, AND IF THEY WERE DISPLAYED --

3 MS. ABRAMSON: YES.

4 THE COURT: -- TO THE JURY. IF THEY HAVE, THEN
5 THEY SHOULD BE RECEIVED.

6 MS. ABRAMSON: I DON'T THINK THEY WERE HELD --
7 WELL, I DON'T THINK --

8 MS. NAJERA: THEY WEREN'T.

9 MS. ABRAMSON: I DON'T THINK THEY WERE HELD UP OR
10 DISPLAYED.

11 THE COURT: IS ANYONE OFFERING IT? IF NO ONE IS
12 OFFERING IT, WE DON'T NEED IT.

13 IT'S A PEOPLE'S EXHIBIT. ARE THE PEOPLE
14 OFFERING IT?

15 MS. ABRAMSON: NO, IT'S A DEFENSE EXHIBIT, YOUR
16 HONOR.

17 MS. TOWERY: IT'S A DEFENSE EXHIBIT.

18 MS. ABRAMSON: WE HAD THEM MARKED, YOUR HONOR.
19 LET ME JUST THINK.

20 THE COURT: 293 ALSO IS IN THE SAME CATEGORY.

21 MS. ABRAMSON: YOUR HONOR, I AM NOT GOING TO
22 OFFER THEM.

23 AND 293, I AM NOT OFFERING THAT EITHER,
24 BECAUSE I THINK THEY'RE JUST GOING TO CONFUSE THE JURY,
25 SINCE THEY'RE ALL WRONG.

26 MS. TOWERY: HOWEVER, YOUR HONOR, 290 AND 291 ARE
27 DIFFERENT.

28 THE COURT: I'M SORRY?

1 MS. TOWERY: 290 AND 291 ARE A LITTLE DIFFERENT.

2 THE COURT: LET'S DEAL WITH 279 TO 289. ARE THE
3 PEOPLE OFFERING THOSE?

4 MS. NAJERA: NO, YOUR HONOR.

5 THE COURT: THEY WILL NOT BE RECEIVED THEN.

6 279 THROUGH 289 ARE NOT RECEIVED, AND 293
7 IS NOT RECEIVED.

8 290 AND 291, ARE THEY BEING OFFERED?

9 MS. ABRAMSON: YES.

10 THE COURT: OKAY. 290, I REMEMBER THERE WAS AN
11 OBJECTION BY THE PROSECUTION ON THE GROUNDS OF HEARSAY.
12 THE COURT SUSTAINS THAT OBJECTION, AND IT WILL NOT BE
13 RECEIVED.

14 291 IS A BAGGIE WITH SHOT, WADDING. IT WAS
15 IDENTIFIED I BELIEVE DURING THE TESTIMONY OF
16 DR. MC CARTHY.

17 MS. ABRAMSON: YES, RIGHT.

18 THE COURT: AND IS THE DEFENSE OFFERING THAT?

19 MS. ABRAMSON: YES.

20 THE COURT: IT WILL BE RECEIVED.

21 ONE OTHER THAT I SHOW HERE, 306. THIS IS
22 THE XEROX COPY OF SOME TARGETS. THIS WAS USED DURING
23 THE EXAMINATION OF DR. MC CARTHY AS WELL, SHOWING HIM
24 THE DISPLAY, REFERRING HIM TO THE ORIGINALS, I BELIEVE.

25 MS. ABRAMSON: RIGHT. I AM NOT OFFERING THOSE.

26 THE COURT: ARE THE PEOPLE OFFERING THOSE?

27 MS. NAJERA: NO, YOUR HONOR.

28 THE COURT: 306 IS NOT RECEIVED.

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1 THAT, AS I LOOK AT IT, INCLUDES ALL THE
2 EXHIBITS THAT WERE OFFERED BY THE PARTIES AND SUBJECT TO
3 OBJECTION, WITH THE EXCEPTION OF THAT KNIFE THAT I TOLD
4 COUNSEL I WANT REFERENCE TO THE TESTIMONY OF THE
5 DEFENDANT.

6 MS. ABRAMSON: WHAT'S THE STATUS OF 327 AND
7 328, BECAUSE IF WE DIDN'T OBJECT TO THEM BEFORE, WE
8 SHOULD HAVE.

9 THE COURT: MR. LEVIN HASN'T OBJECTED TO THOSE
10 WHEN THE MATERIALS WERE DISCUSSED BEFORE, 327 AND 328.

11 MS. ABRAMSON: THEY NEVER TIED THEM UP, YOUR
12 HONOR. THEY NEVER LAID A FUNCTION FOR WHERE THEY
13 OBTAINED OR HOW THEY OBTAINED THAT STUFF. THEY
14 INDICATED THEY WOULD, BUT THEY DIDN'T.

15 SO I AM OBJECTING TO IT. IT WAS SUPPOSEDLY
16 USED TO TRY TO IMPEACH VAN HORN, AND THERE WAS NO
17 TESTIMONY FROM ANYBODY AS TO WHERE THAT AMMUNITION CAME
18 FROM, WHERE IT WAS OBTAINED, WHO GOT IT.

19 SO I AM OBJECTING TO 327 AND 328.

20 THE COURT: WHAT IS THE PEOPLE'S POSITION?

21 MS. NAJERA: YOUR HONOR, I BELIEVE THAT DEPUTY
22 VAN HORN TESTIFIED THAT THE SHOT OF 328 AND 327 DIDN'T

23 EXIST AND WAS -- OR THE SHOT OF 328, THAT SIZE, DIDN'T
24 EXIST, AND 327, THAT TYPE SHOT DIDN'T EXIST, AND THAT
25 WAS BROUGHT OUT AND SHOWN TO HIM, AND THEN HE ADMITTED
26 THAT YES, IT DID EXIST.

27 SO I DON'T KNOW WHY WE NEED TO SAY WHERE IT
28 CAME FROM. THE FACT THAT IT EXISTS --

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1 MS. ABRAMSON: MAYBE YOU MADE IT.

2 THE POINT IS HE SAID EIGHT AND A HALF SHOT
3 IS NOT COMMERCIALY AVAILABLE. SO THE FACT THEY FOUND
4 SOME SOMEWHERE, SOMEHOW, SOMETIME WHICH WE DON'T KNOW
5 ABOUT DOES NOT IMPEACH HIM, AND THE FACT THAT THEY
6 HAVEN'T BEEN PACKING IT --

7 THE COURT: AS FAR AS THOSE TWO EXHIBITS, IF YOU
8 CAN FIND THAT PORTION OF THE TESTIMONY OF DEPUTY VAN
9 HORN, I WILL REVIEW IT. FIND THE EXACT PAGE WHERE THAT
10 WAS DISCUSSED.

11 MS. ABRAMSON: BUT THE FACT OF THE MATTER IS
12 THERE'S BEEN NO AUTHENTICATION OF THE SOURCE OF THOSE,
13 AND WE KNOW THAT DR. MC CARTHY KNOWS HOW TO PACK
14 AMMUNITION.

15 AND THEREFORE ON THE BASIS OF LACK OF
16 AUTHENTICATION THAT THAT IS REALLY COMMERCIALY SOLD
17 AMMUNITION, WE OBJECT.

18 THE COURT: OKAY. LET ME SEE THE TRANSCRIPT FROM

19 DEPUTY VAN HORN'S TESTIMONY ON THAT SUBJECT.

20 MS. ABRAMSON: WHO ARE YOU ASKING FOR IT, JUDGE?

21 THE COURT: WHOEVER IS OBJECTING TO IT.

22 MS. ABRAMSON: WHOEVER IS OFFERING IT SHOULD SHOW
23 ITS RELEVANCE.

24 THE COURT: THEY TOLD ME THEY THINK IT'S VERY
25 RELEVANT. YOU TOLD ME IT WASN'T IDENTIFIED. SOMEBODY
26 BETTER DO IT, OTHERWISE --

27 MS. ABRAMSON: OTHERWISE WHAT?

28 THE COURT: IT'LL BE RECEIVED.

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1 ANYTHING ELSE HERE?

2 MR. LEVIN: YES. I HAVE A REDACTED VERSION OF
3 423. THAT'S THE PAGE FROM MR. CIGNARELLI'S NOTEBOOK.

4 THE COURT: OKAY.

5 MS. LEVIN: MAY I GIVE IT TO YOU, YOUR HONOR?

6 THE COURT: SHOW IT TO COUNSEL.

7 MR. LEVIN: I HAVE.

8 THE COURT: ANY OBJECTION TO THAT?

9 MS. NAJERA: I AM READING IT NOW. IT LOOKS FINE,
10 YOUR HONOR. IT'S FINE. I WILL CHECK IT LATER. I AM
11 SURE IT'S FINE.

12 THE COURT: 423 AS REDACTED WILL BE RECEIVED. IT
13 WILL BE MARKED AS 423-A SO WE CAN KEEP THE ORIGINAL.

14 423-A IS RECEIVED.

15 OKAY, ANY OTHER LOOSE ENDS HERE ON
16 EXHIBITS?
17 MS. NAJERA: YOUR HONOR, WITH REGARDS TO EXHIBIT
18 61 AND 76, DID WE EVER RESOLVE THOSE? ARE THEY IN OR
19 OUT?

20 THE COURT: MY NOTE INDICATES THAT 61 WAS
21 RECEIVED.

22 MS. NAJERA: OKAY.

23 THE COURT: IT HAD BEEN DONE QUITE AWHILE AGO.

24 MS. TOWERY: MINE INDICATES THAT AS WELL, YOUR
25 HONOR, BUT I DON'T HAVE A RESOLUTION ON 76. THAT WAS
26 THE RIFLES.

27 THE COURT: THAT WAS PENDING THE DEFENSE CASE.

28 MS. NAJERA: RIGHT.

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1 THE COURT: IT WAS HELD IN ABEYANCE UNTIL THE
2 DEFENSE CASE WAS PRESENTED.

3 MS. NAJERA: THAT'S RIGHT.

4 THE COURT: SO WE HAD THEM MARKED DURING THE
5 PEOPLE'S CASE BY MR. BARALT, AND THEN THE RELEVANCE WAS
6 AWAITING THE DEFENSE PRESENTATION.

7 IT'LL BE RECEIVED. ALL RIGHT.

8 MS. NAJERA: WERE THEY RELEVANT?

9 THE COURT: I AM SORRY.

10 MS. NAJERA: I THOUGHT -- OKAY, THAT'S FINE.

11 MS. TOWERY: JUDGE, IN THAT SAME VEIN, I DON'T

12 KNOW THAT --

13 THE COURT: THOSE RIFLES, AS I RECALL, WERE

14 REFERRED TO DURING THE TESTIMONY OF THE DEFENDANT.

15 MS. ABRAMSON: RIGHT. HE IDENTIFIED THEM.

16 THE COURT: I AM SORRY. THE CLERK TELLS ME

17 SOMETHING ABOUT 48, OR SOME PORTION OF IT.

18 THE CLERK: 48, IT WAS MARKED AFTER IT WAS

19 DISCUSSED, SO I'M SURE IT HAS NEVER REALLY BEEN

20 INCLUDED.

21 THE COURT: THAT'S PART OF A WHOLE PACKAGE.

22 MS. ABRAMSON: IT'S PART OF THE PELLET EVIDENCE.

23 THE COURT: OKAY. IT WILL BE RECEIVED.

24 MS. TOWERY: ALSO, YOUR HONOR, 127, I DON'T SHOW

25 THAT THE COURT MADE A RULING. THOSE ARE THE MOSSBERG

26 SHOTGUNS.

27 THE COURT: ALL RIGHT. BASED UPON THE EVIDENCE

28 PRESENTED AND THE USE OF IT DURING THE EXAMINATION OF

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1 THE VARIOUS WITNESSES, IT'LL BE RECEIVED.

2 MR. LEVIN: BUT THAT'LL BE AN ITEM THEY'LL HAVE

3 TO ASK FOR, YOUR HONOR?

4 MS. ABRAMSON: THEY HAVE TO ASK FOR EVERYTHING.

5 THE COURT: YES.

6 WHAT ELSE?

7 MS. ABRAMSON: WE WOULD OBJECT TO THAT GUN GOING
8 TO THE JURY AT ANY TIME, BECAUSE IT'S BEEN MODIFIED. IT
9 WAS MODIFIED IN ANTICIPATION THAT THE PEOPLE WOULD HAVE
10 MY CLIENT HANDLE IT, AND THAT NEVER HAPPENED. BUT IT'S
11 NO LONGER WHAT IT WAS.

12 THE COURT: WELL, THE MODIFICATION WAS THE
13 REMOVAL OF THE FIRING PIN, AS I UNDERSTAND IT. THAT
14 DOESN'T AFFECT ITS OPERATION IN ANY WAY.

15 MR. LEVIN: I DON'T THINK THEY EVER FIXED THE
16 PART THAT UNSCREWS.

17 THE COURT: NO. MC CARTHY OR SOMEBODY SAID THEY
18 FIXED IT.

19 MR. LEVIN: WELL, I SAW HIM JAMMING THE POINTER
20 DOWN THE BARREL, AND HE BROKE THE POINTER, AND I WAS
21 KIDDING HIM ABOUT BEING AN ENGINEER, BUT --

22 THE COURT: WHY DON'T YOU CHECK IT AND SEE?

23 MS. NAJERA: IT DOES NOT WORK NOW. THEY TOOK THE
24 FIRING PIN OUT.

25 THE COURT: WE ARE TALKING ABOUT A DIFFERENT
26 ASPECT OF IT, THE THING WHERE THE ROD OR DOWEL GOES.

27 ALL RIGHT. ANY OTHER LOOSE ENDS HERE AS
28 FAR AS EXHIBITS?

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1 MS. TOWERY: 150-A.

2 THE COURT: 150-A. OKAY. THE ONLY PORTION

3 THAT'S RECEIVED IS A CHECK ON 150-A, OR 150.

4 YES, THE CHECK WAS MISSING, AND SOMEBODY
5 WAS GOING TO GET IT.

6 MS. NAJERA: WELL, WE COULDN'T.

7 THE COURT: IF YOU DON'T HAVE IT, YOU DON'T HAVE
8 IT.

9 MS. NAJERA: I DON'T HAVE IT.

10 THE COURT: SO THEN IT WON'T BE RECEIVED. THE
11 ONLY PORTION OF THAT THAT WAS GOING TO BE RECEIVED WAS
12 THE CHECK.

13 MS. NAJERA: RIGHT.

14 THE COURT: SO IF YOU'VE NEVER OBTAINED THAT,
15 THEN IT WON'T BE RECEIVED.

16 MS. NAJERA: CORRECT.

17 THE COURT: 150 THEN IS NOT RECEIVED, INCLUDING
18 150-A.

19 WHAT ELSE?

20 MS. NAJERA: I THINK THAT'S IT.

21 THE COURT: THEN LET'S GO THROUGH HERE. I WILL
22 RECEIVE ALL THESE OTHER EXHIBITS THAT I SHOW HAVEN'T
23 BEEN RECEIVED BUT ARE NOT BEING OBJECTED TO, AND IF
24 SOMEBODY IS OBJECTING, NOW IS THE TIME.

25 MS. TOWERY: COULD WE HAVE JUST A MOMENT, YOUR
26 HONOR?

27 THE COURT: WHILE YOU'RE TALKING, THERE ARE SOME
28 EXHIBITS HERE CURRENTLY THAT ARE BEING REPLACED THAT

1 SOMEBODY -- ONE OF THE WITNESSES WALKED OFF WITH SOME
2 EXHIBITS; IS THAT IT? IS THAT WHAT THESE ARE? AND SO
3 THEY'RE BEING REPLACED AS DUPLICATES.

4 MS. NAJERA: THAT'S CORRECT, YOUR HONOR. I
5 BELIEVE THERE'S FIVE OF THEM THAT WE REPLACED. I SPOKE
6 TO MS. ABRAMSON. THESE ARE THE FIVE YOU GAVE ME.

7 MS. ABRAMSON: WHAT IS THE SIZE OF THE
8 REPLACEMENT ONES?

9 MS. NAJERA: EXACTLY THE SAME SIZE, FIVE BY
10 SEVEN.

11 MS. ABRAMSON: NO. SOME OF THE ONES THAT WERE
12 MISSING WERE SMALLER.

13 THE COURT: WELL, I DON'T KNOW WHAT THESE ALL
14 ARE, SO -- HAVE THE LAWYERS LOOKED AT THESE RECENTLY?
15 SOME OF THESE, I DON'T KNOW WHAT THEY ARE.

16 MS. ABRAMSON: WHAT HAPPENED, YOUR HONOR, WAS
17 THERE WERE SOME CRIME SCENE PHOTOGRAPHS THAT THE PEOPLE
18 HAD MARKED THAT THEN SOMEHOW DISAPPEARED, AND WE THEN
19 GAVE THEM FROM OUR SET OF PHOTOGRAPHS SOME ORIGINALS TO
20 BE REPHOTOGRAPHED.

21 BUT I AM JUST LOOKING AT -- THE SIZE OF THE
22 PHOTOGRAPHS THE COURT IS HOLDING IS NOT THE SAME SIZE AS
23 WHAT WAS ORIGINALLY MARKED. SOME OF THE ONES ORIGINALLY
24 MARKED WERE LITTLE ONES.

25 THE COURT: I DON'T HAVE ANY RECOLLECTION OF ANY
26 OF THIS, SO I WILL GIVE THEM TO COUNSEL, AND THERE IS
27 SOMETHING HERE -- SOME OF THESE WERE THINGS THAT WERE

28 NEVER USED IN THE FIRST TRIAL, APPARENTLY, THAT WERE

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1 MISPLACED AND GIVEN TO THE CLERK, SO SHE CAN REPLACE
2 THEM FROM EXHIBITS THAT HAVE NEVER BEEN USED IN THE
3 RETRIAL.

4 SO SOME OF THESE MAY NOT BE IN USE IN THIS
5 TRIAL. I WILL GIVE THEM TO COUNSEL, AND YOU CAN LOOK AT
6 THEM.

7 OKAY. NOW I'M GOING TO GO THROUGH THE
8 EXHIBITS THAT I HAVE YET TO REFER TO HERE, THAT AS FAR
9 AS MY RECORDS SHOW, WERE NOT SUBJECT TO OBJECTION.

10 324, 325, 326. HOLDING OFF ON 27 AND 28.

11 329 IS RECEIVED.

12 330 THROUGH 343 ARE RECEIVED.

13 344 THROUGH 348 ARE RECEIVED.

14 353, 353-A, THESE WERE SUBJECT TO OBJECTION
15 BY THE PROSECUTION. THEY WILL BE RECEIVED. I THINK I
16 ALREADY RULED ON THOSE, IF I AM NOT MISTAKEN.

17 355 WILL BE RECEIVED.

18 356 THROUGH 359 WILL BE RECEIVED. HOLDING
19 OFF ON 362.

20 364 AND -5 ARE RECEIVED. 367 AND 368 ARE
21 RECEIVED.

22 371 THROUGH 383 ARE RECEIVED.

23 384 THROUGH 391 ARE RECEIVED.

24 394 IS RECEIVED.
25 397 IS RECEIVED.
26 398, -99, 400, 401 ARE RECEIVED.
27 406 IS RECEIVED.
28 410 IS RECEIVED.

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1 415 THROUGH 421 ARE RECEIVED.
2 424 IS RECEIVED.
3 AND WE'RE WAITING FOR 440, AND THE PEOPLE
4 TO LOOK AT THE CONTRACT.
5 MS. ABRAMSON: OKAY.
6 THE COURT: I BELIEVE THAT'S EVERYTHING.
7 MS. ABRAMSON: LET ME ADDRESS THESE PHOTOGRAPHS,
8 YOUR HONOR, IF I COULD.
9 THE COURT: WELL, FIRST OF ALL, LET'S FOCUS ONLY
10 ON THOSE THAT ARE ACTUALLY MARKED FOR IDENTIFICATION IN
11 THIS TRIAL, NOT JUST THOSE THAT WERE IN THE INVENTORY
12 MS. ABRAMSON: THAT'S GONE ALREADY. THE MATTERS
13 FROM THE FIRST TRIAL ARE GONE.
14 I AM HOLDING TWO PHOTOGRAPHS. ONE OF THEM
15 IS ADMITTED INTO EVIDENCE. THIS IS A REPLACEMENT FOR
16 WHAT WAS ACTUALLY A SMALL PHOTOGRAPH, BECAUSE I PULLED
17 IT OUT OF MY BOOK AND GAVE IT TO THE PEOPLE. THIS IS A
18 REPLACEMENT FOR THAT ORIGINAL EXHIBIT 54. I DON'T HAVE
19 AN OBJECTION TO THIS COMING IN, EVEN IN THIS ENLARGED

20 SIZE.

21 THE COURT: THIS IS EXHIBIT 54?

22 MS. ABRAMSON: 54, AND IT'S MEANT TO SHOW ITEM 5,
23 WHICH IS THE PLASTIC BRACELET.

24 THE COURT: 54 IS NOW BEING REPLACED WITH THIS
25 NEW PHOTOGRAPH.

26 MR. LEVIN: YOUR HONOR, MAY I BE EXCUSED? I HAVE
27 TO TAKE MY DAUGHTER TO THE DOCTOR.

28 THE COURT: SURE.

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1 MS. ABRAMSON: 54 CAME ABOUT BECAUSE THE PEOPLE
2 WANTED TO USE 29, WHICH WE POINTED OUT DIDN'T SHOW ITEM
3 NO. 1, AND WAS UNNECESSARILY BLOODY.

4 THE COURT: 29 WAS NEVER IDENTIFIED. IT WILL NOT
5 BE RECEIVED. IT WAS NEVER IDENTIFIED.

6 MS. ABRAMSON: ALL RIGHT. NOW THE SAME WAS TRUE
7 I BELIEVE OF 36.

8 THE COURT: 36 HAS NOT BEEN RECEIVED.

9 MS. ABRAMSON: RIGHT, AND WE CONTINUE TO OBJECT.

10 THE COURT: IT HAS NOT BEEN RECEIVED.

11 MS. ABRAMSON: OKAY. THAT TAKES CARE OF THAT
12 ONE.

13 THE OTHER TWO, I DON'T HAVE AN OBJECTION TO
14 35, WHICH IS ALREADY IN.

15 THE COURT: OKAY. 35 WILL BE SUBSTITUTED

16 MS. ABRAMSON: OKAY. BUT I DO HAVE AN OBJECTION
17 TO 30, BECAUSE WE ALREADY HAVE ABOUT A ZILLION
18 PHOTOGRAPHS OF THIS GLOB OF TISSUE, AND IT'S BEEN
19 REFERRED TO, AND IT'S OUT OF CONTEXT THERE, SO I DON'T
20 SEE ANY PURPOSE.

21 THE COURT: WELL, IT'S ALREADY BEEN RECEIVED.

22 IT'S JUST A LARGER PICTURE THAN THE ONE
23 THAT WAS USED BEFORE, OR WHAT?

24 MS. NAJERA: I DON'T BELIEVE THAT'S THE CASE.
25 THEY WERE ON CARDBOARD, SO THEY MIGHT HAVE LOOKED
26 SMALLER. THEY WERE PRESSED ON CARDBOARD.

27 THE COURT: LOOKING AT IT, I DON'T SEE THERE'S
28 ANY POTENTIAL PREJUDICE. IT'S JUST ANOTHER PHOTOGRAPH

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1 OF SOME BODY MATTER.

2 MS. ABRAMSON: JUST A PHOTOGRAPH OF BODY PARTS,
3 NO PROBLEM.

4 THE COURT: 34 WILL BE RECEIVED. A NEW
5 PHOTOGRAPH IS SUBSTITUTED FOR THE ONE THAT WAS LOST.

6 OKAY. I BELIEVE NOW THOSE ARE THE
7 EXHIBITS.

8 THE PROSECUTION, I BELIEVE IN CONJUNCTION
9 OR COOPERATION WITH THE DEFENSE, WAS PREPARING A LIST OF
10 ALL THE EXHIBITS THAT HAD BEEN RECEIVED THAT CAN BE
11 SHOWN OR GIVEN TO THE JURY.

12 MS. NAJERA: RIGHT.

13 THE COURT: WHAT IS THE STATUS OF THAT?

14 MS. TOWERY: YOUR HONOR, I DON'T HAVE WHAT THE

15 COURT DID WITH 334 THROUGH 343. DID YOU RULE ON THAT?

16 THE COURT: 334 THROUGH --

17 MS. TOWERY: THROUGH 343.

18 THE COURT: THEY WERE ALL RECEIVED.

19 MS. NAJERA: YOUR HONOR, WE WILL PROVIDE THAT, IF

20 WE CAN, BY 1:30 TOMORROW. WE WILL HAVE A DRAFT -- FIRST

21 DRAFT THAT THE DEFENSE CAN LOOK OVER.

22 THE COURT: OKAY. BEAR IN MIND IT DOESN'T HAVE

23 TO BE FINALIZED UNTIL THE JURY STARTS DELIBERATION, BUT

24 IT'S SUBJECT TO NEGOTIATION AND RESOLUTION IF WE HAVE

25 ANY DEBATES ABOUT HOW THINGS ARE DESCRIBED.

26 MS. NAJERA: WE WILL GIVE THEM A FIRST DRAFT

27 TOMORROW.

28 MS. TOWERY: ONE MORE QUESTION, YOUR HONOR. WHAT

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1 ABOUT 351?

2 THE COURT: 351 HAS BEEN RECEIVED.

3 MS. TOWERY: OKAY.

4 THE COURT: HOW MUCH LONGER DO YOU EXPECT

5 EXAMINATION -- THE CROSS-EXAMINATION OF THE WITNESS TO

6 TAKE?

7 MR. CONN: PROBABLY A HALF HOUR TO AN HOUR.

8 THE COURT: OKAY. AS FAR AS THE JURY
9 INSTRUCTIONS ARE CONCERNED -- BEFORE WE GET TO THAT, I
10 WILL GO TO THE TRANSCRIPT OF THE TAPE. IT'S AN EXHIBIT.
11 I DON'T KNOW IF ANYBODY HAS THEIR TRANSCRIPT HERE. IF
12 YOU DON'T, WE CAN GO ON TO SOMETHING ELSE.

13 MS. NAJERA: I KNOW I DON'T.

14 THE COURT: IF YOU DON'T HAVE IT, IT DOESN'T MAKE
15 SENSE TO GO THROUGH IT NOW WITHOUT EVERYBODY HAVING IT.
16 SO WE WILL HOLD OFF.

17 MS. TOWERY: I HAVE IT IF MS. NAJERA WANTS TO
18 LOOK OVER MY SHOULDER.

19 THE COURT: IF YOU WANT TO DO THAT, WE CAN JUST
20 BRIEFLY TALK ABOUT IT AND RESOLVE AS MUCH AS WE CAN.

21 TWO EXHIBITS THAT WERE NOT RECEIVED HERE OR
22 OFFERED HERE THAT WERE MISPLACED FROM THE CLERK'S
23 EXHIBITS FROM THE FIRST TRIAL ARE BEING SUBSTITUTED.
24 THAT IS 187 AND 107 FROM THE FIRST TRIAL, AND THEY WILL
25 BE MARKED BY THE CLERK FOR THE FIRST TRIAL.

26 OKAY. THE TRANSCRIPT, THE FIRST DISPUTE
27 WAS ON PAGE 3.

28 THE BEST I CAN COME UP WITH IS THAT THAT

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1 SHOULD BE "ENCOURAGED". IT SOUNDS MORE LIKE THAT THAN
2 "PUSHED". I DON'T KNOW IF ANY OF THESE THINGS ARE
3 REALLY OF ANY SIGNIFICANCE ANYWAY, FRANKLY. THEY WERE

4 IN DISPUTE, BUT THAT'S THE BEST I COULD COME UP WITH.

5 ON PAGE 21 THERE WERE TWO, AS I UNDERSTAND

6 IT. THE FIRST ONE ON THE FIRST LINE, I DON'T HEAR THE

7 WORD "VERY".

8 THEN DOWN ON LINE 20 THERE IS A DISPUTE

9 APPARENTLY AS TO BLOOD ON SOMETHING. TO ME IT SOUNDS

10 MORE LIKE "BATHROOM" THAN ANYTHING ELSE. YOU SAY "BED".

11 SO I CAN'T SAY ONE WAY OR THE OTHER. I HAVE BATHROOM

12 WITH A QUESTION MARK.

13 SO IF YOU WANT TO TAKE IT OUT OR LEAVE IT

14 THAT WAY WITHOUT ANYTHING, BLOOD ON DASH-DASH-DASH,

15 BECAUSE THAT'S THE BEST I CAN COME UP WITH.

16 MS. ABRAMSON: BETWEEN THE BED AND THE BATHROOM.

17 THE COURT: THAT'S HOW IT SOUNDED.

18 PAGE 22, I DON'T KNOW WHAT THAT IS. THAT'S

19 LINE 20. I HAVE MR. LEVIN'S TAPE RECORDER. I HAVEN'T

20 USED IT. IF SOMEBODY WANTED TO FIND THAT PARTICULAR

21 THING ON HIS TAPE RECORDER AND CUE IT UP FOR ME, I WILL

22 BE GLAD TO LISTEN TO IT AGAIN. BUT I AM NOT GOING TO GO

23 THROUGH THAT TAPE AGAIN TO TRY AND FIND ONE OR TWO

24 THINGS, BECAUSE EVERY TAPE COUNTER IS DIFFERENT, AND

25 EVERY MACHINE IS DIFFERENT. IT'S ALMOST IMPOSSIBLE TO

26 FIND IT UNLESS YOU LISTEN TO THE WHOLE THING.

27 THAT ONE I DON'T KNOW HOW TO RESOLVE IT.

28 IF YOU WANT TO PLAY IT AGAIN AND ALL LISTEN TO IT USING

1 HIS MACHINE, WHICH HAS THE CAPACITY SLOW DOWN.

2 I DON'T KNOW IF IT SAYS ANYTHING MORE THAN

3 "I JUST NEVER GAVE IT." I DON'T KNOW. WHOEVER IS

4 ASKING FOR THE REST OF IT.

5 MS. ABRAMSON: WE WERE ASKING FOR "GUESS THAT I

6 WAS NEVER GIVEN A CHANCE."

7 THE COURT: I CAN'T SAY I HEAR THAT. I CAN'T SAY

8 ONE WAY OR THE OTHER. SO IF YOU WANT, I WILL LISTEN TO

9 IT AGAIN, IF YOU WANT TO CUE IT UP.

10 24. IT SOUNDS LIKE THE WORD ACT IS IN

11 THERE, HE WAS THE PROCESS OF SAYING ACTING, AND THEN HE

12 STOPPED. A-C-T RATHER THAN JUST "A". I THINK THE WAY

13 IT IS THERE, MAYBE YOU WANT TO PUT DOTS AFTER THAT, OR

14 LEAVE IT THE WAY IT IS. IT'S LINE 26.

15 32, LINE 10, I BELIEVE THERE IS THAT PHRASE

16 "MAYBE IT'S NOT TRUE". IT SOUNDS LIKE THAT IS THERE IN

17 THE TAPE, AND I THINK THAT'S IT. AND THAT'S THE BEST I

18 CAN DO.

19 SO WE HAVE ONE THAT I CAN'T MAKE OUT. IF

20 THAT WAS IMPORTANT TO ONE SIDE OR THE OTHER, I WILL BE

21 GLAD TO LISTEN TO IT AGAIN, IF YOU WANT TO CUE IT UP TO

22 THAT PORTION ON THE TAPE.

23 MS. TOWERY: OKAY.

24 THE COURT: I WILL GIVE YOU MR. LEVIN'S TAPE

25 RECORDER TOMORROW, OR WHENEVER YOU WANT.

26 MS. TOWERY: MAYBE WE WILL CUE UP BATHROOM AS

27 WELL, ON PAGE 21, WHILE WE ARE DOING IT.

28 THE COURT: FINE. OKAY. ALL RIGHT.

1 OKAY. AS FAR AS JURY INSTRUCTIONS, THERE
2 ARE SEVERAL ISSUES RELATING TO SUBSTANTIVE INSTRUCTIONS
3 ON THE CHARGES, SPECIFICALLY RELATING TO MANSLAUGHTER,
4 AND THE PARTIES HAVE SUBMITTED BRIEFING ON THOSE, AND WE
5 WILL HAVE ARGUMENT TOMORROW ON THAT.

6 I INDICATED OFF THE RECORD TO THE PARTIES
7 THAT IN REGARD TO THE PEOPLE'S MEMORANDUM RELATING TO
8 CONSPIRACY TO COMMIT MURDER, THERE WAS A NEW CASE THAT
9 WAS DECIDED BY THE CALIFORNIA SUPREME COURT WHICH TOOK
10 THE POSITION IT WOULD ONLY GO SO FAR AND NO FARTHER IN
11 RESOLVING ISSUES IN DISPUTE, AND I DON'T KNOW IF THE
12 PARTIES GOT TO READ THAT.

13 SO YOU CAN READ THAT AND GIVE ME THE
14 BENEFIT OF YOUR THINKING ON IT AS TO WHAT SHOULD OR
15 SHOULD NOT BE DONE IN REGARD TO THE INSTRUCTION ON
16 CONSPIRACY TO COMMIT MURDER.

17 AS FAR AS THE INSTRUCTIONS AS A WHOLE ARE
18 CONCERNED, THE PEOPLE GAVE ME A PACKET OF INSTRUCTIONS.
19 THE DEFENSE HAS GIVEN ME A LIST OF INSTRUCTIONS, IN
20 ADDITION TO SOME SPECIAL INSTRUCTIONS.

21 TO THE EXTENT, OBVIOUSLY, THAT THERE ARE NO
22 DISPUTES ON THE STANDARD INSTRUCTIONS, THOSE WILL BE
23 GIVEN.

24 I ASSUME THE PARTIES HAVE HAD A CHANCE, OR
25 WILL HAVE A CHANCE TONIGHT, TO GO THROUGH THE LIST

26 PROVIDED BY THE DEFENSE, COMPARE IT TO THE OFFER OF THE
27 PROSECUTION TO IDENTIFY ALL OF THOSE WHERE THERE IS NO
28 DISPUTE, SO THAT PERHAPS TOMORROW WHEN WE FIRST DISCUSS

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1 THESE, YOU CAN QUICKLY IDENTIFY ALL THOSE THAT ARE NOT
2 IN DISPUTE SO WE CAN JUST GET THOSE OUT OF THE WAY AND
3 THEN MOVE ON TO THOSE THAT ARE OF SUBSTANCE HERE.

4 AND DOES ANYONE WANT TO DISCUSS ANY OF
5 THESE INSTRUCTIONS AT THIS POINT, OR DO YOU WANT TO WAIT
6 UNTIL TOMORROW?

7 BEAR IN MIND THAT WE HAVE TO GET THIS
8 RESOLVED SO WE CAN GET TO THE ARGUMENT. I KNOW I WANT
9 TO GET THE INSTRUCTIONS RESOLVED AS SOON AS POSSIBLE SO
10 THAT YOU CAN PREPARE YOUR ARGUMENT.

11 ARE THERE ANY THAT YOU WANT TO TALK ABOUT
12 NOW THAT YOU FEEL THAT BOTH SIDES ARE READY TO TALK
13 ABOUT?

14 MS. ABRAMSON: GENERAL INSTRUCTIONS, YOU MEAN?

15 THE COURT: ANY INSTRUCTIONS.

16 MS. ABRAMSON: WE CAN TALK ABOUT OBVIOUSLY THE
17 ONES -- I THINK IT MAKES MORE SENSE, YOUR HONOR, FOR US
18 TO COME IN TOMORROW MORNING, OR INDICATE IF WE KNOW NOW
19 WHAT WE'RE OBJECTING TO, BECAUSE WHY TALK ABOUT THE ONES
20 YOU ARE NOT OBJECTING TO.

21 THE COURT: I WANT YOU TO GET TOGETHER AND GO

22 THROUGH THEM. FIRST, YOU KNOW, THOSE YOU AREN'T
23 OBJECTING TO, BECAUSE THERE IS A LIST, AND YOU CAN GO
24 THROUGH AND IDENTIFY THOSE YOU ARE NOT OBJECTING TO.
25 MS. ABRAMSON: I AM SURE THE PEOPLE ARE OBJECTING
26 TO ALL OF OUR SPECIAL ONES, BECAUSE THEY ALL REFER TO --
27 WITH THE EXCEPTION OF THE ONE I HAVE ON REVERSE FLIGHT,
28 THEY ALL REFER TO IMPERFECT SELF DEFENSE AND HEAT OF

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1 PASSION.

2 THE COURT: RIGHT.

3 MS. ABRAMSON: AND THE PEOPLE ARE TAKING THE
4 POSITION WE ARE NOT ENTITLED TO ANY MANSLAUGHTER
5 INSTRUCTIONS. SO UNTIL THE COURT RESOLVES THAT --

6 THE COURT: I AM JUST ASKING, IS THERE ANYTHING
7 HERE THAT'S RIPE FOR DISCUSSION RIGHT NOW OTHER THAN
8 THESE LARGE ISSUE DEBATES THAT HAVE BEEN BRIEFED THAT WE
9 MIGHT HAVE FURTHER ORAL DISCUSSION?

10 MR. GESSLER: I DON'T THINK SO, YOUR HONOR. I
11 THINK IT'S MORE PRODUCTIVE ACTUALLY FOR US TO GET TO THE
12 MAJOR SUBSTANTIVE ISSUES TOMORROW, AND THEN GO OFF ON
13 THE SUBSIDIARY INSTRUCTIONS THAT ARE IN DISPUTE.

14 THE COURT: OKAY. WE CAN DO THAT.

15 MS. ABRAMSON: CAN WE TALK ABOUT THOSE THAT DON'T
16 HAVE TO DO WITH MANSLAUGHTER?

17 THE COURT: IF YOU HAVE SOME THAT YOU KNOW YOU

18 ARE OBJECTING TO THAT THE PROSECUTION IS SUBMITTING, WE
19 CAN DISCUSS THOSE.

20 MS. TOWERY: IN THE MEANTIME, THE REFERENCE BY
21 ERIK MENENDEZ, OR THE IDENTIFICATION OF ERIK MENENDEZ ON
22 THE KNIFE IS IN VOLUME 259 AT PAGE 43,375. THAT'S WHERE
23 HE IDENTIFIED IT. MR. LEVIN MARKED IT AS EXHIBIT 362,
24 AND THEN HAD THE BAILIFF SHOW IT TO HIM, AND
25 MR. MENENDEZ IDENTIFIED IT AS THE KNIFE THAT HIS FATHER
26 RETURNED WITH.

27 THE COURT: OKAY. I WILL LOOK AT THAT.

28 MS. TOWERY: OKAY.

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1 THE COURT: WELL, IF YOU KNOW RIGHT NOW WHAT IT
2 IS THAT YOU ARE GOING TO OBJECT TO, WE CAN TALK ABOUT
3 SOME OF THE GENERAL INSTRUCTIONS.

4 MS. ABRAMSON: I THINK YOU ARE OBJECTING TO 203,
5 204, 206, AREN'T YOU, CHARLIE?

6 MR. GESSLER: WE ARE OBJECTING TO 206 TOTALLY.

7 THE COURT: OKAY. LET'S TALK ABOUT 203 THEN.

8 OKAY. AND YOU OBJECT TO THAT. BUT IN LIEU
9 THEREOF, IF THAT OBJECTION IS OVERRULED, YOU SUBMITTED
10 YOUR OWN SPECIAL.

11 MS. ABRAMSON: YES.

12 THE COURT: OKAY. WHAT IS THE PEOPLE'S POSITION
13 ON THE DEFENSE MODIFICATION?

14 IF YOU'RE NOT READY TO ARGUE IT, JUST LET
15 ME KNOW. IF YOU HAVEN'T EVEN READ IT YET --
16 MR. CONN: LET'S DO IT TOMORROW. I THINK THAT
17 WOULD BE BETTER. I DID LOOK AT THAT, BUT --
18 THE COURT: -- WE'RE WASTING TIME. OKAY.
19 WE WILL BE IN RECESS UNTIL TOMORROW AT
20 8:30.
21 MS. TOWERY: JUDGE, JUST ONE MORE THING. I HAVE
22 A DOCTOR'S APPOINTMENT AT 4:30 TOMORROW. I GATHER I
23 SHOULD CHANGE IT. AT KAISER.
24 THE COURT: I'D LIKE TO GET AS MUCH RESOLVED SO
25 THAT COUNSEL WILL BE ABLE TO ARGUE THE MATTER WITHOUT
26 BEING CONCERNED -- PREPARING YOUR ARGUMENT WITHOUT BEING
27 CONCERNED AS TO WHAT'S GOING TO BE IN THE INSTRUCTIONS.
28

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1 (AT 4:50 P.M. PROCEEDINGS WERE
2 ADJOURNED UNTIL 8:30 A.M. THE
3 FOLLOWING DAY)
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8)
VS.) NO. BA 068880

9)
ERIK GALEN MENENDEZ, AND)
10 JOSEPH LYLE MENENDEZ,)
DEFENDANTS.)
11 _____)

12
13 REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS
14 THURSDAY, FEBRUARY 15, 1996
15 VOLUME 297
16

17
18 APPEARANCES:
19 (SEE APPEARANCE PAGE
20
21
22
23
24
25
26
27
28

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22 MARY LU MURPHY
23 CSR NO. 5178
24 OFFICIAL REPORTER
25
26
27
28

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4

5

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6

7

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22 A = MS. ABRAMSON

C = MR. CONN

23 N = MS. NAJERA

T = MS. TOWERY

24 L = MR. LEVIN

25

26

27

28

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