

1 VAN NUYS, CALIFORNIA; FRIDAY, FEBRUARY 16, 1996

2 9:30 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 OUT OF THE PRESENCE OF

9 THE JURY:)

10

11 THE COURT: OKAY. WE'RE IN SESSION HERE.

12 JUST AN APPROXIMATION AS FAR AS THE LENGTH

13 OF THE EXAMINATION AGAIN, MR. CONN.

14 MR. CONN: THIRTY MINUTES, I'D SAY. SIXTY

15 MINUTES -- THIRTY MINUTES, I'D SAY.

16 THE COURT: AND ANY ESTIMATE BY THE DEFENSE ON

17 ANY REDIRECT AT THIS POINT?

18 MS. ABRAMSON: AT THIS POINT, TWO MINUTES, BUT I

19 SUSPECT THAT WILL EXPAND PROPORTIONAL TO THE

20 PROSECUTION'S EXAMINATION.

21 THE COURT: IS IT REALISTIC TO EXPECT THAT WE

22 WILL NOT NEED THE JURY BEYOND NOON TODAY?

23 MS. ABRAMSON: YES.

24 THE COURT: THAT IS THE PEOPLE'S POSITION AS

25 WELL?

26 MR. CONN: YES.

27 MS. ABRAMSON: I AM ALSO CALLING DETECTIVE

28 ZOELLER VERY BRIEFLY.

1 THE COURT: BUT MY QUESTION IS JUST SO THAT THE
2 BAILIFFS CAN MAKE ARRANGEMENTS FOR THE JURORS BEYOND THE
3 NOON HOUR. IS IT REALISTIC TO EXPECT THAT WE WON'T NEED
4 THE JURORS AFTER NOON TODAY?

5 MS. ABRAMSON: YES.

6 MR. GESSLER: I WOULD THINK SO.

7 THE COURT: ALL RIGHT. LET'S GET THE WITNESS
8 BACK TO THE WITNESS STAND.

9 MR. GESSLER: YOUR HONOR, WE DO HAVE ONE MORE
10 THING, WHILE THE JURY IS OUT.

11 WE HAVE THE CALENDAR, WHICH I WOULD LIKE TO
12 HAVE MARKED AS AN EXHIBIT, AND WE COULD GO AHEAD AND
13 INTRODUCE THAT WHILE THE JURY IS STILL OUT HERE.

14 THE COURT: IS THERE GOING TO BE AN OBJECTION TO
15 THE CALENDAR?

16 MR. CONN: NO, YOUR HONOR.

17 THE COURT: THEN LET'S MARK IT.

18 (ALL ATTORNEYS CONFER
19 SOTTO VOCE)

20

21 MS. NAJERA: WE DON'T HAVE TO STIPULATE TO
22 ANYTHING.

23 MR. GESSLER: WELL, YOU DON'T HAVE TO, BUT THEY
24 HAVE NOT CONTESTED THE FOUNDATION.

25 THE COURT: THEY ARE NOT GOING TO DISPUTE THE

26 FOUNDATION FOR IT. IT'S CLEAR WHAT IT IS. I DON'T KNOW
27 IF YOU NEED ANY MORE. IT'S NO DIFFERENT THAN THE
28 PEOPLE'S ARGUMENT ABOUT THE SO-CALLED ESCAPE PLANS THAT

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1 WERE FOUND IN THE JAIL, AND THE FACT THAT THEY WERE NOT
2 READ TO THE JURY.

3 MS. ABRAMSON: IT'S NOT A MATTER OF READING IT,
4 YOUR HONOR. IT'S JUST LETTING THE JURY KNOW IT EXISTS
5 AND WHERE IT CAME FROM, AND WHAT IT IS.

6 THE COURT: WELL, IF YOU HAVE SOMEBODY THAT CAN
7 DESCRIBE IT, IF YOU WANT TO DO THAT, THAT'S UP TO YOU.
8 BUT IT CERTAINLY IS SELF-AUTHENTICATING WHAT IT IS.

9 MR. LEVIN: IT'LL JUST APPEAR, AND IT WILL BE
10 KIND OF ODD. SO HE CAN JUST SAY THAT HE CONTACTED
11 FAILURE ANALYSIS.

12 MS. ABRAMSON: JUST HAVE HIM COME OVER. WE'LL
13 FIGURE IT OUT.

14 THE COURT: LET'S GET THE JURY OUT, PLEASE.

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 MORNING. WE ARE READY TO RESUME WITH
21 THE TRIAL.

22 DR. VICARY IS AGAIN ON THE WITNESS STAND.
23 I WILL REMIND YOU YOU ARE STILL UNDER OATH, AND WE ARE
24 IN CROSS-EXAMINATION.
25 MR. CONN: THANK YOU.
26
27 ///
28 ///

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1 WILLIAM VICARY,
2 CALLED AS A WITNESS BY THE DEFENSE, HAVING BEEN
3 PREVIOUSLY SWORN, RESUMED THE STAND SWORN AND TESTIFIED
4 FURTHER AS FOLLOWS:
5
6 CROSS-EXAMINATION (CONTINUED)
7 BY MR. CONN:
8 Q. NOW, DR. VICARY, I BELIEVE THAT YOU SAID
9 THAT YOU HAVE -- YOU HAVE EVALUATED APPROXIMATELY 1,000
10 PERSONS CHARGED WITH HOMICIDE SINCE 1977; IS THAT
11 CORRECT?
12 A. YES.
13 Q. AND HAVE YOU TESTIFIED IN ALL OF THOSE
14 CASES?
15 A. NO.
16 Q. AND HOW MANY OF THOSE CASES DID YOU TESTIFY
17 IN?

18 A. PROBABLY FIVE PERCENT.

19 Q. FIVE PERCENT. SO YOU'VE TESTIFIED IN ABOUT
20 15 HOMICIDE CASES?

21 A. WELL, ACTUALLY MAYBE 10 PERCENT, 15 PERCENT
22 AT THE MAXIMUM.

23 Q. OKAY. ABOUT A HUNDRED HOMICIDE CASES; IS
24 THAT CORRECT?

25 A. RIGHT.

26 Q. AND HOW MANY HOURS DO YOU PUT IN IN
27 INTERVIEWING THE DEFENDANT BEFORE YOU TESTIFIED IN THOSE
28 CASES?

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1 A. IT WOULD VARY FROM FOUR OR FIVE HOURS ALL
2 THE WAY UP TO MAYBE 20, 30 HOURS, EVEN MORE.

3 Q. SO YOU FIND THAT SOMETIMES IT IS SUFFICIENT
4 FOR YOU TO TESTIFY IN A FORENSIC SETTING IN REGARD TO A
5 HOMICIDE PROSECUTION AFTER JUST FOUR OR FIVE HOURS
6 INTERVIEWING THE DEFENDANT?

7 A. YES.

8 Q. NOW, YOU'VE INDICATED THAT YOU SPENT
9 APPROXIMATELY 113 HOURS INTERVIEWING ERIK MENENDEZ; IS
10 THAT CORRECT?

11 A. YES.

12 Q. AND HOW MUCH ADDITIONAL TIME DID YOU SPEND
13 WORKING ON THE CASE BESIDES THE TIME THAT YOU SPENT

14 INTERVIEWING THE DEFENDANT?

15 A. ABOUT 300 HOURS.

16 Q. THREE HUNDRED HOURS IN TOTAL, OR 300 ON TOP
17 OF THE 100?

18 A. THREE HUNDRED ON TOP OF THE 100.

19 Q. SO YOU SPENT OVER 400 HOURS WORKING ON THIS
20 CASE?

21 A. YES.

22 Q. AND HOW MUCH WERE YOU PAID?

23 A. A TOTAL OF \$31,000.

24 Q. AND NOW, BESIDES THAT \$31,000, DID YOU ALSO
25 MAKE TELEVISION APPEARANCES IN REGARD TO THIS CASE?

26 A. A COUPLE.

27 Q. HOW MANY TELEVISION SHOWS DID YOU APPEAR
28 ON?

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1 A. TWO, I BELIEVE.

2 Q. WHAT SHOWS WERE THEY?

3 A. CHANNEL 5, LOCALLY ON THE NEWS, AND I DID
4 THE DONAHUE SHOW IN NEW YORK CITY.

5 Q. THE DONAHUE SHOW?

6 A. YES.

7 Q. AND DID YOU DRUM UP SOME BUSINESS BY DOING
8 THAT?

9 A. I DON'T THINK SO.

10 Q. YOU GOT YOUR FACE ON NATIONAL T.V.?
11 A. AFTERNOON TELEVISION SHOW, YES.
12 Q. IT DOESN'T HURT, DOES IT?
13 MS. ABRAMSON: OBJECT TO THE FORM OF THE
14 QUESTION, YOUR HONOR.
15 THE COURT: SUSTAINED.
16 Q. BY MR. CONN: WHY'D YOU GO ON THAT SHOW?
17 A. WELL, PROBABLY PARTLY TO WHAT YOU SAID,
18 JUST GET MY FACE OUT IN PUBLIC.
19 AND TWO, I THOUGHT MAYBE I COULD OFFER
20 SOMETHING TO TRY AND ADD TO THE PUBLIC UNDERSTANDING OF
21 THE CASE.
22 Q. WERE YOU PAID FOR THAT APPEARANCE?
23 A. NO, I WASN'T.
24 Q. YOU HAVE A PRIVATE PRACTICE?
25 A. I DO.
26 Q. AND YOU RELY UPON PEOPLE COMING TO YOU AND
27 PAYING YOU FOR THEIR EVALUATIONS?
28 A. PROBABLY ABOUT 10 PERCENT OF MY CASES ARE

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1 PRIVATE. THE REST OF THEM ARE COURT APPOINTMENTS.
2 Q. NOW, YOU SAY THAT POST-TRAUMATIC STRESS
3 DISORDER AND GENERALIZED ANXIETY DISORDER ARE SOMETIMES
4 SIMILAR IN TERMS OF THE MEDICATION THAT IS PRESCRIBED
5 FOR THOSE DISORDERS?

6 A. YES.

7 Q. AND SO YOU CAN'T TELL WHETHER OR NOT A
8 PERSON IS SUFFERING FROM POST-TRAUMATIC STRESS DISORDER
9 OR GENERALIZED ANXIETY DISORDER SIMPLY BY LOOKING AT THE
10 TYPE OF MEDICATION THAT WAS PRESCRIBED, CAN YOU?

11 A. NO.

12 Q. NOW, IN REGARD TO THE FREQUENCY IN WHICH
13 THE GENERALIZED ANXIETY DISORDER APPEARS IN THE
14 POPULATION, YOU RELIED UPON SOME INFORMATION THAT IS
15 CONTAINED IN THE DSM; IS THAT CORRECT?

16 A. YES.

17 Q. AND DO YOU HAVE ANY STATISTICAL INFORMATION
18 BEYOND WHAT'S CONTAINED IN THE DSM?

19 A. NO.

20 Q. OKAY. SO WE'RE JUST TALKING ABOUT TWO
21 SENTENCES CONTAINED IN THE DSM?

22 A. YES.

23 Q. AND THAT'S WHAT YOU'RE RELYING UPON?

24 A. YES.

25 Q. AND IS THAT ON PAGE 434 OF THE DSM?

26 A. IT IS.

27 Q. AND THAT STATISTICAL INFORMATION MAKES
28 REFERENCE TO A COMMUNITY SAMPLE; IS THAT CORRECT?

1 A. YES.

2 Q. WHERE WAS THAT COMMUNITY SAMPLE TAKEN?

3 A. I DON'T KNOW.

4 Q. WHAT WAS THE SIZE OF THE POPULATION?

5 A. THE LARGEST ONE I AM FAMILIAR WITH WAS A

6 STUDY THAT WAS DONE IN HALF A DOZEN MAJOR CITIES IN THE

7 UNITED STATES. LOS ANGELES WAS ONE OF THEM. I THINK

8 BALTIMORE, BOSTON, WASHINGTON, D.C. AND A FEW OTHERS,

9 AND THEY SENT RESEARCHERS OUT WITH WHAT'S CALLED THE

10 DIAGNOSTIC INTERVIEW SCHEDULE, WHICH IS A BOOK THAT HAS

11 HUNDREDS OF QUESTIONS IN IT, AND IT'S KIND OF ASKING YOU

12 "DO YOU HAVE ANY OF THESE SYMPTOMS?" AND IT HAS SYMPTOMS

13 FOR ALL OF THE DISORDERS.

14 SO THEY GO TO YOUR HOUSE AND THEY SPEND

15 FOUR HOURS, SIX HOURS, EIGHT HOURS, HOWEVER LONG IT

16 TAKES TO ADMINISTER THIS THING TO YOU.

17 THEN IT GOES BACK AND THEY RUN IT THROUGH

18 THE COMPUTER, AND THEY SAY HOW MANY DIAGNOSES IN THIS

19 BOOK YOU WOULD QUALIFY FOR.

20 SO THAT'S HOW THEY DID THE STUDY. IT WAS

21 RANDOM SELECTION IN THESE SIX MAJOR POPULATION CENTERS,

22 AND THEN THE RESULTS WERE COMPILED, AND THAT'S WHERE

23 THESE NUMBERS CAME FROM, I BELIEVE.

24 Q. ARE YOU SAYING THAT THAT STUDY THAT YOU'RE

25 REFERRING TO IS THE SAME STUDY THAT THE DSM REFERS TO ON

26 PAGE 434?

27 A. THAT'S MY UNDERSTANDING, THAT THAT IS THE

28 MOST DEFINITIVE POPULATION STUDY THAT'S EVER BEEN DONE.

1 I DON'T KNOW THAT IT'S EXACTLY THE ONE THEY ARE

2 REFERRING TO HERE. I SUSPECT THAT IT IS.

3 Q. WELL, YOU HAVE NO PERSONAL KNOWLEDGE THAT

4 THE STUDY YOU'RE REFERRING TO IS THE COMMUNITY SAMPLE

5 THEY'RE REFERRING TO ON PAGE 434, DO YOU?

6 A. I THINK IT IS. I THINK IT IS, BUT I DON'T

7 KNOW FOR CERTAIN.

8 THIS BOOK IS THE STATE OF THE ART. THIS IS

9 WRITTEN BY THE TOP PEOPLE ALL ACROSS THE COUNTRY.

10 THAT'S THE BEST SAMPLE, COMMUNITY SAMPLE THAT I KNOW

11 ABOUT, AND THESE PEOPLE ALWAYS USE THE BEST.

12 Q. THAT IS THE ONLY SAMPLE THAT YOU KNOW

13 ABOUT; IS THAT CORRECT?

14 A. NO, THERE ARE OTHERS, BUT THAT'S THE BEST

15 STUDY.

16 Q. LISTEN TO THE QUESTION.

17 ARE YOU FAMILILAR WITH OTHER COMMUNITY

18 SAMPLES THAT WERE CONDUCTED OVER THE YEARS?

19 A. THERE HAVE BEEN MANY.

20 Q. OKAY. AND DO YOU KNOW THE RESULTS OF

21 THOSE?

22 A. FOR EACH DIAGNOSTIC CATEGORY?

23 Q. YES.

24 A. OR EVEN FOR THIS ONE?

25 Q. YES, FOR GENERALIZED ANXIETY DISORDER?

26 A. FOR EACH PARTICULAR STUDY I WOULDN'T KNOW

27 THE EXACT NUMBERS.

28 Q. SO WHEN THEY MAKE REFERENCE ON PAGE 434 TO

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1 A COMMUNITY SAMPLE, THEN YOU DON'T KNOW WHICH SAMPLE
2 THEY'RE REFERRING TO, DO YOU?

3 MS. ABRAMSON: OBJECTION, YOUR HONOR.
4 ARGUMENTATIVE, AND ASKED AND ANSWERED.

5 THE COURT: REPHRASE THE QUESTION.

6 Q. BY MR. CONN: YOU HAVE NO BASIS UPON WHICH
7 YOU CAN CONCLUDE THAT THE COMMUNITY SAMPLE THAT THEY'RE
8 REFERRING TO HERE IS THE SAME AS THE COMMUNITY SAMPLE
9 THAT YOU'RE REFERRING TO, DO YOU?

10 A. RIGHT. THE ONLY WAY I -- ANYONE WOULD KNOW
11 THAT WOULD BE TO CALL UP THE CHIEF MUCKETY-MUCK THAT WAS
12 IN CHARGE OF ANXIETY DISORDERS AND ASK HIM WHAT DID YOU
13 GUYS MEAN WHEN YOU SAID IN A COMMUNITY SAMPLE, WHICH
14 STUDY.

15 Q. RIGHT. SO THEN YOU DON'T KNOW HOW LARGE
16 THIS PARTICULAR SAMPLE WAS, DO YOU?

17 A. NO.

18 Q. AND YOU DON'T KNOW WHEN THIS PARTICULAR
19 SAMPLE WAS CONDUCTED, DO YOU?

20 A. NO.

21 Q. OKAY.

22 NOW, IN THIS PARTICULAR SAMPLE, WHATEVER IT

23 HAS -- WHENEVER IT TOOK PLACE AND REGARDLESS OF THE
24 NUMBER OF PEOPLE INVOLVED, IT SAYS THAT THERE WAS A
25 ONE-YEAR PREVALENCE RATE FOR GENERALIZED ANXIETY
26 DISORDER THAT WAS APPROXIMATELY THREE PERCENT; IS THAT
27 CORRECT?

28 A. YES.

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1 Q. AND WHAT DOES ONE-YEAR PREVALENCE RATE
2 MEAN?

3 A. THAT MEANS THAT IN ANY ONE YEAR, IF YOU
4 WENT OUT INTO THE COMMUNITY AND YOU TOOK A HUNDRED
5 PEOPLE AT RANDOM, AND YOU GAVE THEM THIS INTERVIEW
6 SCHEDULE, THREE OF THEM WOULD HAVE THE SYMPTOMS FOR THIS
7 DISORDER.

8 Q. AND WHAT DOES A LIFETIME PREVALENCE RATE OF
9 FIVE PERCENT MEAN?

10 A. THAT MEANS YOU, AS A PERSON, DURING YOUR
11 LIFETIME, WHAT CHANCE DURING YOUR 75 YEARS OR 85 YEARS,
12 HOWEVER LONG YOU'RE GOING TO LIVE, WHAT CHANCE DO YOU
13 HAVE OF HAVING THIS CLUSTER OF SYMPTOMS.

14 Q. OKAY. AND IT SAYS -- IT ALSO GOES ON TO
15 SAY THAT IN ANXIETY DISORDER CLINICS, APPROXIMATELY 12
16 PERCENT OF THE INDIVIDUALS PRESENT WITH GENERALIZED
17 ANXIETY DISORDERS; IS THAT CORRECT?

18 A. YES.

19 Q. NOW, AS FAR AS WHETHER OR NOT GENERALIZED
20 ANXIETY DISORDER IS GENETIC, DOESN'T THE DSM SAY THAT
21 ANXIETY AS A TRAIT HAS FAMILIAL ASSOCIATION?
22 A. YES.
23 Q. AND DOESN'T IT SAY THAT INCONSISTENT
24 FINDINGS HAVE BEEN REPORTED REGARDING FAMILIAL PATTERNS
25 FOR GENERALIZED ANXIETY DISORDER, WITH MOST REPORTS
26 FAILING TO FIND SPECIFIC FAMILIAL AGGREGATIONS?
27 A. YES.
28 Q. OKAY. AND THAT MEANS THAT IT HAS NOT YET

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1 BEEN DETERMINED WHETHER OR NOT GENERALIZED ANXIETY
2 DISORDER IS GENETICALLY BASED; IS THAT CORRECT?
3 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.
4 THE COURT: OVERRULED.
5 THE WITNESS: I THINK IT'S SAYING THAT THE
6 RESEARCH THAT'S BEEN DONE TO ANSWER THAT QUESTION
7 INDICATES MORE NO THAN YES.
8 Q. MORE NO THAN YES. THAT MEANS WE STILL
9 DON'T KNOW FOR SURE; ISN'T THAT CORRECT?
10 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.
11 THE COURT: REPHRASE THE QUESTION.
12 Q. BY MR. CONN: WHAT DOES INCONSISTENT
13 FINDINGS MEAN, DR. VICARY?
14 A. IT MEANS THAT SOME STUDIES SAY YES AND SOME

15 SAY NO.

16 Q. RIGHT. SO WE STILL DON'T KNOW WHETHER IT'S
17 GENETICALLY BASED OR NOT; ISN'T THAT CORRECT?

18 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

19 THE COURT: OVERRULED.

20 THE WITNESS: IT HAS NOT BEEN PROVEN.

21 Q. BY MR. CONN: RIGHT. AND ISN'T THAT WHAT
22 DR. DIETZ TESTIFIED TO?

23 MS. ABRAMSON: OBJECTION. THAT MISSTATES
24 DR. DIETZ' TESTIMONY.

25 THE COURT: SUSTAINED.

26 Q. BY MR. CONN: NOW, DR. VICARY, ARE YOU
27 SAYING THAT THE ESSENTIAL FEATURE OF GENERALIZED ANXIETY
28 DISORDER IS THAT IT TAKES AWAY YOUR ABILITY TO HAVE

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1 REFLECTIVE THOUGHT?

2 A. NO.

3 Q. ARE YOU SAYING THAT THE ESSENTIAL FEATURE
4 OF GENERALIZED ANXIETY DISORDER IS THAT IT MAKES YOU
5 DELUSIONAL?

6 A. NO.

7 Q. ARE YOU SAYING THAT THE ESSENTIAL FEATURE
8 OF GENERALIZED ANXIETY DISORDER IS THAT IT MAKES YOU
9 UNABLE TO CONTROL YOUR IMPULSES?

10 A. NO.

11 Q. ARE YOU SAYING THAT THE ESSENTIAL FEATURE
12 OF GENERALIZED ANXIETY DISORDER IS THAT IT IMPAIRS THE
13 HIGHER REASONING FUNCTIONS OF THE BRAIN?
14 A. ONLY IN THE MOST EXTREME SITUATIONS.
15 Q. THAT IS AN ESSENTIAL FEATURE OF GENERALIZED
16 ANXIETY DISORDER?
17 A. NO, IT'S NOT.
18 Q. YOU'RE SAYING THAT IN ANY PERSON, A
19 SPECIFIC EVENT CAN IMPAIR THE HIGHER REASONING FUNCTIONS
20 OF THE BRAIN; IS THAT CORRECT?
21 MS. ABRAMSON: OBJECTION, YOUR HONOR. MISSTATES
22 THE TESTIMONY. IT'S ARGUMENTATIVE.
23 THE COURT: PERHAPS YOU CAN REPHRASE THE
24 QUESTION.
25 Q. BY MR. CONN: ARE YOU SAYING THAT FOR ANY
26 PERSON IN A PARTICULAR SITUATION, THE HIGHER CORTICAL
27 FUNCTIONS OF THE BRAIN CAN BE IMPAIRED?
28 A. IN EXTREME CASES, YES.

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1 Q. YES. BUT THERE IS NOTHING WITHIN THE
2 DIAGNOSTIC AND STATISTICAL MANUAL WHICH SUGGESTS THAT
3 THAT IS MORE PREVALENT FOR PEOPLE SUFFERING FROM
4 GENERALIZED ANXIETY DISORDER, IS THERE?
5 A. THAT'S CORRECT.
6 Q. THE ESSENTIAL FEATURE OF GENERALIZED

7 ANXIETY DISORDER AS DESCRIBED IN THE DSM IS EXCESSIVE

8 ANXIETY AND WORRY; ISN'T THAT TRUE?

9 A. YES.

10 Q. AND THAT IS ESSENTIALLY WHAT THIS IS ALL

11 ABOUT, SIMPLY ANXIETY AND WORRY; IS THAT CORRECT?

12 MS. ABRAMSON: OBJECTION, YOUR HONOR. THAT'S

13 ARGUMENTATIVE.

14 THE COURT: IT'S UNCLEAR WHAT YOU MEAN

15 "ESSENTIALLY WHAT THIS IS ALL ABOUT."

16 Q. BY MR. CONN: BY "ESSENTIAL FEATURE", DO

17 YOU UNDERSTAND THAT TERM TO MEAN THAT FUNDAMENTALLY

18 GENERALIZED ANXIETY DISORDER IS SIMPLY EXCESSIVE ANXIETY

19 AND WORRY?

20 A. AND THEN THE SENTENCE THAT YOU'RE -- THAT'S

21 THE FIRST SENTENCE ON PAGE TWO OF THE DEFINITION SAYS

22 "THE ANXIETY AND WORRY ARE ASSOCIATED WITH THREE OR MORE

23 OF THE FOLLOWING SYMPTOMS."

24 SO IT'S MORE THAN JUST THAT.

25 Q. OKAY. WE'LL GO THROUGH THOSE, THREE OR

26 MORE OF THE FOLLOWING SYMPTOMS.

27 THE DIAGNOSTIC CRITERIA FIRST IS OUTLINED

28 ON PAGES 435 AND 436; IS THAT CORRECT?

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1 A. YES.

2 Q. AND IT SAYS THAT THE FIRST DIAGNOSTIC

3 CRITERIA FOR GENERALIZED ANXIETY DISORDER IS EXCESSIVE
4 ANXIETY AND WORRY, OCCURRING MORE DAYS THAN NOT, FOR AT
5 LEAST SIX MONTHS, ABOUT A NUMBER OF EVENTS OR ACTIVITIES
6 SUCH AS WORK OR SCHOOL PERFORMANCE.

7 IS THAT THE FIRST DIAGNOSTIC CRITERIA?

8 A. YEAH. YOU LEFT OUT THE THING IN
9 PARENTHESIS WHERE IT SAYS "APPREHENSIVE EXPECTATION".

10 Q. YES. WHAT THEY'RE DOING THERE IS
11 EXPLAINING WHAT IS MEANT BY WORRY, APPREHENSIVE
12 EXPECTATION?

13 A. YES.

14 Q. SECOND DIAGNOSTIC CRITERIA IS SIMPLY THAT
15 THE PERSON FINDS IT DIFFICULT TO CONTROL THE WORRY; IS
16 THAT CORRECT?

17 A. YES.

18 Q. AND THEN THE THIRD DIAGNOSTIC CRITERIA THAT
19 YOU'RE REFERRING TO IS THAT THE ANXIETY AND WORRY ARE
20 ASSOCIATED WITH THREE OR MORE OF THE FOLLOWING SIX
21 SYMPTOMS, WITH AT LEAST SOME SYMPTOMS PRESENT FOR MORE
22 DAYS THAN NOT, FOR THE PAST SIX MONTHS, AND IT LISTS THE
23 SIX SYMPTOMS; IS THAT CORRECT?

24 A. YES.

25 Q. THE FIRST SYMPTOM THAT IS ASSOCIATED WITH
26 GENERALIZED ANXIETY DISORDER IS RESTLESSNESS OR FEELING
27 KEYED-UP, ON THE EDGE; IS THAT CORRECT?

28 A. YES.

1 Q. THE SECOND SYMPTOM ASSOCIATED WITH
2 GENERALIZED ANXIETY DISORDER IS BEING EASILY FATIGUED;
3 IS THAT CORRECT?

4 A. YES.

5 Q. THE THIRD SYMPTOM ASSOCIATED WITH
6 GENERALIZED ANXIETY DISORDER IS SIMPLY DIFFICULTY
7 CONCENTRATING OR MIND GOING BLANK; IS THAT CORRECT?

8 A. YES.

9 Q. AND THE FOURTH ONE IS IRRITABILITY; IS THAT
10 CORRECT?

11 A. YES.

12 Q. AND THE FIFTH ONE IS MUSCLE TENSION; IS
13 THAT CORRECT?

14 A. YES.

15 Q. AND THE SIXTH ONE IS SLEEP DISTURBANCE; IS
16 THAT CORRECT?

17 A. YES.

18 Q. AND THERE IS NOTHING IN THE DSM THAT SAYS
19 THAT GENERALIZED ANXIETY DISORDER CAUSES PEOPLE TO GO
20 DELUSIONAL OR TO KILL, DOES IT?

21 A. NO.

22 Q. ANYONE CAN BECOME DELUSIONAL OR KILL UNDER
23 SPECIFIC CIRCUMSTANCES; IS THAT CORRECT?

24 A. IN THE MOST EXTRAORDINARY, EXTREME
25 CIRCUMSTANCES, I THINK THAT'S TRUE.

26 Q. RIGHT. BUT THAT IS NOT AN ESSENTIAL
27 FEATURE OF GENERALIZED ANXIETY DISORDER, IS IT?

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1 Q. NOW, THE DSM ALSO GOES ON TO SPEAK ABOUT
2 ASSOCIATED FEATURES OF GENERALIZED ANXIETY DISORDER ON
3 PAGE 433; IS THAT CORRECT?

4 A. YES.

5 Q. AND IT SAYS THAT GENERALIZED ANXIETY
6 DISORDER IS ASSOCIATED WITH MUSCLE TENSION. THERE MAY
7 BE TREMBLING, TWITCHING, FEELING SHAKY, AND MUSCLE ACHES
8 OR SORENESS; IS THAT CORRECT?

9 A. YES.

10 Q. THOSE ARE PHYSICAL MANIFESTATIONS THAT CAN
11 OCCUR WITH GENERALIZED ANXIETY DISORDER; IS THAT
12 CORRECT?

13 A. YES.

14 Q. AND IT GOES ON TO SAY THAT MANY INDIVIDUALS
15 WITH GENERALIZED ANXIETY DISORDER ALSO EXPERIENCE
16 SOMATIC SYMPTOMS; FOR EXAMPLE, COLD, CLAMMY HANDS, DRY
17 MOUTH, SWEATING, NAUSEA OR DIARRHEA, URINARY FREQUENCY,
18 TROUBLE SWALLOWING OR A LUMP IN THE THROAT, AND AN
19 EXAGGERATED STARTLE RESPONSE. DEPRESSIVE SYMPTOMS ARE
20 ALSO COMMON; IS THAT CORRECT?

21 A. YES.

22 Q. SO ESSENTIALLY WHAT GENERALIZED ANXIETY
23 DISORDER DOES IS SOMETIMES IT MAKES PEOPLE HURT, IT

24 MAKES THEM PHYSICALLY HURT; IS THAT CORRECT?

25 A. YES.

26 Q. DOESN'T MAKE YOU GO SHOPPING FOR SHOTGUNS,
27 DOES IT?

28 MS. ABRAMSON: OBJECTION, YOUR HONOR.

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1 THE COURT: SUSTAINED.

2 MS. ABRAMSON: YOUR HONOR, I'D LIKE TO APPROACH.

3 THE COURT: HOW MUCH LONGER DO YOU HAVE,
4 MR. CONN?

5 MR. CONN: JUST PROBABLY FIVE MINUTES.

6 THE COURT: OKAY. WE'LL KEEP GOING.

7 Q. BY MR. CONN: AND THE DSM ALSO
8 DISTINGUISHES BETWEEN GENERALIZED ANXIETY DISORDER AND
9 NON-PATHOLOGICAL ANXIETY; IS THAT CORRECT?

10 A. YES.

11 Q. ON PAGE 435?

12 A. YES.

13 Q. AND WHAT IS MEANT BY NON-PATHOLOGICAL
14 ANXIETY?

15 A. I THINK WHAT I TALKED ABOUT YESTERDAY IN
16 TERMS OF WE ALL GET NERVOUS AND WE ALL WORRY ABOUT
17 THINGS.

18 Q. OKAY. SO THE DIFFERENCE BETWEEN THE PERSON
19 WHO IS JUST THE NORMAL PERSON WHO IS SOMETIMES ANXIOUS

20 OR EXPERIENCES ANXIETY AND GENERALIZED ANXIETY DISORDER

21 IS EXPLAINED IN THIS PARAGRAPH; IS THAT CORRECT?

22 A. YES.

23 Q. AND IT INDICATES THAT THERE ARE THREE

24 FEATURES WHICH DISTINGUISH GENERALIZED ANXIETY DISORDER

25 FROM NON-PATHOLOGICAL ANXIETY; IS THAT CORRECT?

26 MS. ABRAMSON: YOUR HONOR, I AM GOING TO OBJECT.

27 DR. VICARY DID NOT RENDER A DIAGNOSIS.

28 THE COURT: COUNSEL, ALL WE'RE TALKING ABOUT --

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1 MS. ABRAMSON: THIS IS IRRELEVANT AND BEYOND THE

2 SCOPE OF DIRECT.

3 THE COURT: WE ARE NOT TALKING ABOUT ANY

4 DIAGNOSIS IN THIS CASE. WE ARE TALKING ABOUT IN GENERAL

5 THE CONCEPT OF THE CONDITION REFERRED TO AS GENERALIZED

6 ANXIETY DISORDER. IT'S NOT RELATED TO THIS CASE, BUT

7 JUST THE GENERAL CONCEPT AS IT'S DESCRIBED IN THE BOOK.

8 Q. BY MR. CONN: CAN YOU TELL US WHAT IS THE

9 FIRST FEATURE WHICH DISTINGUISHES GENERALIZED ANXIETY

10 DISORDER FROM NON-PATHOLOGICAL ANXIETY?

11 A. THAT IS ANXIETY AND WORRY ARE DIFFICULT TO

12 CONTROL AND INTERFERE WITH FUNCTIONING.

13 Q. OKAY. IT'S DIFFICULT TO CONTROL THAT SENSE

14 OF ANXIETY; IS THAT CORRECT?

15 A. YES.

16 Q. OKAY. THAT'S ONE OF THE REASONS THAT
17 DISTINGUISHES ORDINARY ANXIETY FROM THIS DISORDER THAT
18 WE CALL GENERALIZED ANXIETY DISORDER; IS THAT CORRECT?

19 A. YES.

20 Q. WHAT IS THE SECOND FEATURE WHICH
21 DISTINGUISHES ORDINARY ANXIETY FROM PEOPLE SUFFERING
22 FROM GENERALIZED ANXIETY DISORDER?

23 A. WELL, THE SECOND IS MORE COMPLICATED. IT
24 SAYS THAT THE ANXIETY IS MORE PERVASIVE, DISTRESSING,
25 LASTS LONGER AND FREQUENTLY OCCURS WITHOUT ANY OBVIOUS
26 CAUSE.

27 Q. OKAY. SO IT'S MORE PERVASIVE AND INTENSE;
28 IS THAT CORRECT?

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1 A. YES.

2 Q. OKAY. AND TELL US WHAT THE THIRD FEATURE
3 IS.

4 A. THE ANXIETY IN THE DISORDER IS MUCH MORE
5 LIKELY TO BE ACCOMPANIED BY PHYSICAL SYMPTOMS, AND YOU
6 MENTIONED THOSE EARLIER. THERE ARE ALL KINDS OF
7 PHYSICAL THINGS FROM COLD HANDS, SWEATING, RAPID
8 HEARTBEAT, THAT KIND OF THING.

9 Q. OKAY. SO WHAT DISTINGUISHES THEN THE
10 PERSON -- THE NORMAL PERSON WHO FEELS ANXIETY FROM THE
11 PERSON WHO IS SUFFERING FROM GENERALIZED ANXIETY

12 DISORDER IS THAT THE PERSON SUFFERING FROM GENERALIZED
13 ANXIETY DISORDER SIMPLY HAS TROUBLE CONTROLLING THE
14 ANXIETY. IT IS MORE PERVASIVE AND HE MIGHT HAVE
15 PHYSICAL SYMPTOMS; IS THAT CORRECT?

16 A. YES.

17 MS. ABRAMSON: OBJECT TO THE FORM OF THE
18 QUESTION, YOUR HONOR, AS ARGUMENTATIVE.

19 THE COURT: OVERRULED.

20 THE ANSWER WILL STAND.

21 MR. CONN: THANK YOU, YOUR HONOR.

22 I HAVE NOTHING FURTHER.

23 THE COURT: REDIRECT.

24

25

26 ///

27 ///

28

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1 REDIRECT EXAMINATION

2 BY MS. ABRAMSON:

3 Q. DR. DIETZ DIAGNOSED MR. MENENDEZ WITH

4 GENERAL ANXIETY DISORDER, YOU DIDN'T; IS THAT CORRECT,

5 DR. VICARY?

6 MR. CONN: OBJECTION. BEYOND THE SCOPE.

7 THE COURT: SUSTAINED.

8 Q. BY MS. ABRAMSON: MR. CONN JUST ASKED YOU
9 IF THE MEDICATION FOR TREATING P.T.S.D. AND GENERALIZED
10 ANXIETY DISORDER ARE THE SAME.

11 DO YOU REMEMBER THAT QUESTION?

12 A. YES.

13 Q. ARE THE DOSAGES DIFFERENT?

14 THE COURT: WE'VE BEEN ALL THROUGH THIS ALREADY
15 ON THE DIRECT EXAMINATION.

16 MS. ABRAMSON: NO, I AM NOT ASKING --

17 THE COURT: COUNSEL, I'M NOT GOING TO ARGUE ABOUT
18 IT. WE'VE BEEN THROUGH IT. GO ON TO SOMETHING ELSE.

19 MS. ABRAMSON: I AM JUST RESPONDING TO A QUESTION
20 THAT WAS JUST ASKED.

21 THE COURT: COUNSEL, GO ON TO ANOTHER QUESTION.

22 Q. BY MS. ABRAMSON: DID YOU PRESCRIBE
23 MEDICATION IN THIS CASE FOR GENERALIZED ANXIETY
24 DISORDER?

25 MR. CONN: OBJECTION. IRRELEVANT.

26 THE COURT: SUSTAINED.

27 Q. BY MS. ABRAMSON: DOES THE DSM-IV SAY THAT
28 IT IS INAPPROPRIATE TO DIAGNOSE GENERALIZED ANXIETY

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1 DISORDER WHEN THE REAL DISORDER IS POST-TRAUMATIC STRESS
2 DISORDER?

3 A. YES.

4 Q. NOW, ARE THERE DEGREES OF GENERALIZED
5 ANXIETY DISORDER?

6 A. YES.

7 Q. CAN IT BE EXTREME?

8 A. YES.

9 Q. DOES ONE EVEN PRESCRIBE MEDICATION FOR
10 GENERALIZED ANXIETY DISORDER THAT IS MILD?

11 A. IN MANY CASES, NO.

12 Q. I'M GOING TO GET BACK TO SOME OF THE
13 EARLIER QUESTIONS.

14 IS IT APPROPRIATE FOR A FORENSIC
15 PSYCHIATRIST TO FORM DIAGNOSTIC OPINIONS BEFORE HE EVER
16 INTERVIEWS THE SUBJECT?

17 MR. CONN: OBJECTION. ASSUMES FACTS NOT IN
18 EVIDENCE. IT HAS NOT BEEN ESTABLISHED.

19 THE COURT: SUSTAINED.

20 Q. BY MS. ABRAMSON: DR. DIETZ TESTIFIED, DID
21 HE NOT, THAT HE HAD --

22 THE COURT: LET'S NOT GO INTO WHAT THIS WITNESS
23 REMEMBERS ABOUT WHAT SOMEONE ELSE TESTIFIED. AS I SAID
24 BEFORE, WHEN YOU DO THAT YOU GET INTO A DEBATE AS TO
25 WHETHER HIS RECOLLECTION IS CORRECT OR NOT, SO IT
26 DOESN'T REALLY HELP US.

27 Q. BY MS. ABRAMSON: HAVE YOU EVER DIAGNOSED
28 SOMEONE BEFORE YOU INTERVIEWED THEM?

1 A. I SOMETIMES HAVE HAD TENTATIVE IDEAS, LIKE
2 WE TALKED ABOUT THE DIFFERENTIAL DIAGNOSIS THAT SOME OF
3 THE STATEMENTS AND BEHAVIORS IN THE RECORDS IN A CASE
4 SEEM TO SUGGEST THAT THE PERSON MIGHT HAVE SUCH AND SUCH
5 A DISORDER.

6 BUT EXPERIENCE TEACHES YOU THAT NO MATTER
7 HOW SMART YOU THINK YOU ARE, THAT A LOT OF TIMES YOU GO
8 IN AND YOU FIND SOMETHING THAT'S REMARKABLY DIFFERENT
9 THAN WHAT YOU THOUGHT YOU WERE GOING TO SEE.

10 Q. SO IT'S BEST NOT TO MAKE UP YOUR MIND
11 BEFORE YOU INTERVIEW THE PERSON?

12 A. WELL, YOU ARE HUMBLLED OVER AND OVER AGAIN
13 WHEN YOU TRY AND COME TO AN ANSWER BEFORE YOU'VE GOT ALL
14 THE INFORMATION, AND THE MOST IMPORTANT INFORMATION
15 OFTENTIMES IS THE FACE-TO-FACE INTERVIEW WITH THE
16 PATIENT.

17 Q. HAVE YOU EVER, DR. VICARY, BEEN PRESENTED
18 WITH REFERENCE MATERIALS, SUCH AS A PATIENT'S MEDICAL
19 BACKGROUND, SCHOOL RECORD BACKGROUND, AND REFUSED TO
20 READ THEM?

21 MR. CONN: OBJECTION. ASSUMES FACTS NOT IN
22 EVIDENCE.

23 THE COURT: SUSTAINED.

24 Q. BY MS. ABRAMSON: WOULD YOU EVER IGNORE OR
25 NOT READ MATERIALS THAT ARE SUBMITTED TO YOU WHEN YOU'RE
26 MAKING A FORENSIC EVALUATION?

27 A. NO. THE HONEST ANSWER TO THAT IS THAT
28 WOULD BE BELOW THE STANDARD OF PRACTICE.

1 Q. WHEN YOU ARE APPOINTED BY THE COURT OR
2 PRIVATELY RETAINED TO RENDER AN EVALUATION OF A
3 DEFENDANT, DO YOU ALSO ACT AS A LAWYER IN THE CASE AND
4 PARTICIPATE IN DRAFTING MOTIONS?

5 MR. CONN: OBJECTION. ARGUMENTATIVE AND
6 IRRELEVANT.

7 THE COURT: SUSTAINED.

8 BEYOND THE SCOPE OF THE DIRECT EXAMINATION.

9 MS. ABRAMSON: EXCUSE ME?

10 THE COURT: BEYOND THE SCOPE OF THE DIRECT
11 EXAMINATION.

12 MS. ABRAMSON: I'M DOING DIRECT EXAMINATION, YOUR
13 HONOR.

14 THE COURT: NO, YOU ARE DOING REDIRECT
15 EXAMINATION.

16 BEYOND THE SCOPE OF THE CROSS. I AM SORRY.

17 MS. ABRAMSON: WE ARE TALKING ABOUT THE
18 APPROPRIATE --

19 THE COURT: I UNDERSTAND, BUT YOU'RE BEYOND THE
20 SCOPE OF THE CROSS-EXAMINATION.

21 Q. BY MS. ABRAMSON: NOW, WHATEVER THE
22 DIAGNOSIS -- THE DIAGNOSTIC CRITERIA IN THE DSM-IV DO
23 NOT DESCRIBE HOW PEOPLE WITH THE VARIOUS DISORDERS,
24 WHATEVER THEY ARE, BEHAVE UNDER STRESSFUL SITUATIONS,
25 DOES IT?

26 IS THAT TOO BROAD A QUESTION?

27 A. I THINK WHAT THE MANUAL IS TRYING TO DO IS

28 DESCRIBE PEOPLE IN GENERAL TERMS UNDER THE MORE ORDINARY

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1 OR BROAD SPECTRUM OF NORMAL SITUATIONS THAT THE DOCTOR
2 WOULD ENCOUNTER THE PATIENT IN, AND THIS IS WHAT YOU
3 WOULD SEE. THESE ARE THE KIND OF SYMPTOMS.

4 Q. THAT WOULD PRESENT IN AN INTERVIEW, FOR
5 EXAMPLE?

6 A. WHEN YOU EXAMINE THE PATIENT, YES. THIS IS
7 WHAT YOU WOULD FIND WHEN YOU TOOK THE HISTORY AND
8 EXAMINED THE PATIENT.

9 Q. THE DSM-IV ISN'T TRYING TO DESCRIBE WHAT
10 HAPPENS TO PEOPLE WITH ANXIETY DISORDERS WHEN THEY FEEL
11 THEY ARE THREATENED WITH DEATH, DOES IT?

12 A. NO.

13 Q. IT DOESN'T TRY TO DESCRIBE WHAT PEOPLE WITH
14 ANXIETY DISORDERS -- HOW THEY WOULD BEHAVE WHEN THEY ARE
15 PROVOKED, DOES IT?

16 A. NO.

17 Q. PEOPLE WHO SUFFER FROM THE ANXIETY
18 DISORDERS, HOWEVER, IT IS UNDERSTOOD IN THE RESEARCH AND
19 LITERATURE, IS IT NOT, THAT THEY ARE MORE EASILY AROUSED
20 TO A FEARFUL STATE, CORRECT?

21 MR. CONN: OBJECTION. LEADING.

22 THE COURT: OVERRULED.

23 THE WITNESS: YES.

24 Q. BY MS. ABRAMSON: AND THEY REACT MORE

25 EXTREMELY IN A FEARFUL STATE THAN PEOPLE WITHOUT ANXIETY

26 DISORDERS, CORRECT?

27 A. YES.

28 Q. NOW, YOU WERE PAID \$31,000 FOR YOUR WORK-UP

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1 UNTIL THE END OF THE FIRST TRIAL, CORRECT?

2 A. YES.

3 Q. WHAT HAVE YOU GOTTEN SINCE?

4 A. NOTHING.

5 Q. WHAT ARE YOU GOING TO GET?

6 A. THAT'S A GOOD QUESTION. PROBABLY NOTHING.

7 Q. YOU UNDERSTAND THAT THERE WERE NO FUNDS

8 APPROVED FOR YOUR APPOINTMENT ON THIS CASE DUE TO

9 BUDGETARY CONSTRAINTS?

10 MR. CONN: OBJECTION. CALLS FOR HEARSAY AND

11 IRRELEVANT.

12 THE COURT: SUSTAINED.

13 Q. BY MS. ABRAMSON: AND YOU DON'T EXPECT TO

14 GET PAID FOR ANY OF THE WORK THAT YOU'VE DONE SINCE THE

15 FIRST TRIAL, DO YOU, DR. VICARY?

16 A. REALISTICALLY, NO.

17 Q. AND THAT WORK INCLUDES CONTINUING TO SEE

18 MR. MENENDEZ AND MONITOR HIS MEDICATION?

19 A. YES.

20 MR. CONN: OBJECTION. IRRELEVANT.

21 THE COURT: OVERRULED.

22 Q. BY MS. ABRAMSON: READING THE TRANSCRIPTS

23 OF DR. WILSON'S TESTIMONY, MR. MENENDEZ' TESTIMONY, AND

24 DR. DIETZ'S TESTIMONY FROM THIS TRIAL?

25 A. YES.

26 Q. REVIEWING AND REFRESHING YOUR RECOLLECTION

27 CONCERNING THE STATEMENTS OF 49 SEPARATE WITNESSES?

28 A. YES.

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1 Q. REVIEWING AND REFRESHING YOUR RECOLLECTION

2 CONCERNING MR. MENENDEZ' MEDICAL RECORDS AND SCHOOL

3 RECORDS?

4 A. YES.

5 Q. YOU'VE HAD BOXES AND BOXES OF MATERIALS

6 ABOUT THIS CASE, HAVE YOU NOT?

7 A. I HAVE EIGHT BOXES.

8 Q. AND HAVE YOU READ EVERYTHING THAT WAS

9 SUBMITTED TO YOU?

10 A. UNFORTUNATELY, I HAVE.

11 Q. AND WHETHER YOU RELIED ON EVERYTHING OR

12 NOT, DID YOU MAKE SURE THAT YOU READ EVERYTHING?

13 A. THAT'S THE WAY I SEE MY WORK.

14 Q. NOW, PART OF THAT \$31,000 WAS PAID TO YOU

15 PRIVATELY, WAS IT NOT?

16 A. IT WAS.

17 MR. CONN: OBJECTION. IRRELEVANT.

18 THE COURT: OVERRULED. THE ANSWER WILL STAND.

19 Q. BY MS. ABRAMSON: IT WAS PAID TO YOU BY

20 FUNDS THAT WERE GIVEN TO THE DEFENSE FROM THE ESTATES OF

21 MR. AND MRS. MENENDEZ, CORRECT?

22 MR. CONN: OBJECTION. CALLS FOR SPECULATION. NO

23 FOUNDATION.

24 THE COURT: SUSTAINED.

25 Q. BY MS. ABRAMSON: YOU KNOW THAT YOU WERE

26 PAID PRIVATELY FROM A TRUST FUND THAT I ADMINISTERED,

27 CORRECT?

28 MR. CONN: OBJECTION. LEADING.

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1 THE COURT: SUSTAINED.

2 Q. BY MS. ABRAMSON: YOU GOT CHECKS FROM A

3 PRIVATE TRUST FUND?

4 THE COURT: IT'S IRRELEVANT.

5 MS. ABRAMSON: THE PEOPLE BROUGHT IT OUT, YOUR

6 HONOR.

7 THE COURT: THE QUESTION WAS HOW MUCH WAS HE

8 PAID, NOT WHERE IT CAME FROM.

9 MS. ABRAMSON: HOW MUCH WERE YOU PAID FROM

10 TAXPAYER FUNDS?

11 MR. CONN: OBJECTION. IRRELEVANT.

12 THE COURT: IT DOESN'T MATTER. THE QUESTION IS
13 HOW MUCH WAS HE PAID.

14 Q. BY MS. ABRAMSON: HOW MANY HOURS HAVE YOU
15 PUT IN SINCE THE LAST TRIAL?

16 A. ABOUT 60.

17 Q. HAVE YOU EVER BEEN PAID \$400 AN HOUR AS A
18 FORENSIC PSYCHIATRIST?

19 MR. CONN: OBJECTION. IRRELEVANT.

20 THE COURT: OVERRULED.

21 YOU MAY ANSWER THE QUESTION.

22 THE WITNESS: NO.

23 Q. BY MS. ABRAMSON: DO YOU KNOW OF ANYONE
24 BESIDES DR. DIETZ WHO CHARGES \$400 AN HOUR?

25 A. THE ONLY OTHER DOCTOR THAT I KNOW IS
26 ANOTHER LOCAL, FORENSIC PSYCHIATRIST WHO, ON AT LEAST
27 ONE CASE, HAD TRIED TO CHARGE THAT, AND THE ATTORNEY --

28 THE COURT: YOU'VE ANSWERED THE QUESTION.

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1 THE WITNESS: SORRY.

2 THE COURT: YOU KNOW THAT THERE'S SOMEBODY ELSE
3 THAT CHARGES THAT AMOUNT.

4 MS. ABRAMSON: THAT TRIED TO CHARGE THAT.

5 THE COURT: YOUR NEXT QUESTION, PLEASE.

6 Q. BY MS. ABRAMSON: DO YOU KNOW ANYBODY

7 THAT'S BEEN PAID THAT?

8 MR. CONN: OBJECTION. IRRELEVANT.

9 THE COURT: SUSTAINED.

10 Q. BY MS. ABRAMSON: NOW, THE DONAHUE PROGRAM

11 THAT YOU APPEARED ON, WAS THAT A PROGRAM THAT INCLUDED

12 JURORS FROM THE FIRST TRIAL?

13 A. YES. THERE WAS ONE JUROR AND ONE ALTERNATE

14 JUROR THAT APPEARED ON THAT PROGRAM.

15 Q. AND WAS THERE ALSO A FAMILY MEMBER OF THE

16 MENENDEZ FAMILY WHO APPEARED ON THAT SHOW?

17 MR. CONN: OBJECTION. IRRELEVANT.

18 THE COURT: OVERRULED.

19 YOU CAN ANSWER THAT YES OR NO.

20 THE WITNESS: YES.

21 Q. BY MS. ABRAMSON: AND WAS THIS A SHOW THAT

22 WAS DONE SHORTLY AFTER THE FIRST JURIES HUNG IN THIS

23 CASE?

24 MR. CONN: OBJECTION. ASSUMES FACTS NOT IN

25 EVIDENCE. IRRELEVANT.

26 THE COURT: REPHRASE THE QUESTION.

27 Q. BY MS. ABRAMSON: WAS THIS SHOW SHORTLY

28 AFTER THE MISTRIALS WERE DECLARED AFTER THE FIRST TRIAL?

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1 A. YES. I THINK THIS WAS ABOUT A WEEK

2 AND-A-HALF AFTER THE FIRST TRIAL.

3 Q. AND WAS THERE A GREAT DEAL OF PUBLIC
4 DISCUSSION OF THE CASE AT THAT TIME?

5 A. YES.

6 Q. AND DID YOU GO ON THIS SHOW IN ORDER TO
7 CLARIFY SOME OF THE ISSUES THAT WERE BEING MISREPORTED
8 IN THE MEDIA?

9 MR. CONN: OBJECTION. LEADING.

10 THE COURT: REPHRASE THE QUESTION.

11 Q. BY MS. ABRAMSON: WHAT WAS YOUR PURPOSE?
12 YOU SAID YOU WANTED TO OFFER SOMETHING TO ADD TO THE
13 PUBLIC KNOWLEDGE.

14 THE COURT: WAS THAT YOUR PURPOSE?

15 THE WITNESS: WELL, THAT WAS MY GRANDIOSE
16 THINKING, YES.

17 THE COURT: THEN THAT'S HIS ANSWER.

18 Q. BY MS. ABRAMSON: YOU THOUGHT YOU MIGHT BE
19 ABLE TO MAKE PEOPLE UNDERSTAND?

20 MR. CONN: OBJECTION. LEADING.

21 THE COURT: HE'S ALREADY ANSWERED THE QUESTION.

22 Q. BY MS. ABRAMSON: AND YOU DIDN'T RECEIVE
23 ANY MONEY FOR THAT?

24 A. NO, I DIDN'T.

25 Q. HAVE YOU SEEN DR. DIETZ ON TELEVISION
26 PROGRAMS IN THE PAST?

27 MR. CONN: OBJECTION. IRRELEVANT.

28 THE COURT: SUSTAINED.

1 Q. BY MS. ABRAMSON: ARE YOU AWARE THAT
2 DR. DIETZ HAS MADE TELEVISION APPEARANCES?

3 MR. CONN: OBJECTION. IRRELEVANT.

4 THE COURT: SUSTAINED.

5 Q. BY MS. ABRAMSON: ON YOUR C.V., DO YOU LIST
6 HIGH PUBLICITY CASES?

7 A. NO, I DON'T.

8 Q. NOW, YOU HAVE REASON TO BELIEVE, DO YOU
9 NOT, DR. VICARY, THAT THE PEOPLE WHO PUT TOGETHER THE
10 DSM-IV USED THE MOST COMPREHENSIVE STUDIES AVAILABLE?

11 A. YES. THERE'S NO QUESTION ABOUT THAT.

12 Q. THEY COMMISSION THESE STUDIES, DON'T THEY?

13 A. THEY ACTUALLY ARE THE DOCTORS THAT DO THE
14 BEST STUDIES.

15 Q. THEY, BEING THE PANELS OF DOCTORS THAT ARE
16 ON THE VARIOUS COMMITTEES OF THE DSM-IV?

17 A. YES.

18 Q. AND YOU UNDERSTAND DR. WILSON IS ONE OF
19 THOSE DOCTORS?

20 A. YES.

21 Q. AND THESE GROUPS OF DOCTORS, THESE
22 COMMITTEES GO OUT AND CONDUCT THESE STUDIES SO THAT THEY
23 CAN GIVE IN THE DSM-IV THESE PREVALENCE RATES --

24 MR. CONN: OBJECTION. LEADING.

25 MS. ABRAMSON: -- DO THEY NOT?

26 THE COURT: OVERRULED.

27 THE WITNESS: YES.

28 Q. BY MS. ABRAMSON: NOW, THE FACT THAT ONLY

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1 12 PERCENT OF PEOPLE IN ANXIETY DISORDER CLINICS HAVE
2 GENERALIZED ANXIETY DISORDER, DOES THAT INDICATE THAT A
3 FAR LARGER PROPORTION OF PEOPLE SUFFER FROM OTHER MORE
4 COMMON ANXIETY DISORDERS?

5 A. YES. THERE IS A WHOLE VARIETY OF DIFFERENT
6 TYPES OF ANXIETY DISORDERS.

7 Q. AND IS GENERALIZED ANXIETY DISORDER A
8 RELATIVELY RARE DIAGNOSIS?

9 MR. CONN: OBJECTION. VAGUE.

10 THE COURT: DO YOU UNDERSTAND THE QUESTION?

11 THE WITNESS: I THINK I DO.

12 THE COURT: OKAY.

13 THE WITNESS: WELL, RARE IN THE SENSE THAT OF ALL
14 PEOPLE, THERE'S ONLY ONE PERCENT WHO HAVE IT IN ANY ONE
15 YEAR.

16 Q. DO YOU KNOW WHAT PERCENT OF PEOPLE HAVE
17 POST-TRAUMATIC STRESS DISORDER?

18 A. THERE IS A WIDE VARIATION OF THE STUDIES,
19 AND THEY SAY ANYWHERE FROM ONE PERCENT TO PERHAPS 10 OR
20 15 PERCENT OF THE GENERAL POPULATION.

21 Q. AND IN ANXIETY CLINICS, DO YOU HAVE ANY
22 IDEA WHAT PERCENT OF THOSE FOLKS ARE BEING TREATED FOR

23 POST-TRAUMATIC STRESS DISORDER RATHER THAN GENERALIZED
24 ANXIETY DISORDER?
25 A. I WOULD SAY PROBABLY AS MANY POST-TRAUMATIC
26 STRESS DISORDER PATIENTS AS GENERALIZED ANXIETY
27 DISORDER. PROBABLY A FEW MORE.
28 Q. YOU BELIEVE IT WOULD BE MORE, OR LESS, OR

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1 THE SAME?
2 A. MY EXPERIENCE WOULD TELL ME THAT IT WOULD
3 BE ROUGHLY THE SAME, PERHAPS A FEW MORE WITH
4 POST-TRAUMATIC STRESS DISORDER.
5 Q. NOW, IF -- IF A DOCTOR DID BELIEVE, IN
6 SPITE OF WHAT'S WRITTEN IN THE DSM-IV, THAT GENERALIZED
7 ANXIETY DISORDER WAS A FAMILY TRAIT, WOULD IT BE
8 INCUMBENT UPON THAT DOCTOR THEN TO FIND OUT IF ANYBODY
9 ELSE IN THE FAMILY EVER SUFFERED FROM GENERALIZED
10 ANXIETY DISORDER?
11 MR. CONN: OBJECTION. IRRELEVANT.
12 THE COURT: IT'S UNCLEAR WHAT YOU MEAN. BY
13 ASKING?
14 Q. BY MS. ABRAMSON: WOULD IT BE APPROPRIATE
15 PRACTICE WITHIN THE STANDARD OF CARE, IF YOU THINK
16 SOMEONE HAS GENERALIZED ANXIETY DISORDER, AND IF IN YOUR
17 PERSONAL OPINION YOU THINK IT RUNS IN FAMILIES, WOULD IT
18 BE PART OF THE STANDARD OF CARE TO FIND OUT IF ANYBODY

19 ELSE IN THE FAMILY HAD IT?

20 MR. CONN: OBJECTION. ASSUMES FACTS NOT IN

21 EVIDENCE.

22 THE COURT: OVERRULED.

23 THE WITNESS: YES, IT WOULD.

24 Q. BY MS. ABRAMSON: AND IF YOU, AS SUCH A

25 DOCTOR, FAILED TO, FOR WHATEVER REASON, READ ALL THE

26 AVAILABLE MATERIAL ON FAMILY BACKGROUND, WOULD THAT

27 SUGGEST THAT YOU DON'T REALLY BELIEVE THE PERSON HAS

28 GENERALIZED ANXIETY DISORDER, OR YOU DON'T REALLY

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1 BELIEVE IT RUNS IN FAMILIES, OR BOTH?

2 MR. CONN: OBJECTION. IRRELEVANT, AND CALLS FOR

3 SPECULATION.

4 THE COURT: SUSTAINED.

5 Q. BY MS. ABRAMSON: IF YOU WERE SUCH A DOCTOR

6 WHO BELIEVED, FOR WHATEVER REASON, THAT IT DID RUN IN

7 FAMILIES, AND YOU HAD FAMILY MATERIALS AVAILABLE TO YOU,

8 IS IT WITHIN THE STANDARD OF CARE TO READ THEM?

9 MR. CONN: OBJECTION.

10 THE COURT: I THINK HE'S ALREADY ANSWERED THAT.

11 Q. BY MS. ABRAMSON: NOW, MR. CONN ASKED YOU,

12 READING THE SYMPTOM LIST IN THE DSM-IV OF GENERALIZED

13 ANXIETY DISORDER, HE ASKED YOU ABOUT THE ONE SYMPTOM

14 THAT'S CALLED SLEEP DISTURBANCE.

15 A. YES.

16 Q. DOES SLEEP DISTURBANCE MEAN REPETITIVE
17 NIGHTMARES?

18 A. NO, IT DOESN'T.

19 Q. ARE REPETITIVE NIGHTMARES NOT A SYMPTOM OF
20 GENERALIZED ANXIETY DISORDER?

21 A. THEY'RE NOT A SYMPTOM.

22 Q. ARE THEY A SYMPTOM OF POST-TRAUMATIC STRESS
23 DISORDER?

24 A. OFTEN THEY ARE.

25 MS. ABRAMSON: I HAVE NOTHING FURTHER, YOUR
26 HONOR.

27 THE COURT: ANYTHING ELSE?

28 MR. CONN: NOTHING FURTHER.

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1 THE COURT: THANK YOU. YOU MAY STEP DOWN.

2 YOU'RE EXCUSED.

3 I THINK YOU HAVE ANOTHER WITNESS YOU'RE
4 CALLING.

5 MS. ABRAMSON: YES. I THINK WE NEED A BRIEF
6 HEARING BEFORE I CALL THIS WITNESS, YOUR HONOR.

7 THE COURT: OKAY.

8 MS. ABRAMSON: JUST VERY BRIEF.

9 THE COURT: OKAY. WE WILL LET DR. VICARY GATHER
10 UP HIS MATERIALS HERE.

11 WE'LL TAKE A SHORT BREAK. WE WILL ASK THAT
12 YOU GO INTO THE JURY ROOM. WE WILL BE BREAKING THIS
13 MORNING AND EXCUSING YOU FOR THE BALANCE OF THE DAY.
14 SO AS I UNDERSTAND IT, THERE'S SOME BRIEF
15 TESTIMONY, BUT WE WANT TO TALK ABOUT SOME MATTERS FIRST
16 BEFORE YOU COME OUT. SO WE WILL SEE YOU IN JUST A FEW
17 MOMENTS.

18 (JURY ENTERS THE JURY ROOM
19 AND THE FOLLOWING PROCEEDINGS
20 WERE HELD:)

21
22 THE COURT: OKAY. WHAT IS IT YOU WANT TO TALK
23 ABOUT?

24 MS. ABRAMSON: I AM GOING TO BE CALLING DETECTIVE
25 ZOELLER, YOUR HONOR, TO TESTIFY CONCERNING THE STATEMENT
26 HE TOOK FROM JAMIE PISARCIK ON NOVEMBER 2ND; THAT AT THE
27 TIME HE TOOK THAT STATEMENT ON NOVEMBER 2ND, BOTH LYLE
28 MENENDEZ AND ERIK MENENDEZ HAD ALREADY TESTIFIED IN THE

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1 FIRST TRIAL, AND WE HAVE WHAT WE BELIEVE ARE THE DATES
2 FOR THAT.

3 THE COURT: FOR WHAT, WHEN THEY TESTIFIED?

4 MS. ABRAMSON: FOR WHEN THEY TESTIFIED. I JUST
5 WANT TO VERIFY THEM.

6 AND ALSO, I AM GOING TO ASK HIM IF, DURING

7 THAT TESTIMONY BY ERIK MENENDEZ IN THE FIRST TRIAL, HE
8 TESTIFIED TO THE INCIDENT WHERE HE OBSERVED HIS MOTHER
9 RIPPING OFF HIS BROTHER'S HAIRPIECE, WHICH I THINK HE
10 RECOLLECTS.

11 DETECTIVE ZOELLER: I DO.

12 MS. ABRAMSON: AND THEN I WAS GOING TO ASK HIM
13 WHETHER OR NOT, BASED ON THE CONVERSATION HE HAD WITH
14 MS. PISARCIK -- BY THE WAY, THE DATES WE HAVE, YOUR
15 HONOR, IS SEPTEMBER 10TH THROUGH SEPTEMBER 24TH, '93 FOR
16 LYLE MENENDEZ, AND SEPTEMBER 27TH THROUGH OCTOBER 12TH,
17 1993 FOR ERIK MENENDEZ.

18 AND THEN I WAS GOING TO ASK HIM IF, BASED
19 ON THE CONVERSATION HE HAD, DID HE PREPARE A REPORT.
20 I'M GOING TO ASK HIM IF HE WROTE IN HIS REPORT: "SHE"
21 MEANING MS. PISARCIK, "WAS THERE AT THE HOUSE IN BEVERLY
22 HILLS WHEN ERIK HAD OVERHEARD THEIR MOTHER TALKING ABOUT
23 THE HAIRPIECE."

24 NOW, THAT'S THE IMPEACHING SENTENCE. THE
25 WITNESS, WHEN CONFRONTED WITH THIS SENTENCE, SAID SHE
26 HAD NO RECOLLECTION THAT SHE EVER MADE IT, AND SHE
27 DENIED THAT BEING IN FACT TRUE INFORMATION.

28 AND THE REASON I BRING THIS UP IS BECAUSE

1 MS. NAJERA INDICATED YESTERDAY THAT SHE BELIEVED SHE HAS
2 A RIGHT TO BRING IN MS. PISARCIK'S POST-DENIALS THAT SHE

3 MADE THIS STATEMENT, AND OUR POSITION IS UNDER THE
4 HEARSAY RULES, THIS IS A PRIOR INCONSISTENT STATEMENT,
5 AND THERE IS NO CONSISTENT STATEMENT PRIOR IN TIME TO
6 THIS ONE.

7 THE COURT: WHEN YOU SAY POST-DENIALS, YOU MEAN
8 AFTER THIS CONVERSATION WITH DETECTIVE ZOELLER?

9 MS. ABRAMSON: AFTER SHE GOT ON THE WITNESS STAND
10 IN THE FIRST TRIAL, SHE DENIED THAT SENTENCE AT THE
11 FIRST TRIAL.

12 THE COURT: WHEN SHE WAS ON THE WITNESS STAND, OR
13 HOW IS IT THE PEOPLE INTEND TO BRING THAT OUT?

14 MS. NAJERA: YOUR HONOR, I BELIEVE WE WANT TO ASK
15 DETECTIVE ZOELLER WHETHER OR NOT HE EVER CONFRONTED HER
16 WITH THIS STATEMENT AFTER SHE WROTE IT TO DETERMINE
17 WHETHER OR NOT IT WAS VALID, AND HE WILL SAY HE DIDN'T.

18 THE COURT: HE DID NOT?

19 MS. NAJERA: HE DID NOT. AND THE FIRST TIME THAT
20 HE EVER -- THAT SHE EVER SAW IT WAS WHEN SHE WAS ON THE
21 WITNESS STAND, BECAUSE HE DID NOT CONFRONT HER WITH THIS
22 STATEMENT AHEAD OF TIME.

23 THE COURT: WHAT DOES THAT PROVE? THE QUESTION
24 IS WHETHER OR NOT DETECTIVE ZOELLER WAS ACCURATE IN HIS
25 REPORTING.

26 MS. NAJERA: WELL, THIS GOES TO THE NEXT
27 QUESTION, AND WE HAD HIM CHECK HIS NOTES TO DETERMINE
28 THIS, AND THIS WAS NOT IN HIS NOTES.

1 MS. ABRAMSON: WE HAVE NEVER GOTTEN HIS NOTES.

2 THE COURT: WE WENT THROUGH THIS WITH SOME
3 IMPEACHMENT OF OTHER WITNESSES -- NOT SO MUCH
4 IMPEACHMENT, BUT PRIOR RECORDED STATEMENTS AS TO WHETHER
5 SOMETHING WAS OR WASN'T.

6 ALL RIGHT. THE BOTTOM LINE WAS WHETHER IT
7 WAS OR WASN'T IN HIS NOTES. IF HE PUT IT IN HIS REPORT,
8 THAT WAS HIS RECOLLECTION OF THE STATEMENTS. SO WHETHER
9 IT WAS IN HIS NOTES DOESN'T MEAN MUCH.

10 MS. NAJERA: WE AGREE.

11 THE COURT: WHAT ARE YOU GOING TO DO? ARE YOU
12 GOING TO IMPEACH DETECTIVE ZOELLER ON THIS SUBJECT?

13 MS. NAJERA: I DON'T THINK SO. I THINK YOU'RE
14 ABSOLUTELY RIGHT.

15 MS. ABRAMSON: OKAY. THAT'S ALL I WANTED TO
16 KNOW.

17 THE COURT: WHAT ABOUT YOU, MR. GESSLER? DID YOU
18 WANT TO CALL A WITNESS ON THAT CALENDAR?

19 MS. TOWERY: HE'S ON HIS WAY, YOUR HONOR. I JUST
20 CHECKED. HE SHOULD BE HERE MOMENTARILY. MAYBE WE COULD
21 PUT HIM ON AFTER DETECTIVE ZOELLER. IF HE'S NOT HERE
22 THEN --

23 THE COURT: LET'S WAIT, SO WE DON'T HAVE TO STOP
24 THEN IF DETECTIVE ZOELLER IS GOING TO BE ON FOR JUST A
25 MINUTE HERE. THAT'S THE WAY IT SOUNDS.

26 HE IS COMING FROM THE BUILDING ACROSS THE
27 WAY?

28 MS. ABRAMSON: HE IS COMING FROM DOWNTOWN.

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1 MS. TOWERY: HE WAS DOWNTOWN.

2 THE COURT: SO IT'S GOING TO BE A WHILE YET.

3 MS. TOWERY: WELL, HE LEFT ABOUT 20 MINUTES AGO.

4 IT SHOULDN'T TAKE HIM TOO LONG. HE SHOULD BE HERE BY
5 THE END OF THE BREAK.

6 ARE WE GOING TO HAVE A BREAK?

7 MS. ABRAMSON: I THINK WE'RE IN A BREAK.

8 THE COURT: I THOUGHT HE WAS IN THE BUILDING OR
9 NEXT DOOR. I DON'T WANT TO HAVE THE JURY COME OUT FOR
10 TWO MINUTES HERE.

11 SO LET ME ASK. WE TALKED A LITTLE BIT
12 ABOUT INSTRUCTIONS, BUT NOT MUCH. THERE WAS ONE NEW
13 INSTRUCTION SUBMITTED TODAY BY THE DEFENSE.

14 IS THERE ANYTHING ELSE BEING SUBMITTED, OR
15 IS THIS IT RIGHT NOW?

16 MS. TOWERY: THAT'S IT.

17 MR. GESSLER: THAT'S OUR SUBMISSION PENDING WHAT
18 THE COURT DECIDES TO GIVE OF THE PEOPLE'S INSTRUCTIONS.

19 THE COURT: RIGHT.

20 MR. GESSLER: THERE MIGHT BE SOME MORE
21 MODIFICATIONS WHEN WE GET INTO OUR DISCUSSIONS.

22 THE COURT: BUT RIGHT NOW AT THIS POINT YOU HAVE
23 NOTHING ELSE COMING?

24 MR. GESSLER: THAT'S CORRECT.
25 THE COURT: AND THAT'S THE SAME WITH THE PEOPLE
26 AND THE CO-DEFENDANT?
27 MR. CONN: YES, DEPENDING UPON THE RULINGS OF THE
28 COURT.

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1 MS. ABRAMSON: BASED ON THAT CASE, ON SWAIN, YOUR
2 HONOR, WE MIGHT HAVE TO DO SOME VERY CREATIVE
3 INSTRUCTION WRITING ON CONSPIRACY TO COMMIT MURDER.
4 IT'S A MIND-BLOWER.

5 THE COURT: THEY HAD THE CHANCE TO GO ALL THE
6 WAY, AND THEY DIDN'T DO IT. JUSTICE MOSK IS STILL
7 FIGHTING HIS OWN LITTLE BATTLE THERE.

8 MS. ABRAMSON: AND JUSTICE KENNARD IS FIGHTING ON
9 THE OTHER SIDE OF THAT BATTLE.

10 THE COURT: OKAY. WE WILL TAKE A BREAK. NO
11 LATER THAN 25 AFTER. THAT'S 15 MINUTES FROM NOW. I
12 WANT EVERYBODY BACK AT 25 AFTER. HOPEFULLY, YOUR
13 WITNESS WILL BE HERE BY THAT TIME.

14 MS. TOWERY: JUDGE, ALSO THE CITATION TO THE
15 TRANSCRIPT WITH RESPECT TO THE EXHIBITS.

16 THE COURT: RIGHT.

17 MS. TOWERY: 327 AND 328 IS VOLUME 252, PAGES
18 42,213 --

19 THE COURT: 42,213.

20 MS. TOWERY: THROUGH ABOUT -17.
21 THE COURT: OKAY. OKAY. FIFTEEN MINUTES.
22 (A RECESS WAS TAKEN FROM
23 10:05 A.M TO 10:25 A.M.)
24
25 THE COURT: ARE WE READY?
26 MR. GESSLER: YES, YOUR HONOR.
27 THE COURT: OKAY. LET'S HAVE THE JURY OUT.
28

-14929

1 (THE JURY ENTERS THE COURTROOM
2 AND THE FOLLOWING PROCEEDINGS
3 WERE HELD:)
4
5 THE COURT: THE JURY IS BACK.
6 YOUR NEXT WITNESS, PLEASE.
7 MS. ABRAMSON: I WOULD LIKE TO RECALL DETECTIVE
8 ZOELLER, YOUR HONOR.
9 THE COURT: WE'LL SWEAR YOU IN AGAIN. IT'S BEEN
10 AWHILE.
11 LESLIE H. ZOELLER,
12 RECALLED AS A WITNESS BY THE DEFENSE, WAS SWORN AND
13 TESTIFIED AS FOLLOWS:
14 THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE
15 TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE

16 THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND

17 NOTHING BUT THE TRUTH, SO HELP YOU GOD.

18 THE WITNESS: I DO.

19 THE CLERK: PLEASE BE SEATED, AND STATE YOUR NAME

20 FOR THE RECORD.

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

22

23 DIRECT EXAMINATION

24 BY MS. ABRAMSON:

25 Q. DETECTIVE ZOELLER, YOU WERE THE

26 INVESTIGATING OFFICER AT THE TIME OF THE FIRST TRIAL IN

27 THIS CASE AS WELL AS NOW, CORRECT?

28 A. THAT'S CORRECT.

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1 Q. AND YOU ATTENDED MOST SESSIONS OF THAT

2 TRIAL?

3 A. I DID.

4 Q. ON NOVEMBER 2ND, 1993, AS OF THAT DATE, WAS

5 THE FIRST TRIAL STILL IN SESSION?

6 A. YES, IT WAS.

7 Q. ON THAT DATE, AT 2:00 O'CLOCK IN THE

8 AFTERNOON, DID YOU INTERVIEW JAMIE PISARCIK IN THE

9 DETECTIVE DIVISION AT THE BEVERLY HILLS POLICE

10 DEPARTMENT?

11 A. THAT'S CORRECT.

12 Q. AND TO THE BEST OF YOUR RECOLLECTION,
13 BEFORE THAT DATE HAD BOTH LYLE MENENDEZ AND ERIK
14 MENENDEZ TESTIFIED IN THE TRIAL?

15 A. THEY HAD.

16 Q. AND HAD ERIK MENENDEZ' TESTIMONY GONE OVER
17 THE DAYS OF SEPTEMBER 27TH, 1993 THROUGH OCTOBER 12TH,
18 1993? DOES THAT SOUND ABOUT RIGHT?

19 A. THAT SOUNDS ABOUT RIGHT. THAT'S CORRECT.

20 Q. BY NOVEMBER 2ND, THE DATE THAT YOU
21 INTERVIEWED MS. PISARCIK, IT HAD BEEN A NUMBER OF WEEKS
22 SINCE ERIK MENENDEZ HAD TESTIFIED, CORRECT?

23 A. CORRECT.

24 Q. AND DO YOU REMEMBER IN THAT FIRST TRIAL
25 THAT ERIK MENENDEZ TESTIFIED, AS HE DID IN THIS TRIAL,
26 THAT ON THE TUESDAY BEFORE THE SHOOTINGS HE SAW HIS
27 MOTHER AND BROTHER ENGAGED IN A CONFRONTATION DURING
28 WHICH HIS MOTHER PULLED OFF LYLE MENENDEZ' HAIRPIECE?

-14927

1 A. YES.

2 Q. NOW, ON NOVEMBER 2ND, 1993, DID YOU ASK
3 JAMIE PISARCIK IF SHE KNEW WHETHER ERIK MENENDEZ KNEW
4 THAT HIS BROTHER WORE A HAIRPIECE?

5 A. YES.

6 Q. AND DID SHE TELL YOU THAT ERIK MENENDEZ
7 DIDN'T KNOW FROM THE BEGINNING, BUT HE FOUND OUT IN THE

8 SPRING OF 1989?

9 A. THAT WAS MY UNDERSTANDING OF OUR
10 CONVERSATION, YES.

11 Q. THAT'S WHAT YOU WROTE IN THE POLICE REPORT
12 THAT YOU PREPARED REFLECTING THAT CONVERSATION, CORRECT?

13 A. YES.

14 Q. AND DID SHE GO ON TO TELL YOU THAT SHE,
15 MEANING MS. PISARCIK, WAS THERE AT THE HOUSE IN BEVERLY
16 HILLS WHEN ERIK HAD OVERHEARD THEIR MOTHER, MEANING ERIK
17 AND LYLE MENENDEZ' MOTHER, TALKING ABOUT THE HAIRPIECE?

18 A. THAT'S WHAT I WROTE. THAT'S CORRECT.

19 Q. AND THAT'S WHAT YOU BELIEVED SHE SAID?

20 A. THAT'S CORRECT.

21 Q. OR ELSE YOU WOULDN'T HAVE WRITTEN IT, IF
22 YOU DIDN'T THINK SHE SAID IT?

23 A. THAT WAS MY UNDERSTANDING. THAT'S CORRECT.

24 MS. ABRAMSON: I HAVE NOTHING FURTHER.

25 THE COURT: ANY CROSS?

26 MS. NAJERA: YES, YOUR HONOR.

27

28 ///

-14926

1 CROSS-EXAMINATION

2 BY MS. NAJERA:

3 Q. AND DID SHE FURTHER STATE THAT SHE

4 REMEMBERED THAT ERIK LAUGHED AND SAID: "I CAN'T BELIEVE
5 IT, AND THAT'S WHY HIS HAIR IS NEVER OUT OF PLACE"?

6 MS. ABRAMSON: OBJECTION, YOUR HONOR. NO
7 FOUNDATION. HEARSAY. NO FOUNDATION.

8 THE COURT: OKAY. THIS IS THE SAME CONVERSATION
9 OR A DIFFERENT CONVERSATION?

10 MS. NAJERA: YES.

11 MS. ABRAMSON: THERE'S NO FOUNDATION, YOUR HONOR.
12 THIS HAS ALREADY BEEN PRESENTED WITH THE WITNESS ON THE
13 STAND.

14 THE COURT: OKAY. LET ME SEE WHAT IT IS THAT
15 YOU'RE REFERRING TO.

16 MS. NAJERA: CERTAINLY, YOUR HONOR.

17 THE COURT: WERE YOU JUST ASKING ABOUT THE NEXT
18 SENTENCE?

19 MS. NAJERA: CORRECT, YOUR HONOR.

20 THE COURT: THE OBJECTION IS OVERRULED.

21 MS. NAJERA: THANK YOU, YOUR HONOR.

22 Q. AND DETECTIVE ZOELLER, DID YOU FURTHER HEAR
23 FROM MS. PISARCIK THAT SHE REMEMBERED THAT ERIK MENENDEZ
24 LAUGHED AND SAID: "I CAN'T BELIEVE IT. THAT'S WHY HIS
25 HAIR IS NEVER OUT OF PLACE"?

26 A. THAT'S WHAT SHE SAID. THAT'S CORRECT.

27 Q. AND WHEN YOU ASKED HER ABOUT THIS
28 CONVERSATION, WAS SHE CERTAIN ABOUT THE DATE?

1 MS. ABRAMSON: OBJECTION, YOUR HONOR. CALLS FOR
2 SPECULATION.

3 THE COURT: SUSTAINED.

4 Q. BY MS. NAJERA: DID SHE TELL YOU ANYTHING
5 ABOUT WHEN THIS HAPPENED?

6 A. SHE DID.

7 Q. AND WHAT DID SHE TELL YOU?

8 A. SHE GAVE IT AS A STATEMENT THAT SHE
9 OVERHEARD. I ATTEMPTED TO FIND OUT WHEN SHE OVERHEARD
10 IT, AND THE BEST I COULD GET OUT OF HER WAS THE SPRING
11 OF 1989.

12 Q. AND WHEN YOU SAY THE BEST YOU COULD GET OUT
13 OF HER, WAS SHE CERTAIN ABOUT THIS DATE?

14 MS. ABRAMSON: OBJECTION. CALLS FOR SPECULATION.

15 THE COURT: SUSTAINED.

16 Q. BY MS. NAJERA: WHAT DO YOU MEAN BY THE
17 BEST YOU COULD GET OUT OF HER?

18 A. BECAUSE SHE COULDN'T TELL ME EXACTLY WHEN
19 THE STATEMENT WAS MADE.

20 Q. OKAY. AND WHEN SHE TOLD YOU THIS
21 STATEMENT, DID SHE EVER TELL YOU WHETHER OR NOT SHE
22 SPECIFICALLY OVERHEARD THIS, WHETHER ERIK MENENDEZ TOLD
23 HER ABOUT THIS, OR SHE ASSUMED THIS OR WHAT?

24 MS. ABRAMSON: YOUR HONOR, I AM GOING TO OBJECT.
25 THE QUESTION IS VERY VAGUE.

26 THE COURT: IT'S VAGUE.

27 Q. BY MS. NAJERA: DID SHE EVER TELL YOU
28 WHETHER OR NOT ERIK MENENDEZ HAD TOLD HER THAT HE HAD

1 OVERHEARD HIS MOTHER TALKING ABOUT IT, OR DID SHE JUST
2 ASSUME THIS?

3 MS. ABRAMSON: OBJECTION. IT CALLS FOR
4 SPECULATION. SHE SAID WHAT SHE DID.

5 Q. BY MS. NAJERA: DID SHE EVER CLARIFY THE
6 STATEMENT THAT YOU PUT IN YOUR REPORT CONCERNING HOW SHE
7 FOUND OUT AS TO HOW ERIK MENENDEZ KNEW ABOUT IT?

8 A. IN THAT INTERVIEW, NO.

9 Q. DID SHE EVER AT ANY TIME?

10 MS. ABRAMSON: OBJECTION, YOUR HONOR. NO
11 FOUNDATION.

12 THE COURT: SUSTAINED.

13 Q. BY MS. NAJERA: NOW, AFTER YOU HEARD
14 THAT -- YOU'VE HEARD THE TESTIMONY OF ERIK MENENDEZ
15 WHICH COUNSEL ASKED YOU ABOUT.

16 DID YOU INVESTIGATE WHETHER OR NOT PEOPLE
17 KNEW THAT LYLE MENENDEZ WORE A HAIRPIECE?

18 MS. ABRAMSON: OBJECTION, YOUR HONOR. BEYOND THE
19 SCOPE.

20 Q. BY MS. NAJERA: DID YOU CONTACT
21 MS. PISARCIK AFTER ERIK MENENDEZ TESTIFIED AND QUESTION
22 HER ABOUT LYLE'S HAIRPIECE?

23 A. YES.

24 Q. AND DID SHE VOLUNTEER INFORMATION ABOUT THE
25 HAIRPIECE, OR DID YOU INITIATE A CONVERSATION ABOUT IT?

26 A. I CALLED HER AND INQUIRED ABOUT IT, SO I
27 INITIATED THE CONVERSATION, AND THEN SHE VOLUNTEERED
28 ASPECTS OF HER KNOWLEDGE OF THE HAIRPIECE.

-14923

1 Q. SO SHE DID NOT CALL YOU AFTER THE TESTIMONY
2 AND SAY, "I HAVE INFORMATION THAT YOU MIGHT BE
3 INTERESTED IN"?

4 A. THAT'S CORRECT.

5 Q. AND, IN FACT, WERE YOU SPECIFICALLY LOOKING
6 FOR INFORMATION CONCERNING THE HAIRPIECE AND WHO KNEW
7 ABOUT IT?

8 A. YES.

9 Q. AND DID MS. PISARCIK RESPOND TO YOUR
10 QUESTIONS?

11 A. YES.

12 MS. NAJERA: I HAVE NOTHING FURTHER.

13 THE COURT: ANYTHING ELSE?

14 MS. ABRAMSON: NO.

15 THE COURT: OKAY. THANK YOU, SIR. YOU MAY STEP
16 DOWN.

17 YOUR NEXT WITNESS.

18 MR. GESSLER: YOUR HONOR, I HAVE A 1996 FAILURE
19 ANALYSIS CALENDAR, I WOULD ASK THAT BE MARKED THE NEXT
20 EXHIBIT IN ORDER.

21 THE COURT: 441.

22 MR. GESSLER: CALL DOUG LOVE.

23

24

25

26 ///

27 ///

28

-14922

1 DOUGLAS LOVE,

2 CALLED AS A WITNESS BY THE DEFENSE, WAS SWORN AND

3 TESTIFIED AS FOLLOWS:

4 THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE

5 TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE

6 THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND

7 NOTHING BUT THE TRUTH, SO HELP YOU GOD.

8 THE WITNESS: I DO.

9 THE CLERK: PLEASE TAKE THE STAND AND STATE YOUR

10 NAME FOR THE RECORD.

11 THE WITNESS: DOUGLAS S. LOVE, L-O-V-E.

12

13 DIRECT EXAMINATION

14 BY MR. GESSLER:

15 Q. MR. LOVE, HOW ARE YOU EMPLOYED?

16 A. INVESTIGATOR WITH THE LOS ANGELES COUNTY

17 PUBLIC DEFENDER'S OFFICE.

18 Q. AND HOW LONG HAVE YOU BEEN SO EMPLOYED,

19 SIR?

20 A. FOR NINE YEARS.

21 Q. AND BEFORE THAT DID YOU HAVE LAW

22 ENFORCEMENT EXPERIENCE?

23 A. YES, I DID.

24 Q. NOW, DIRECTING YOUR ATTENTION TO THE LAST

25 WEEK, DID AT THAT TIME YOU RECEIVE FROM ME AN AUGUST

26 1996 PAGE FROM A FAILURE ANALYSIS ASSOCIATES' CALENDAR?

27 A. YES, I DID.

28 Q. AND DID YOU TAKE THAT INTO YOUR POSSESSION?

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1 A. YES.

2 MR. GESSLER: MAY I APPROACH THE WITNESS, YOUR

3 HONOR?

4 THE COURT: YES.

5 Q. BY MR. GESSLER: MR. LOVE, SHOWING YOU

6 EXHIBIT 441, DOES THIS APPEAR TO BE THE AUGUST 1996

7 PICTURE THAT YOU RECEIVED?

8 A. IT DOES.

9 Q. AND DOES THAT RELATE TO THE MENENDEZ

10 BROTHERS' MURDER TRIAL, AND WORK THAT FAILURE ANALYSIS

11 ASSOCIATES SAY THEY DID ON IT?

12 A. IT DOES, YES.

13 Q. THEN AT OUR REQUEST DID YOU TAKE STEPS TO

14 SECURE THE ACTUAL CALENDAR OF WHICH THE AUGUST PAGE IS A
15 PART?
16 A. YES, I DID.
17 Q. WHAT STEPS DID YOU TAKE TO DO THAT?
18 A. I CONTACTED AN INVESTIGATOR WITH THE SANTA
19 CLARA COUNTY PUBLIC DEFENDER'S OFFICE, AND REQUESTED
20 SOME ASSISTANCE REGARDING HER GOING TO MENLO PARK TO
21 FAILURE ANALYSIS AND PICKING UP A CALENDAR, A 1996.
22 Q. AND TO THE BEST OF YOUR KNOWLEDGE, DID SHE
23 DO SO?
24 A. YES, SHE DID.
25 Q. DID SHE TAKE STEPS TO SEND THAT TO YOU?
26 A. SHE DID.
27 Q. AND IS THAT CALENDAR NOW ON THE BOARD,
28 EXHIBIT 441 -- IS THAT THE CALENDAR THAT SHE SENT?

-14920

1 A. IT IS.
2 MR. GESSLER: THANK YOU.
3 I HAVE NOTHING FURTHER, YOUR HONOR.
4 THE COURT: OKAY. ANY EXAMINATION?
5
6 CROSS-EXAMINATION
7 BY MR. CONN:
8 Q. SO YOU'RE SAYING THAT FAILURE ANALYSIS GAVE
9 HER THE CALENDAR; IS THAT CORRECT?

10 A. YES, IT IS.

11 MR. CONN: OKAY.

12 NO FURTHER QUESTIONS.

13 THE COURT: THANK YOU, SIR. YOU MAY STEP DOWN.

14 ANY FURTHER EVIDENCE TO BE OFFERED BY THE

15 DEFENSE?

16 MS. ABRAMSON: NO, YOUR HONOR. WE REST IN

17 SURREBUTTAL.

18 MR. GESSLER: WE ALSO REST, YOUR HONOR.

19 THE COURT: OKAY.

20 ANYTHING FURTHER FROM THE PROSECUTION?

21 MR. CONN: NO, YOUR HONOR. NOTHING FURTHER.

22 THE COURT: OKAY.

23 THAT COMPLETES THEN THE EVIDENCE PHASE OF

24 THE CASE, AND I AM GOING TO BE EXCUSING THE JURY.

25 THE LAWYERS AND I ARE GOING TO DISCUSS

26 INSTRUCTIONS THAT I WILL BE GIVING THE JURY. THAT TAKES

27 QUITE A BIT OF TIME FOR US TO DO THAT; AND HOPEFULLY, WE

28 WILL HAVE COMPLETED THAT DISCUSSION SO THAT ON TUESDAY

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1 THE LAWYERS WILL BE IN A POSITION TO ARGUE THE CASE TO

2 THE JURY.

3 ARGUMENT WILL TAKE, MOST LIKELY, SEVERAL

4 DAYS, AND THEN I WILL INSTRUCT THE JURY AND THE JURY

5 WILL BEGIN ITS DELIBERATIONS.

6 IT'S STILL PREMATURE FOR YOU TO DISCUSS THE
7 CASE AMONG YOURSELVES. YOU WILL BE ABLE TO DO THAT
8 DURING DELIBERATIONS AND NOT BEFORE.

9 DO NOT DISCUSS THE CASE WITH ANYONE AT ALL
10 OUTSIDE THE COURTROOM OR INSIDE THE COURTROOM. DON'T
11 TALK TO ANYBODY ABOUT THE CASE. WAIT UNTIL
12 DELIBERATIONS, AND THEN THE 12 JURORS WILL BE ABLE TO
13 TALK ABOUT IT.

14 DON'T FORM ANY FINAL OPINIONS ABOUT THE
15 CASE. THERE IS STILL ARGUMENT AND INSTRUCTIONS TO BE
16 GIVEN TO YOU, AND THE TIME TO FORM FINAL OPINIONS IS
17 WHEN YOU GO IN AND START DELIBERATING.

18 DON'T PERMIT YOURSELF TO BE EXPOSED TO
19 ANYTHING ABOUT THIS CASE OUTSIDE OF THE COURTROOM. JUST
20 CONTINUE DOING WHAT YOU HAVE BEEN DOING VERY DILIGENTLY
21 THROUGHOUT THE TRIAL, SO THAT YOU CAN MAKE YOUR DECISION
22 BASED ONLY ON THE EVIDENCE YOU HAVE HEARD AND SAW IN THE
23 COURTROOM, AND MY INSTRUCTIONS ON THE LAW.

24 HAVE A GOOD WEEKEND. WE WILL SEE YOU ALL
25 BACK HERE TUESDAY, MONDAY BEING A LEGAL HOLIDAY.
26 TUESDAY AT 8:30.

27

28 ///

-14918

1 (THE JURY EXITS THE COURTROOM

2 AND THE FOLLOWING PROCEEDINGS

3 WERE HELD:)

4

5 THE COURT: OKAY. WE WILL DEAL WITH LOOSE ENDS

6 OF EXHIBITS SOMETIME TODAY HOPEFULLY, AS WELL. WE'LL

7 JUST CLEAR THE DECKS HERE AND GET ALL OUR PAPERWORK

8 REGARDING INSTRUCTIONS, AND PICK UP THOSE DISCUSSIONS IN

9 ABOUT FIVE MINUTES.

10 (A RECESS WAS TAKEN FROM

11 10:45 A.M. UNTIL 11:00 A.M.)

12

13 THE COURT: OKAY. EVERYBODY IS HERE, AND WE WILL

14 NOW TALK ABOUT INSTRUCTIONS.

15 AS I INDICATED YESTERDAY, I HAVE RECEIVED

16 AND THE PARTIES HAVE SHARED THEIR BRIEFS ON THE -- SOME

17 OF THE MAJOR ISSUES THAT WE'LL BE DISCUSSING.

18 LET ME FIRST ASK WHETHER OR NOT THE PARTIES

19 HAVE A PREFERENCE AS TO WHICH OF THESE SUBJECTS THAT YOU

20 WANT TO DISCUSS FIRST?

21 MR. GESSLER: I THINK, YOUR HONOR, IT WOULD BE

22 PROBABLY THE MOST PRODUCTIVE IF WE GOT RULINGS AS TO THE

23 VARIOUS THEORIES OF VOLUNTARY MANSLAUGHTER THAT WE HAVE

24 SUBMITTED ON BEHALF OF EACH DEFENDANT, BECAUSE THAT

25 PERMEATES A LOT OF THE OTHER INSTRUCTIONS; SPECIAL

26 INSTRUCTIONS, MODIFICATIONS, THINGS WE WOULD BE TALKING

27 ABOUT.

28 I THINK, ALTHOUGH THE CONSPIRACY

1 INSTRUCTION IS ALSO IN ISSUE, THE MANSLAUGHTER IS A
2 PROBLEM HERE. IF WE COULD RESOLVE THAT FIRST, I THINK
3 OTHER THINGS WOULD FLOW MORE EASILY.

4 THE COURT: OKAY. AT LEAST WE'LL TALK ABOUT IT.
5 WHETHER WE'LL RESOLVE IT THIS MORNING OR THIS AFTERNOON,
6 I WILL, FIRST OF ALL, GET A FEEL FROM YOU AS TO THE
7 LENGTH OF ARGUMENT, THE EXTENT OF THE ARGUMENT.

8 LET'S FIRST TALK ABOUT IMPERFECT
9 SELF-DEFENSE.

10 THE PROSECUTION FILED AN ADDITIONAL BRIEF
11 ON THAT SUBJECT, TO SOME EXTENT MIRRORING THE BRIEF THEY
12 FILED PRIOR TO THIS ONE THEY FILED, AND I DON'T THINK
13 THE DEFENSE FILED ANYTHING IN RESPONSE TO THAT.

14 MS. TOWERY: WE DID NOT, YOUR HONOR. WE DID FILE
15 A VERY SUBSTANTIAL BRIEF IN CONNECTION WITH THE HEARING
16 THE COURT CONDUCTED EARLIER, PRIOR TO THE TESTIMONY.

17 THE COURT: RIGHT.

18 MS. TOWERY: OF THE -- OR PRIOR TO THE HEARING ON
19 THE TESTIMONY OF THE EXPERTS.

20 THE COURT: I HAVE THAT.

21 MS. TOWERY: AND WE WOULD BE RELYING ON THE
22 ARGUMENTS SET FORTH IN THAT BRIEF, WHICH I THINK,
23 BECAUSE THE PROSECUTION HAS BASICALLY REITERATED THE
24 SAME ARGUMENTS AS THEY SET FORTH IN THEIR BRIEF AT THAT
25 HEARING, I THINK THAT BRIEF ADEQUATELY ADDRESSES THEIR
26 ARGUMENTS.

27 THE COURT: OKAY. THEN LET ME INQUIRE.

28 IS THERE ANYTHING FURTHER THAT YOU WANTED

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1 TO SAY IN RESPONSE TO THE PEOPLE'S BRIEF, OR

2 SUPPLEMENTING YOUR ARGUMENT?

3 MS. TOWERY: WELL, JUST IN TERMS OF THE LEGAL

4 ANALYSIS, YOUR HONOR, I THINK THE IBARRA CASE, WHICH THE

5 PEOPLE RELY UPON IN THEIR MOST RECENT BRIEF, WAS DEALT

6 WITH IN OUR PRIOR BRIEF, AND THAT CASE INVOLVED A SINGLE

7 PIECE OF EVIDENCE OF LACK OF INTENT THAT THE DEFENDANT

8 GAVE TESTIMONY ABOUT. AND IBARRA WAS LIMITED TO ITS

9 FACTS IN PEOPLE VERSUS GLENN, WHICH IS 229 CAL.APP.3D,

10 1461 AT 1466 THROUGH 1467.

11 THE GLENN COURT FOUND THAT THE COURT BELOW

12 HAD ERRED IN REFUSING TO INSTRUCT ON INVOLUNTARY

13 MANSLAUGHTER, DESPITE THE DEFENDANT IN THAT CASE'S

14 TESTIMONY, WHICH WAS CONTRADICTORY AS TO HOW THE

15 STABBING OCCURRED, STATING BOTH THAT HE INTENDED TO

16 STAB, BUT NOT KILL, AND HE DIDN'T TRY TO STICK IT, IT

17 JUST HAPPENED.

18 THE GLENN COURT, AS I SAID, LIMITED THE

19 IBARRA LANGUAGE TO ITS FACTS.

20 THIS COURT WAS FACED WITH THE IBARRA AND

21 GLENN CASES AT THE LAST TRIAL AND CONSIDERED THEM AND

22 REJECTED THE REASONING OF THE IBARRA DECISION WITH

23 RESPECT TO THE ARGUMENT ON INVOLUNTARY MANSLAUGHTER AT
24 THE LAST TRIAL OVER THE OBJECTION OF THE PROSECUTION AT
25 THE LAST TRIAL.

26 SO I THINK THAT RELIANCE ON THE IBARRA CASE
27 BY THE PROSECUTION IN THIS CASE IS INAPPROPRIATE. I
28 ALSO DISAGREE WITH THE FACTUAL ASSERTION IN THE

-14915

1 PROSECUTION'S BRIEF WHERE THEY DESCRIBE ERIK MENENDEZ'
2 TESTIMONY AS -- AT PAGE 3.

3 "DEFENDANT IN HIS OWN DESCRIPTION
4 OF THE ALLEGED DANGER DESCRIBES A SET OF
5 CIRCUMSTANCES NEGATING HIS CLAIM OF AN
6 IMMEDIATE DANGER."

7 I THINK TO THE CONTRARY, ERIK MENENDEZ'
8 TESTIMONY DESCRIBED HIS OWN BELIEF AND THE BELIEF OF
9 LYLE MENENDEZ OF BEING IN IMMEDIATE DANGER AND THREAT
10 COMING FROM THEIR PARENTS.

11 I WOULD ALSO POINT OUT TO THE COURT THAT
12 THE ARGUMENT AT PAGE 11, WHERE THE PEOPLE ASSERT WITHOUT
13 AUTHORITY THAT IMPERFECT SELF-DEFENSE IS A DEFENSE WHICH
14 IS BASED ON UNREASONABLE BELIEFS OF A DEFENDANT, AND
15 SUCH BELIEFS CANNOT BE ESTABLISHED THROUGH
16 CIRCUMSTANCIAL EVIDENCE.

17 WE ALSO FILED A BRIEF ON THAT ISSUE, WHICH
18 WE FILED RATHER RECENTLY, ENTITLED "MEMORANDUM OF POINTS

19 AND AUTHORITIES RE ADMISSIBILITY OF PRIOR THREATS, ET
20 CETERA, RE JOSEPH LYLE MENENDEZ," AND THAT WAS FILED, I
21 THINK, ON JANUARY 16, 1996.

22 I THINK THERE IS A REASON THAT THE PEOPLE'S
23 ASSERTION CONTAINS NO CITATIONS FOLLOWING IT, AND THAT
24 IS THAT THAT IS CLEARLY NOT THE LAW. WE PROVIDED THE
25 COURT WITH A NUMBER OF CITATIONS INDICATING THAT
26 CIRCUMSTANCIAL EVIDENCE CAN ESTABLISH THE BASIS FOR AN
27 INSTRUCTION FOR IMPERFECT SELF-DEFENSE AND HEAT OF
28 PASSION, AND THAT A DEFENDANT NEED NOT TESTIFY FOR THOSE

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1 INSTRUCTIONS TO BE GIVEN.

2 WE HAVE CITED DELEON, WHICH I AM SURE THE
3 COURT IS TIRED OF PEOPLE CITING TO IT; ALSO CASTILLO,
4 ANDERSON, BROOKS, ROADS, LEWIS AND URIARTE.

5 SO IT'S WITHOUT QUESTION THAT THE LAW IS
6 THAT CIRCUMSTANCIAL EVIDENCE CAN PROVIDE THE BASIS FOR
7 INSTRUCTIONS FOR BOTH HEAT OF PASSION AND IMPERFECT
8 SELF-DEFENSE.

9 THOSE ARE MY ONLY COMMENTS WITH RESPECT TO
10 THE MOST RECENT MOTION.

11 THE COURT: OKAY.

12 AND MS. ABRAMSON, ANYTHING FURTHER?

13 MS. ABRAMSON: JUST BRIEFLY, YOUR HONOR.

14 I THINK THE PEOPLE MISCONSTRUED THE FACTS

15 BY CLAIMING THAT ON CROSS-EXAMINATION ERIK MENENDEZ
16 CONCEDED THAT THINGS COULD ONLY HAPPEN IN THE FUTURE.
17 THAT'S ALWAYS TRUE, UNLESS THE BULLET IS PASSING THROUGH
18 YOUR HEART AT THE MOMENT. YOU'RE NOT SHOT UNTIL YOU'RE
19 SHOT.

20 AND I THINK THE WHOLE POINT OF IMPERFECT
21 SELF-DEFENSE IS THERE IS NO OBJECTIVE STANDARD. IT IS
22 SOLELY THE BELIEF, HOWEVER UNREASONABLE, OF THE PERSON
23 WHO IS ACTING.

24 AND IN A SENSE, MORE IMPORTANTLY, THE WHOLE
25 POINT OF WHY IMPERFECT SELF-DEFENSE REDUCES MURDER TO
26 MANSLAUGHTER IS BECAUSE OF LACK OF MALICE. AND THE
27 CONCEPT THERE IS THE NOTION OF PEOPLE'S EMOTIONAL
28 REACTION TO PERCEIVED THREAT, WHICH IS NOT A RATIONAL OR

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1 INTELLECTUAL PROCESS.

2 WHAT THE PEOPLE COMPLETELY OMIT IN THIS
3 BRIEF, AS IN THE PREVIOUS ONE, IS THE COMMONLY ACCEPTED,
4 LONG-ESTABLISHED RULE OF CASES INVOLVING PENA. THAT IS
5 THE MOST CLEAR EXAMPLE OF A CASE WHERE THERE HAVE BEEN
6 ANTECEDENT THREATS, ANTECEDENT CONDUCT, A HISTORY
7 BETWEEN THE PARTIES.

8 AND EVEN FOR PERFECT SELF-DEFENSE, UNDER
9 THE CIRCUMSTANCES A PERSON IS ENTITLED TO ACT SOONER AND
10 WITH GREATER FORCE THAN IN A SITUATION IN THE ABSENCE OF

11 SUCH THREATS. AND THERE IS NOTHING IN THE LAW OF
12 IMPERFECT SELF-DEFENSE THAT INDICATES THAT YOU HAVE TO
13 WAIT UNTIL YOUR BELIEVED ASSAILANT IS UPON YOU BEFORE
14 YOU CAN EXERCISE YOUR RIGHTS, BECAUSE IF THERE WERE SUCH
15 A REQUIREMENT, THERE WOULD BE NO DISTINCTION BETWEEN
16 PERFECT SELF-DEFENSE AND IMPERFECT SELF-DEFENSE.

17 I THINK THAT EVEN THE TESTIMONY OF THE
18 PROSECUTION'S EXPERT, DR. DIETZ, ESTABLISHES THAT A
19 PERSON WHO IS SUFFERING FROM AN ANXIETY DISORDER, WHO IS
20 PRESENTED WITH A STRESSFUL OR THREATENING SITUATION,
21 FEARS DEATH, AND THAT'S -- AND IN THE DESCRIPTION OF A
22 SO-CALLED PANIC ATTACK THAT DR. DIETZ GAVE, AND HE
23 INDICATED THAT THE EVIDENCE WAS CONSISTENT WITH THAT.

24 DR. WILSON FURTHER TESTIFIED THAT THE
25 FEATURE OF THE OVER-REACTION OF PEOPLE WITH
26 POST-TRAUMATIC STRESS DISORDER IS THAT THEY HAVE AN
27 OVERWHELMING, IMMINENT SENSE OF DEATH AND DOOM. AND IT
28 IS THAT SENSE OF IMMINENT DEATH THAT IS THE

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1 SUBJECTIVE -- THE MAIN SUBJECTIVE COMPONENT OF IMPERFECT
2 SELF-DEFENSE. THE OTHER SUBJECTIVE COMPONENT IS THE
3 ACTUALITY OF THE BELIEF.

4 THERE IS NO WAY. WHAT THE PEOPLE'S
5 STANDARD WOULD REQUIRE IS THAT ONE CAN NEVER BELIEVE OR
6 HAVE A SENSE OF IMMINENCE UNLESS THERE IS, IN FACT,

7 OBJECTIVE IMMINENCE, AND THEN WE ARE OUT OF IMPERFECT
8 SELF-DEFENSE ALTOGETHER.

9 THE ONLY THING THAT THE CHRISTIAN S.
10 COURT -- AND I WOULD TAKE THE POSITION THEY DIDN'T ADD
11 ANYTHING -- THEY SIMPLY CLARIFIED WHAT ALL OF US WHO
12 HAVE BEEN PRACTICING IN THIS AREA FOR YEARS ALREADY
13 KNEW, WHICH IS THAT THE SUBJECTIVE BELIEF, THE
14 SUBJECTIVE, UNREASONABLE BELIEF OF THE ACTOR MUST BE
15 THAT HE IS GOING TO GET IT NOW, OR JUST ABOUT NOW, SINCE
16 ACTUAL NOW WOULD TAKE US OUT OF IMPERFECT SELF-DEFENSE,
17 RATHER THAN SOMEONE WHO SAYS: "I THOUGHT I WAS GOING TO
18 BE ATTACKED TOMORROW," OR "I THOUGHT I WAS GOING TO BE
19 ATTACKED IN AN HOUR," OR "THE CIRCUMSTANCES THAT WERE
20 GOING TO BRING ABOUT THE ATTACK HAD NOT YET HAPPENED,
21 BUT I KNEW THEY WERE GOING TO HAPPEN."

22 NOW, THAT IS NOT BELIEF IN IMMINENT DANGER.

23 BUT EVERYTHING IN THE TESTIMONY OF ERIK
24 MENENDEZ, IN THE TESTIMONY OF DR. WILSON, AND IN THE
25 TESTIMONY OF DR. DIETZ, INDICATES THAT HE WAS IN SUCH A
26 STATE OF REACTIVITY THAT WAS CONSISTENT WITH THE BELIEF
27 THAT HE WAS BEING -- IN THE PROCESS OF BEING ATTACKED.

28 IF IT MEANT A SECOND IS GOING TO GO BY,

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1 THERE IS NO TIME SPAN WRITTEN INTO THE LAW, AND
2 CHRISTIAN S. ITSELF, THE ASSAILANTS WERE 25 YARDS BEHIND

3 CHRISTIAN S. AT THE TIME THAT HE ACTED. I GUESS ONE
4 COULD ARGUE, UNTIL THEY WERE CLOSE ENOUGH TO GET HIM, HE
5 COULDN'T POSSIBLY HAVE A BELIEF IN IMMEDIATE DANGER.

6 AND WE DON'T KNOW WHAT THE ULTIMATE
7 RESOLUTION OF THAT CASE ACTUALLY WAS, BECAUSE IT WAS
8 SENT BACK TO THE TRIAL COURT, THE JUVENILE COURT, FOR A
9 DETERMINATION.

10 BUT IN CASE AFTER CASE -- IN ARIS, FOR
11 EXAMPLE, WHERE THE COURT OF APPEAL RULED THAT IMPERFECT
12 SELF-DEFENSE WAS PROPERLY GIVEN, THE HUSBAND WAS ASLEEP.

13 AND SO ALTHOUGH THE WIFE FELT THAT SHE WAS
14 IN IMMINENT DANGER, IT WAS NOT OBJECTIVE. HE STILL HAD
15 TO WAKE UP, WHICH IS THE FUNCTIONAL EQUIVALENT OF
16 OPENING THE DEN DOORS, OR COMING OUT SOME OTHER WAY FROM
17 THE DEN.

18 THE COURT: WELL, THE APPELLATE COURT IN ARIS
19 SAID ALSO THERE WAS NO REASONABLE LIKELIHOOD IN THAT
20 FACT SITUATION THAT THE JURY WOULD HAVE CONCLUDED THAT
21 THERE WAS IMMINENT DANGER, OR SHE THOUGHT THERE WAS
22 IMMINENT DANGER.

23 MS. ABRAMSON: THEY RULED THERE WAS NO OBJECTIVE
24 IMMINENCE. BUT NEVERTHELESS, IT APPROVED THE GIVING OF
25 THE INSTRUCTION.

26 THE COURT: AS I SAID BEFORE IN ONE OF OUR
27 DISCUSSIONS ABOUT ARIS, THE WHOLE OPINION IS DICTA
28 BECAUSE OF THE ULTIMATE RULING OF THE COURT THAT

1 CONCLUDED THAT IN THAT CASE THERE WAS NO REASONABLE
2 LIKELIHOOD THAT A TRIER OF FACT WOULD HAVE FOUND
3 IMMINENT DANGER; THAT MRS. ARIS HAD THAT BELIEF.

4 SO LOOKING AT ARIS OBJECTIVELY FROM OUR
5 PERSPECTIVE NOW, IT REALLY SEEMS TO HAVE BEEN AN ENTIRE
6 CASE THAT WAS DICTA. BUT IT HAS BEEN CITED BY THE
7 SUPREME COURT.

8 MS. ABRAMSON: IT'S TOO BAD THE SUPREME COURT
9 HASN'T TAKEN ANOTHER CASE THAT COULD GIVE US GUIDANCE
10 THAT ISN'T DICTA, BUT THERE IS A DIFFERENT STANDARD ON
11 APPELLATE REVIEW WHEN CERTAIN INSTRUCTIONS HAVE BEEN
12 GIVEN VERSUS WHEN THEY HAVEN'T.

13 CERTAINLY THE STANDARD IS FOR A TRIAL COURT
14 TO GIVE INSTRUCTIONS BASED ON THE EVIDENCE THAT'S BEEN
15 PRESENTED. THE ENTIRE THRUST OF THIS DEFENSE WAS AS TO
16 MENTAL STATE AS TO MANSLAUGHTER, AND I THINK THERE IS
17 OVERWHELMING EVIDENCE WHERE THE JURY, IF BELIEVED, COULD
18 IMPLY THE INSTRUCTION OF IMPERFECT SELF-DEFENSE.

19 TO ACCEPT THE PROSECUTION'S VERSION WOULD
20 BE TO BUILD IN A TIME SEQUENCE, OR AN ACTION SEQUENCE,
21 ON BEHALF OF DECEDENTS THAT WOULD BE -- WELL, BEYOND
22 INAPPROPRIATE, IT WOULD BE IMPOSSIBLE TO SET A STANDARD
23 THAT THERE IS A PARTICULAR TIME SEQUENCE THAT ONE HAS TO
24 SIGN ON TO BEFORE YOU'RE ENTITLED TO IMPERFECT
25 SELF-DEFENSE, OR A PARTICULAR SERIES OF ACTIONS ON
26 BEHALF OF THE DECEDENTS. THERE IS NOTHING IN THE CASE
27 AUTHORITY THAT INDICATES THAT THAT IS TRUE.

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1 FACTS HERE THAT MY CLIENT WAS IN THAT STATE OF BELIEF,
2 IN IMMINENT DANGER, SUCH AS TO JUSTIFY THE GIVING OF
3 THESE INSTRUCTIONS.

4 THE PEOPLE TRY TO BREAK OUT TWO DIFFERENT
5 REQUIREMENTS, THAT I AM NOT AWARE OF A SINGLE CASE. OF
6 COURSE, THEY DON'T CITE ONE. THEY DON'T CITE ANY CASES
7 FOR THE PROPOSITIONS THEY ARGUE HERE.

8 BUT THEY ARE TRYING TO CRACK OUT THAT THERE
9 HAS TO BE TWO OBJECTIVE BELIEFS; ONE IN IMMINENCE, AND
10 THE OTHER IN NECESSITY, AND THERE SIMPLY IS NO CASE
11 AUTHORITY THAT SAYS YOU MUST ALSO HAVE A REASONABLE
12 BELIEF IN NECESSITY, OR ANY BELIEF THAT BREAKS IN HALF
13 FEAR OF IMMINENT HARM AND A DECISION TO COUNTER IT BY
14 THE USE OF LETHAL FORCE.

15 SO I THINK THE ENTIRE CONSTRUCT OF THE --
16 THE FEAR OF IMMINENT HARM THAT MAKES ONE FEEL THEY HAVE
17 TO DEFEND THEMSELF -- IT'S ALL PART OF THE SAME
18 IRRATIONAL BELIEF, AND THAT'S ALL THAT'S REQUIRED FOR
19 IMPERFECT SELF-DEFENSE.

20 MS. TOWERY: YOUR HONOR, PERHAPS I AM CONFUSED,
21 BUT I THOUGHT THE COURT HAD RESOLVED THE ISSUE OF THE
22 SUBJECTIVE/OBJECTIVE IMPERFECT SELF-DEFENSE PROBLEM AT
23 THE LAST HEARING.

24 THE COURT: YES. I RESOLVED IT DIFFERENTLY THAN
25 YOU'RE ARGUING IT.
26 IN VOLUME 193, THE ARGUMENT AND THE COURT'S
27 OBSERVATIONS AT THAT TIME WERE IN RELATIONSHIP TO
28 WHETHER OR NOT THE COURT WOULD ENTERTAIN EVIDENCE OF THE

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1 MENTAL STATE OF THE DEFENDANTS THROUGH EXPERT TESTIMONY.

2 AND THE PURPOSE OF THOSE DISCUSSIONS WAS
3 JUST TO SET THE STAGE ON THE BASIS OF RELEVANCE; BECAUSE
4 IF THE COURT, BASED UPON WHAT HAD TRANSPIRED IN THE
5 FIRST TRIAL, WAS TO DETERMINE THAT THERE WAS NO LEGAL
6 BASIS FOR THE INSTRUCTION ON IMPERFECT SELF-DEFENSE,
7 THEN THE COURT WOULD HAVE DROPPED DOWN TO A DISCUSSION
8 OF HEAT OF PASSION, PROVOCATION.

9 BUT IT NEVER GOT TO THAT POINT, BECAUSE
10 DURING THOSE DISCUSSIONS I MADE A PRELIMINARY FINDING OF
11 SETTING THE STAGE FOR DISCUSSIONS ON GROUNDS OF
12 RELEVANCE OR ADMISSIBILITY, FINDING THAT THERE WAS A
13 SUFFICIENT SHOWING OF RELEVANCE TO JUSTIFY A DISCUSSION
14 ON THE SUBJECT OF THE EXPERTS -- THE ADMISSIBILITY OF
15 EXPERT TESTIMONY.

16 BUT IN THOSE DISCUSSIONS AND OBSERVATIONS,
17 MY COMMENTS START AT 30,878.

18 MS. TOWERY: WHAT VOLUME IS THAT, YOUR HONOR?

19 THE COURT: I AM JUST SAYING THAT'S WHERE I

20 START, AT THE BOTTOM OF THAT PAGE, 30,878, LINE 28.
21 AND THEN I TALK ABOUT THE SUBJECT OF
22 SUBJECTIVE AND OBJECTIVE STANDARD AT 30,883, LINE 23,
23 AND IMPERFECT SELF-DEFENSE.
24 "THE INITIAL FOCUS IS ON THE
25 SUBJECTIVE BELIEF OF THE DEFENDANTS AS TO
26 WHETHER THEY ACTUALLY BELIEVE THAT THEY
27 WERE IN IMMINENT DANGER. IMPERFECT
28 SELF-DEFENSE REQUIRES" -- QUOTING FROM IN

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1 RE CHRISTIAN S. AT PAGE 783 -- "IMPERFECT
2 SELF-DEFENSE REQUIRES, WITHOUT EXCEPTION,
3 THAT THE DEFENDANT MUST HAVE AN ACTUAL
4 BELIEF IN THE NEED FOR SELF-DEFENSE."
5 THEN I WENT ON AND SAID:
6 "NEXT, THE FOCUS IS ON THE NATURE
7 OF THAT BELIEF. THE DEFENDANT MUST
8 BELIEVE THAT THE PERCEIVED PERIL
9 PRECIPITATING THE NEED FOR DEADLY FORCE IS
10 IMMINENT. THE DEFENDANT IS NOT PERMITTED
11 TO SET UP HIS OWN DEFINITION OF WHAT IS
12 MEANT BY THE TERM 'IMMINENT'. THAT IS
13 SOMETHING DEFINED BY THE STATE, AND IS
14 DEFINED BY THE CALIFORNIA SUPREME COURT,"
15 AND I GO ON AND QUOTE THE SUPREME COURT.

16 SO IN THOSE DISCUSSIONS I WAS INDICATING
17 THAT THERE WAS BOTH AN OBJECTIVE AND A SUBJECTIVE
18 ELEMENT TO THIS, AND THE DEFENSE POSITION IS THAT
19 THERE'S PURELY A SUBJECTIVE.

20 MS. ABRAMSON: YOUR HONOR, THERE IS NO OBJECTIVE
21 ELEMENT. THE ONLY QUESTION IS DOES THE DEFENDANT
22 EXPRESS A BELIEF IN IMMINENCE.

23 THE COURT: THAT'S THE OBJECTIVE ANALYSIS, IS
24 WHETHER WHAT THE DEFENDANT SAYS IS IMMINENT OBJECTIVELY,
25 MEETS THE TEST OF IMMINENT.

26 MS. TOWERY: WELL, YOUR HONOR, IF I UNDERSTAND
27 WHAT THE COURT IS SAYING --

28 MS. ABRAMSON: IF THAT'S TRUE, THEN THERE IS NO

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1 IMPERFECT SELF-DEFENSE.

2 THE COURT: NO, THAT'S NOT TRUE. THE PEOPLE'S
3 ARGUMENT IS -- AND I AM NOT AT THIS TIME ADDRESSING
4 THEIR POSITION, JUST FOCUSING ON THE OBJECTIVE AND
5 SUBJECTIVE.

6 A DEFENDANT SAYS, "IN MY MIND SOMETHING
7 IS -- THERE IS IMMINENT PERIL RIGHT HERE, AND THIS IS
8 WHAT I BELIEVE IS HAPPENING RIGHT NOW."

9 BUT WHEN THAT IS ARTICULATED, AND HIS
10 VERSION OF THE EVENTS AS HE SEES THEM IS ARTICULATED,
11 THAT "RIGHT NOW" OBJECTIVELY ANALYZED IS NOT IMMINENT.

12 IT'S GOING TO HAPPEN IN THE FUTURE, OR IT'S GOING TO
13 HAPPEN SOMETIME LATER.
14 THERE HAS TO BE AN OBJECTIVE ANALYSIS OF
15 THE STATED BELIEF OF THE DEFENDANT, OTHERWISE, YOU JUST
16 HAVE A SITUATION WHERE A DEFENDANT CAN EXPRESS HIS
17 DEFINITION OF WHAT IS IMMINENT AND JUST USE THE MAGIC
18 WORD: "I THINK IT'S HAPPENING NOW," EVEN THOUGH IT'S
19 GOING TO HAPPEN SOMETIME IN THE FUTURE, OBJECTIVELY, AS
20 ONE WOULD LOOK AT WHAT THE PERSON IS SAYING.

21 AND, THEREFORE, THE DEFENDANT IS SETTING UP
22 HIS OWN DEFINITION OF IMMINENT PERIL. AND, THEREFORE,
23 YOU WOULD NEVER TELL THE JURY WHAT IS THE DEFINITION OF
24 IMMINENT PERIL.

25 MS. ABRAMSON: I THINK THE DEFINITION OF IMMINENT
26 PERIL, YOUR HONOR -- IT DOES NOT MEAN -- IF YOU WANT TO
27 LOOK AT IT THAT WAY, FINE. BUT IT DOES NOT MEAN
28 ACTUALLY HAPPENING, BECAUSE IF IT DID, THEN THERE WOULD

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1 BE NO DISTINCTION.

2 AND MY POSITION IS WHAT MY CLIENT TESTIFIED
3 TO DOES MEET THE DEFINITION OF IMMINENT. ANY SECOND IT
4 WOULD BE UPON HIM. AND HIS BELIEF WAS THAT HIS PARENTS
5 WERE IN THE PROCESS OF ATTACKING HIM. WHETHER HE COULD
6 SEE THEM AT THAT POINT OR NOT ISN'T THE DECIDING FACTOR.

7 THERE IS NO CASE AUTHORITY TO POINT TO A

8 PARTICULAR DECIDING FACTOR. WHEN, IN FACT, IT'S ONE
9 THING TO SAY -- IF YOU WANT TO JUST BRIEFLY GO BACK TO
10 ARIS FOR A MINUTE -- THAT THAT WOMAN KNEW HE WAS ASLEEP;
11 AND THEREFORE, YOU COULD SAY THAT COULD BE A DECIDING
12 FACTOR IN THAT CASE. THE INSTRUCTION WAS GIVEN. SHE
13 KNEW HE WAS SLEEP.

14 MY CLIENT DIDN'T KNOW WHAT THEY WERE DOING.
15 HE ONLY HAD HIS FEAR THAT THEY WOULD BE UPON HIM WITHIN
16 A SECOND.

17 NOW, I DON'T KNOW HOW MUCH MORE IMMINENT IT
18 CAN GET WITHOUT IT ACTUALLY BEING THERE.

19 SO EVEN UNDER THAT ANALYSIS, I THINK THE
20 TESTIMONY SUPPORTS THE NOTION THAT WHAT HE THOUGHT WAS
21 IMMINENT IS WHAT THE LAW THINKS IS IMMINENT ALSO.

22 MS. TOWERY: YOUR HONOR, I DON'T UNDERSTAND THE
23 DISTINCTION, IF THAT IS THE LAW, THAT THERE IS AN
24 OBJECTIVE ANALYSIS OF WHETHER OR NOT -- I THINK WHAT THE
25 COURT IS SAYING -- OF WHETHER OR NOT THE DEFENDANT'S
26 PERCEPTION OF IMMINENCE IS REASONABLE.

27 THE COURT: NO. IT HAS NOTHING TO DO WITH
28 REASONABLE. I NEVER SAID REASONABLE. I AM TALKING

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1 ABOUT WHAT THIS PERSON DESCRIBES AS HIS PERCEPTION OF
2 WHAT IS HAPPENING, WHEN ANALYZING THAT OBJECTIVELY DOES
3 THAT MEET THE DEFINITION OF IMMINENT PERIL.

4 THERE IS A DEFINITION OF IMMINENT PERIL
5 THAT IS STATED BY THE APPELLATE COURTS, BY THE SUPREME
6 COURT, AND THERE WOULD BE NO REASON TO INFORM THE JURY
7 OF THAT DEFINITION IF ALL YOU NEEDED WAS A DEFENDANT TO
8 SAY: "I THOUGHT I WAS IN IMMINENT DANGER, AND THEREFORE
9 IF YOU BELIEVE ME, THAT I ACTUALLY FELT I WAS IN
10 IMMINENT DANGER," THAT'S ALL THAT'S REQUIRED.

11 THERE HAS TO BE AN OBJECTIVE ANALYSIS OF
12 THAT.

13 MS. TOWERY: WELL, I THINK WHERE WE DIFFER, YOUR
14 HONOR, IS OUR POSITION IS THAT THE JURY SHOULD MAKE THAT
15 ANALYSIS.

16 THE COURT: WELL, THAT'S A SEPARATE ISSUE.

17 BUT HOW YOU HAVE EXPRESSED IT, HOW
18 MS. ABRAMSON EXPRESSED IT, YOU HAVE USED THE WORDS
19 "PURELY SUBJECTIVE", AND THAT'S CLEARLY NOT THE LAW. IF
20 IT WAS, YOU WOULD JUST SOLELY HAVE ANY INDIVIDUAL
21 ACCUSED OF A CRIME SAYING: "THIS IS MY DEFINITION OF
22 IMMINENT PERIL, AND THE JURY MUST ACCEPT IT, IF THEY
23 ACCEPT THE FACT THAT I BELIEVED THIS, THAT THIS IS MY
24 BELIEF."

25 AND THAT'S CLEARLY NOT THE LAW. IT'S AN
26 OBJECTIVE STANDARD.

27 MS. ABRAMSON: I AGREE WITH THE COURT ON THAT. I
28 CAN ENVISION SITUATIONS WHERE IT'S VERY OBVIOUS THAT A

1 DEFENDANT'S NOTION THAT "I BELIEVE I WAS IN IMMINENT
2 PERIL OF THE SPACESHIP LANDING TOMORROW AND THE ALIENS
3 COMING OUT AND GETTING ME, AND I THOUGHT I WAS IN
4 IMMINENT PERIL," AND I CAN UNDERSTAND THAT. USING THE
5 WORD ISN'T THE KEY.

6 BUT THE POINT IS TO DECIDE ON A
7 FACT-BY-FACT BASIS WHETHER OR NOT THE DEFENDANT'S
8 DEFINITION MEETS SOME OBJECTIVE DEFINITION OF IMMINENT
9 PERIL IS, IN MY OPINION, A VERY RISKY PROPOSITION.

10 THE COURT: THAT'S FOR THE JURY --

11 MS. ABRAMSON: EXACTLY.

12 THE COURT: -- IF AN INSTRUCTION IS GIVEN.

13 MS. ABRAMSON: IT'S FOR THE JURY TO DECIDE.

14 THE COURT: WE'RE GOING TO GET TO THAT POINT.

15 BUT IF AN INSTRUCTION IS GIVEN, THAT'S FOR
16 THE JURY TO DECIDE, BASED ON A DEFINITION OF IMMINENT
17 DANGER.

18 MS. ABRAMSON: WHICH IS CONTAINED RIGHT NOW IN
19 5.17.

20 THE COURT: I AM NOT SATISFIED WITH THAT, AND I
21 TOLD YOU ABOUT THAT VIEW EARLIER. I AM NOT SATISFIED
22 WITH THAT DEFINITION.

23 MS. ABRAMSON: YOU ARE NOT SATISFIED WITH THE
24 CALJIC DEFINITION?

25 THE COURT: I AM DEFINITELY NOT. I DON'T THINK
26 IT'S ACCURATE.

27 MS. ABRAMSON: IT'S WHAT THE COMMITTEE NOT ONLY
28 CAME UP WITH, BUT REVIEWED RECENTLY.

1 THE COURT: I KNOW THEY DID, AFTER YOU REQUESTED
2 THEY REVIEW IT, BECAUSE THEY WROTE DOWN SOMETHING ELSE
3 THAT TALKED ABOUT A REASONABLE MAN.

4 MS. ABRAMSON: YES. I DIDN'T SUGGEST THAT THE
5 IMMINENCE -- IT HAD NOTHING TO DO WITH THE IMMINENCE
6 DEFINITION. IT HAD TO DO WITH THEM PUTTING IN A
7 REASONABLE MAN STANDARD THAT THEY THOUGHT WAS WRONG, AND
8 THEY TOOK IT OUT.

9 THE COURT: LET'S GET BEYOND THAT, AS TO IF AN
10 INSTRUCTION IS GIVEN, AS TO HOW IMMINENT DANGER IS
11 DEFINED. I'VE HEARD YOUR POSITION.

12 LET ME HEAR THE PEOPLE. THEIR POSITION IS
13 THERE SHOULD BE NO INSTRUCTION ON IMMINENT DANGER OR
14 IMPERFECT SELF-DEFENSE.

15 MR. CONN: I DISAGREE WITH COUNSEL THAT THIS
16 ISSUE WAS RESOLVED IN SOME WAY IN THE FIRST TRIAL WHEN
17 THE COURT DECIDED NOT TO RELY UPON THE IBARRA CASE, AND
18 THAT'S NOT MY UNDERSTANDING. I BELIEVE THAT THE IBARRA
19 CASE DID COME UP IN THE FIRST TRIAL IN A DIFFERENT
20 CONTEXT.

21 THIS ISSUE WAS NEVER RESOLVED IN THE FIRST
22 TRIAL. THE PEOPLE ESSENTIALLY AGREED IN THE FIRST TRIAL
23 THAT THE IMPERFECT SELF-DEFENSE SHOULD BE GIVEN. SO I
24 DON'T THINK THERE HAS BEEN A RULING BY THIS COURT IN THE
25 FIRST TRIAL THAT IBARRA DOES NOT APPLY TO THIS FACTUAL

26 SITUATION.

27 AND ALTHOUGH WE DID HOLD A HEARING IN THIS
28 COURT CONCERNING THE APPLICATION OF THE IMPERFECT

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1 SELF-DEFENSE, THAT WAS IN A DIFFERENT CONTEXT. THAT WAS
2 IN REGARD TO WHETHER OR NOT EXPERT TESTIMONY SHOULD BE
3 PRESENTED IN THIS TRIAL.

4 AND THERE THE PROBLEM WAS, OF COURSE, WE
5 HAD TO WAIT AND SEE EXACTLY WHAT THE DEFENDANT WAS GOING
6 TO SAY IN REGARD TO HIS STATE OF MIND AT THE TIME OF THE
7 CRIME, AND WHAT HIS BELIEF WAS, AND I THINK WE WERE ON
8 SHAKY GROUND AT THAT TIME IN TRYING TO DETERMINE, BEFORE
9 WE HEARD THE TESTIMONY OF THE DEFENDANT, WHETHER OR NOT
10 IMPERFECT SELF-DEFENSE AND EXPERT TESTIMONY IN SUPPORT
11 OF IMPERFECT SELF-DEFENSE COULD BE PRESENTED, BECAUSE SO
12 MUCH WAS DEPENDENT UPON THE PRECISE CHARACTERIZATION OF
13 THE DEFENDANT'S OWN STATE OF MIND, AND WE HAD TO AWAIT
14 HIS TESTIMONY TO MAKE THAT DETERMINATION.

15 THE COURT: YOU'RE CORRECT IN ALL YOU'VE SAID SO
16 FAR, THAT I DIDN'T MAKE -- I MADE NO FINAL DECISION ON
17 THE GIVING OF IMPERFECT SELF-DEFENSE.

18 AS I SAID, THE ONLY PURPOSE FOR DISCUSSING
19 IT BEFORE TRIAL WAS TO HAVE A BASIS FOR DETERMINING
20 WHETHER OR NOT THERE WOULD BE EVIDENCE ADMITTED ON THE
21 THEORY OF MENTAL STATE, AND PSYCHOLOGICAL OR PSYCHIATRIC

22 TESTIMONY OFFERED, AND WE WERE GOING TO GO INTO AN
23 EXTENSIVE HEARING ON THAT SUBJECT.
24 AND BEFORE DOING THAT I FELT IT APPROPRIATE
25 AT LEAST TO ADDRESS THAT, AND ASK THE PARTIES TO ADDRESS
26 THE ISSUE OF WHETHER THIS EVIDENCE WOULD EVEN BE
27 RELEVANT.
28 SO THAT'S THE BASIS OF THOSE DISCUSSIONS.

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1 AND THAT CLEARLY IS WHAT I SAID AT THE TIME I MADE MY
2 OBSERVATIONS ON AUGUST THE 1ST OF LAST YEAR.
3 AND YOU'RE ALSO CORRECT THAT I DID NOT
4 APPLY THE IBARRA CASE TO IMPERFECT SELF-DEFENSE IN THE
5 FIRST TRIAL. THE PROSECUTION REQUESTED IMPERFECT
6 SELF-DEFENSE IN THE FIRST TRIAL, AS WELL AS THE DEFENSE.
7 AND AFTER THE COURT EXCLUDED PERFECT SELF-DEFENSE,
8 BECAUSE OF THE POSITION OF THE PARTIES, THE COURT DID
9 GIVE AN INSTRUCTION ON IMPERFECT SELF-DEFENSE IN THE
10 FIRST TRIAL.
11 MR. CONN: YES. SO NOW WE ARE IN THIS SITUATION
12 WHERE WE ARE FINALLY TURNING TO THE ISSUE ON THE MERITS,
13 AND WE HAVE TO EXAMINE THAT ISSUE IN LIGHT OF THE
14 TESTIMONY OF ERIK MENENDEZ.
15 AND I WOULD SUBMIT THAT NOW THE TESTIMONY
16 OF ERIK MENENDEZ HAS CLEARLY ESTABLISHED THAT THE
17 IMPERFECT SELF-DEFENSE DOES NOT APPLY IN THIS CASE,

18 BECAUSE I THINK THAT OUR POSITION IS EVEN STRONGER THAN
19 THE IBARRA POSITION.

20 IN IBARRA, WHAT WE HAD WAS THE CLAIM OF THE
21 DEFENDANT CONCERNING HIS STATE OF MIND SIMPLY WEIGHED
22 AGAINST, OR BALANCED AGAINST, HIS EXPLANATION OF THE
23 OBJECTIVE CIRCUMSTANCES.

24 AND THE COURT IN IBARRA SAID, ON THE ONE
25 HAND HE IS CLAIMING HE DID NOT INTEND TO KILL, BUT ON
26 THE OTHER HAND, WE HAVE THE OBJECTIVE CIRCUMSTANCES, AS
27 HE DESCRIBES THOSE OBJECTIVE CIRCUMSTANCES, AND THOSE
28 OBJECTIVE CIRCUMSTANCES CLEARLY INDICATE AN INTENT TO

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1 KILL.

2 SO IN LIGHT OF THAT, THERE IS NO NEED TO
3 GIVE THE INSTRUCTION IN REGARD TO INVOLUNTARY
4 MANSLAUGHTER.

5 NOW, THE INTERESTING THING ABOUT IBARRA WAS
6 THAT THE DEFENDANT'S CLAIM WAS CLEAR AND UNAMBIGUOUS.
7 HE SAID IN NO UNCERTAIN TERMS, "I DID NOT INTEND TO
8 KILL".

9 I FEEL THAT WE HAVE A STRONGER POSITION NOW
10 IN THIS CASE, BECAUSE ASIDE FROM THE DEFENDANT'S
11 EXPLANATION OF THE OBJECTIVE CIRCUMSTANCES AS HE
12 PERCEIVED THEM, WHICH IS THAT THE DANGER WAS INSIDE THE
13 HOUSE, HE WAS OUTSIDE HIS HOME BEFORE HE DECIDED TO GO

14 INSIDE AND SHOOT HIS PARENTS TO DEATH.

15 SO THE OBJECTIVE CIRCUMSTANCES, AS HE
16 DESCRIBES THEM, IS A DANGER WHICH IS NOT IN THE
17 PRESENT, BUT WAS ACTUALLY IN THE FUTURE.

18 THAT BRINGS US TO THE IBARRA SITUATION,
19 WHERE HIS CLAIM OF IMPERFECT SELF-DEFENSE IS
20 INCONSISTENT WITH HIS EXPLANATION OF THE OBJECTIVE
21 CIRCUMSTANCES.

22 BUT MR. MENENDEZ GOES BEYOND THE IBARRA
23 SITUATION, BECAUSE HE SPEAKS ABOUT HIS RECOGNITION OF
24 THE DANGER BEING IN THE FUTURE. HE IS NOT MERELY
25 SAYING -- HE IS NOT MERELY DESCRIBING A SITUATION IN
26 WHICH WE CAN OBJECTIVELY DETERMINE THAT THE DANGER WAS
27 IN THE FUTURE, BECAUSE THE PARENTS WERE INSIDE THE
28 HOUSE.

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1 BUT HE DESCRIBES IN HIS OWN MIND -- HE
2 ADMITS ON THE WITNESS STAND THE DANGER WAS IN THE
3 FUTURE, AND THOSE ARE HIS WORDS. HE SAID: "AT THAT
4 POINT IN TIME WHEN MY PARENTS WOULD BE A THREAT TO ME,
5 WOULD BE WHEN THEY CAME OUT OF THE DEN," AND HE SAID
6 THAT POINT IN TIME WAS "STILL IN THE FUTURE," AT PAGE
7 44,944.

8 HE ADMITS THAT HE RECOGNIZED IN HIS MIND AT
9 THE TIME OF THE COMMISSION OF THE CRIME THAT HIS PARENTS

10 COULD NOT SHOOT THROUGH WALLS; THAT THEY WERE NOT
11 THEREFORE ABLE TO GET TO HIM AT THAT PARTICULAR POINT IN
12 TIME BY SHOOTING THROUGH WALLS.

13 HE ADMITTED THAT HE DID NOT SEE ANY GUNS
14 THAT DAY. HE ADMITTED THAT HE DID NOT RECEIVE ANY
15 SPECIFIC THREATS FROM HIS PARENTS THAT DAY.

16 SO HE DESCRIBES OBJECTIVELY A SET OF
17 CIRCUMSTANCES IN WHICH THE DANGER IS SPECULATIVE, AT
18 BEST, NOT A REAL AND PRESENT DANGER THAT IS IMMEDIATELY
19 BEFORE HIM.

20 BUT THE KEY IS THAT HE SAID THAT THE DANGER
21 WAS INSIDE THE HOUSE, THE DANGER WAS IN THE FUTURE, AND
22 THE DANGER WOULD NOT BE ABLE TO HARM HIM UP UNTIL SUCH
23 TIME AS THE PARENTS CAME OUT OF THE HOUSE AND HIS LIFE
24 WOULD ACTUALLY BE THREATENED.

25 SO HERE, BY THE DEFENDANT'S OWN ADMISSION,
26 HE IS ACKNOWLEDGING THAT THERE WAS NO NECESSITY TO KILL
27 AT THAT POINT IN TIME, AND THAT THE IMMINENT DANGER AS
28 HE PERCEIVED IT WAS IN THE FUTURE.

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1 SO I WOULD SUBMIT THAT BY HIS OWN
2 CONCESSION THE IMPERFECT SELF-DEFENSE DOES NOT APPLY.

3 AND I THINK THAT COUNSEL, MS. ABRAMSON,
4 STARTED TO CONCEDE THAT SHE CAN ENVISION SITUATIONS IN
5 WHICH THE IMPERFECT SELF-DEFENSE WOULD NOT APPLY. SHE

6 MADE THAT CONCESSION, AND THEN SHE WENT ON TO GIVE A
7 LUDICROUS EXAMPLE OF MARTIANS COMING FROM OUTER SPACE.

8 WELL, I THINK THAT SHE IS CORRECT IN HER
9 CONCESSION THAT IT IS EASY TO CONCEIVE SITUATIONS IN
10 WHICH THE DEFENDANT FAILS TO DESCRIBE AN IMMINENT
11 DANGER, AND THAT BASED UPON THAT FAILURE, THE
12 INSTRUCTION SHOULD NOT BE GIVEN. SHE CONCEDES THAT.

13 WE'RE JUST HAGGLING NOW OVER WHAT ARE THOSE
14 CIRCUMSTANCES. IF THE DEFENDANT SAYS THAT: "MY
15 ASSAILANT WAS FLYING IN FROM NEW YORK, AND IN MY MIND I
16 REGARDED THAT AS IMMINENT, SO I GOT ON THE PLANE AND
17 WENT TO NEW YORK AND SHOT HIM BEFORE HE COULD GET ON THE
18 PLANE," CLEARLY THAT IS NOT A SITUATION IN WHICH
19 IMPERFECT SELF-DEFENSE SHOULD APPLY.

20 NOR DOES IT APPLY WHERE THE DEFENDANT SAYS:
21 "WELL, MY ASSAILANT WAS DOWN THE BLOCK, AND I FELT HE
22 WAS COMING TOWARD ME, AND HE'D BE HERE IN A FEW MINUTES,
23 AND I DECIDED INSTEAD TO USE A HIGH-POWERED RIFLE AND
24 SHOOT HIM AT A DISTANCE".

25 ONCE AGAIN, THERE IS NO NEED, THERE IS NO
26 NECESSITY. AND BY HIS OWN CONCESSION AND BY HIS OWN
27 DESCRIPTION OF THE CIRCUMSTANCES, THERE IS NO IMPERFECT
28 SELF-DEFENSE.

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1 SO I THINK THAT WHAT WE HAVE HERE IS AN

2 IDENTICAL SITUATION, BY HIS OWN DESCRIPTION, OF THE
3 OBJECTIVE CIRCUMSTANCES. THERE IS NO OBJECTIVE DANGER,
4 AND HIS STATE OF MIND, AS HE DESCRIBED IT ON THE WITNESS
5 STAND, THAT THE DANGER WAS IN THE FUTURE, PRECLUDES HIM
6 FROM RECEIVING AN IMPERFECT SELF-DEFENSE INSTRUCTION IN
7 THIS CASE UNDER PEOPLE VERSUS IBARRA.

8 MS. ABRAMSON: YOUR HONOR, I WOULD LIKE TO
9 ADDRESS THAT.

10 I THINK THAT WE -- YOU KNOW, IT WOULD BE
11 NICE IF WE COULD ALL BE RESPONSIBLE AND PROFESSIONAL AT
12 SO IMPORTANT A JUNCTION AS JURY INSTRUCTIONS, WHICH IS
13 THE ONE WAY IN WHICH, I AM SURE, WE ARE ALL FAMILIAR
14 WITH THE CASE AT THIS TIME MORE THAN ANY OTHER.

15 IT JUST DOESN'T MAKE SENSE TO MISSTATE THE
16 EVIDENCE IN ORDER TO LURE THE COURT INTO GIVING AN
17 INSTRUCTION WHICH COULD RESULT IN REVERSAL. THAT'S
18 EXACTLY WHAT COUNSEL JUST DID.

19 HE ASKED A SERIES OF QUESTIONS OF MY CLIENT
20 FROM HIS CURRENT PERSPECTIVE, FROM ERIK MENENDEZ'
21 CURRENT UNDERSTANDING AND PERSPECTIVE, "LOOKING BACK,
22 WASN'T THE DANGER IN THE FUTURE"; AND THEN HE TRIES TO
23 MISLEAD THE COURT INTO THINKING THAT MY CLIENT TESTIFIED
24 THAT THAT WAS MY CLIENT'S STATE OF MIND AT THE TIME.

25 THAT WAS NOT HIS STATE OF MIND AT THE TIME.
26 HIS STATE OF MIND AT THE TIME WAS THAT ANY SECOND, ANY
27 MOMENT, BEFORE HE COULD EVEN PREPARE HIMSELF TO DEFEND,
28 IT WAS HIS BELIEF THAT HIS PARENTS WOULD BE UPON HIM AND

1 HE WOULD FREEZE IN TERROR.

2 BUT WHAT THE PROSECUTION IS COMPLETELY
3 OVERLOOKING IN THEIR ANALYSIS IS THAT HE DIDN'T SHOOT
4 THEM WHEN HE WAS OUTSIDE OF THE CAR. HE DIDN'T SHOOT
5 THEM THROUGH THE DOORS OF THE DEN. HE DIDN'T FIRE THE
6 GUN UNTIL HE HAD -- AFTER HE HAD ENTERED THE DEN AND SAW
7 HIS FATHER IN WHAT HE BELIEVED WAS COMING TOWARDS HIM,
8 AND ONLY THEN -- HE DIDN'T FIRE DOWN THE BLOCK WITH A
9 HIGH-POWERED RIFLE. HE DIDN'T GET ON AN AIRPLANE AND GO
10 SHOOT SOMEBODY. ONLY AFTER HE VERIFIED THAT THEY WERE
11 THERE, IT APPEARED TO HIM THEY WERE STANDING, IT
12 APPEARED TO HIM HIS FATHER WAS COMING AT HIM, THAT'S
13 WHEN HE FIRED A SHOT.

14 SO THIS ANALYSIS ABOUT THE FUTURE, WHICH,
15 OVER REPEATED OBJECTION, MR. CONN ELICITED MY CLIENT'S
16 CURRENT REFLECTION BACK AS TO WHETHER OR NOT THERE WAS
17 AN OBJECTIVE IMMINENCE, IS ENTIRELY IRRELEVANT FOR THESE
18 PURPOSES.

19 THE ACTUAL FACTS, AS THEY APPEARED, ARE HE
20 DID NOT FIRE THROUGH A WINDOW. HE DID NOT FIRE THROUGH
21 A CLOSED DOOR. HE DID NOT SET THE HOUSE ON FIRE. HE
22 DID NOT DROP A BOMB. HE WENT IN THERE, SAW WHAT THE
23 SITUATION WAS, AND ONLY AT THAT POINT DID HE FIRE.

24 I THINK THIS IS A SITUATION WHERE THESE
25 ISSUES ARE BEST LEFT TO THE JURY. I AM NOT SURE WHAT
26 THE COURT HAS IN MIND, IF WE EVER GET THERE, CONCERNING

27 HOW IT COULD POSSIBLY MAKE THE DEFINITION OF IMMINENCE,
28 5.17, ANY TOUGHER THAN IT IS.

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1 THE COURT: I HAVE SOMETHING TO PROPOSE.

2 MS. ABRAMSON: I AM NOT SHOCKED. I AM NOT SURE
3 WHAT IT IS, BUT IN ANY EVENT --

4 THE COURT: ALL RIGHT.

5 MS. ABRAMSON: I THINK THE FACTUAL ANALYSIS THE
6 PEOPLE ARE GIVING IS FALSE.

7 THE COURT: ALL RIGHT.

8 THE ISSUE -- AND I AM NOT GOING TO RESOLVE
9 IT AT THIS MOMENT. I WILL THIS AFTERNOON, BECAUSE WE
10 HAVE TO GET ALL THESE THINGS RESOLVED THIS AFTERNOON.

11 THE ISSUE, AS ARTICULATED BY THE PARTIES,
12 IS WHETHER OR NOT THERE IS SUBSTANTIAL EVIDENCE; THAT
13 IS, EVIDENCE SUFFICIENT FOR A JURY TO CONSIDER, OF AN
14 ACTUAL BELIEF BY THE DEFENDANT OF IMMINENT PERIL. AND
15 IF SO, THE COURT IS OBLIGATED TO GIVE AN INSTRUCTION.
16 IF NOT, THEN THE COURT IS NOT OBLIGATED TO GIVE AN
17 INSTRUCTION.

18 THAT'S THE STANDARD RULE IN DECIDING
19 WHETHER INSTRUCTIONS SHOULD BE GIVEN, WHETHER OR NOT
20 THERE HAS BEEN SUFFICIENT EVIDENCE PRESENTED TO GO TO
21 THE JURY, OR AS A MATTER OF LAW THE COURT SHOULD NOT
22 INSTRUCT, BECAUSE THERE HAS BEEN INSUFFICIENT EVIDENCE.

23 WHAT I WILL DO IS PROVIDE TO THE PARTIES A
24 DRAFT, WHICH WAS PREPARED BY ME QUITE AWHILE AGO, BEFORE
25 WE GOT TO THIS STAGE, AND I DID INDICATE TO COUNSEL,
26 WHETHER YOU REMEMBER IT OR NOT, THAT I WASN'T SATISFIED
27 WITH THE DEFINITION OF IMMINENT DANGER IN 5.17. AND
28 THIS IS THE PRODUCT OF THAT DISSATISFACTION.

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1 WHETHER OR NOT I AM GOING TO GIVE THIS
2 INSTRUCTION, OR GIVE AN INSTRUCTION ON UNREASONABLE
3 SELF-DEFENSE, WILL BE RESOLVED THIS AFTERNOON. BUT I
4 WANTED TO GIVE THIS TO YOU, WHICH CONTAINS MY DEFINITION
5 OF IMMINENT PERIL, AS I SEE IT, IN THE CONTEXT OF A CASE
6 SUCH AS THIS, WHERE THE ISSUE IS JUST THAT AS FOCUSED BY
7 THE PARTIES, WHETHER OR NOT WHATEVER THE DEFENDANT SAID
8 OBJECTIVELY CONSTITUTES IMMINENT PERIL. THE PEOPLE
9 ARGUE THAT IT DOES NOT. AND USING THIS DEFINITION,
10 BECAUSE IT DOES NOT, THE INSTRUCTION SHOULDN'T BE GIVEN
11 AT ALL.

12 THE DEFENSE ARGUES THAT THERE IS SUFFICIENT
13 EVIDENCE FOR THE JURY TO RESOLVE THE ISSUE RATHER THAN
14 FOR THE COURT.

15 THE PURPOSE OF INSTRUCTING THE JURY AND
16 DEFINING IMMINENT PERIL IS, IF THE INSTRUCTION IS GIVEN,
17 IMPERFECT SELF-DEFENSE, THEY HAVE A DEFINITION BY WHICH
18 TO WORK.

19 THE DEFENSE IN THE FIRST TRIAL OBJECTED TO
20 ANY SUCH DEFINITION BEING GIVEN IN THE FIRST TRIAL, AND
21 ONE WAS NOT GIVEN. IN HINDSIGHT, IT SHOULD HAVE BEEN
22 GIVEN. WHETHER IT WOULD HAVE MADE ANY DIFFERENCE, I
23 HAVE NO WAY OF KNOWING.
24 BUT SUBSEQUENT TO THE FIRST TRIAL, THE
25 CALIFORNIA SUPREME COURT ADOPTED THE LANGUAGE OF PEOPLE
26 VERSUS ARIS IN DEFINING IMMINENT PERIL, AND THAT IS THE
27 LANGUAGE I HAVE ADOPTED AND I HAVE MODIFIED 5.17 TO
28 INCORPORATE THE OBJECTIVE DEFINITION OF IMMINENT DANGER,

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1 WHICH IS NOT CONTAINED IN THE 5.17. 5.17 IS IN THE
2 DISJUNCTIVE. IT SAYS, BASICALLY, IMMINENT PERIL IS ONE
3 THAT -- I DON'T RECALL THE EXACT LANGUAGE -- ONE WHICH
4 MUST BE DEALT WITH.

5 MS. ABRAMSON: AND MUST BE IMMEDIATELY DEALT
6 WITH.

7 THE COURT: OR THE DEFENDANT MUST SO BELIEVE.

8 MS. ABRAMSON: IT SAYS "AND MUST SO APPEAR TO BE
9 PRESENT, APPARENT AND IMMEDIATELY DEALT WITH AT THE TIME
10 BY THE SLAYER". IT SAYS "AND MUST SO APPEAR."

11 THE COURT: YES, MUST SO APPEAR.

12 MS. ABRAMSON: APPEAR APPARENT, PRESENT, APPARENT
13 AND IMMEDIATELY DEALT WITH.

14 THE COURT: UNFORTUNATELY, WITH THAT DEFINITION

15 WHAT IT MEANS IS IF IT APPEARS TO THE DEFENDANT, AND
16 THAT'S HOW HE ARTICULATES IT, THAT'S GOOD ENOUGH.
17 IT HAS TO BE AN OBJECTIVE STANDARD. IT
18 CAN'T BE SUBJECTIVE. THE PURPOSE OF THAT PARAGRAPH IS
19 JUST TO DEFINE WHAT IS IMMINENT DANGER.

20 MS. ABRAMSON: JUDGE, THE QUOTE FROM ARIS IS THE
21 PERIL MUST APPEAR TO THE DEFENDANT AS IMMEDIATE AND
22 PRESENT, AND NOT PROSPECTIVE, FOR THE FUTURE.

23 THE COURT: I AM GOING TO GIVE YOU MY PROPOSAL.
24 IT DOESN'T TRACK THE LANGUAGE OF ARIS PRECISELY, BUT MY
25 VIEW IS THAT THE PURPOSE OF THAT PARAGRAPH IN 5.17, IF
26 THE INSTRUCTION IS GIVEN AT ALL, IS TO DEFINE IMMINENT
27 DANGER, OR IMMINENT PERIL, AND THAT DEFINITION IS THE
28 SAME WHETHER IT'S PERFECT SELF-DEFENSE OR IMPERFECT

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1 SELF-DEFENSE. IT DOESN'T CHANGE BECAUSE OF THE NATURE
2 OF THE DEFENSE. IT'S PRECISELY THE SAME.

3 SO I WILL HAND OUT FOUR COPIES -- OR THREE
4 COPIES RATHER. WE HAVE THREE SIDES HERE.

5 MS. ABRAMSON: YOUR HONOR, I DON'T UNDERSTAND WHY
6 WE'RE BOTHERING WITH THIS. THE COURT SURELY KNOWS IF
7 IT'S GOING TO GIVE THIS INSTRUCTION OR NOT.

8 THE COURT: BECAUSE I WANT TO GIVE COUNSEL A
9 CHANCE TO REVIEW THIS.

10 MS. ABRAMSON: FINE, BUT ONLY IF YOU'RE GOING TO

11 GIVE IT DOES IT MATTER.

12 THE COURT: IF YOU DON'T WANT TO LOOK AT IT,
13 DON'T LOOK AT IT. THAT'S UP TO YOU. BUT YOUR
14 OPPORTUNITY IS NOW, NOT IN THE FUTURE. IT'S IMMINENT.

15 ALL RIGHT. LET'S GO TO THE DISCUSSION OF
16 HEAT OF PASSION.

17 BOTH SIDES HAVE FILED BRIEFS ON THAT
18 SUBJECT.

19 ANYTHING FURTHER THAT EITHER SIDE WANTS TO
20 ADD TO THOSE?

21 MS. TOWERY: ARE THERE ANY ISSUES THAT THE COURT
22 WOULD LIKE ADDRESSED?

23 THE COURT: NO. I JUST WANT TO SEE IF YOU WANT
24 TO SUPPLEMENT ANYTHING.

25 MS. ABRAMSON: I JUST WANTED TO HIGHLIGHT ONE
26 POINT.

27 THE COURT: THERE IS AN ISSUE OF PROVOCATION.
28 THE PEOPLE RAISE THE ISSUE OF, NUMBER ONE, THERE ARE TWO

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1 DEFENDANTS AND TWO VICTIMS, AND THE FOCUS HAS TO BE ON
2 EACH DEFENDANT IN RELATIONSHIP TO EACH VICTIM AS TO
3 WHETHER OR NOT THERE IS ADEQUATE PROVOCATION LEGALLY FOR
4 AN INSTRUCTION TO BE GIVEN AS TO EACH DEFENDANT, AS TO
5 EACH VICTIM.

6 SO I KNOW YOU HAVE BRIEFED THAT, AND YOU

7 HAVE TALKED ABOUT IT.

8 IS THERE ANYTHING FURTHER YOU WANTED TO

9 ADD?

10 MR. GESSLER: NO, YOUR HONOR, EXCEPT THAT AS TO
11 EACH VICTIM, BECAUSE PARTICULARLY PER BORCHERS, THE
12 THURSDAY EVENTS -- ALL THE EVENTS THAT WEEK, BUT MOST
13 PARTICULARLY THE THURSDAY EVENTS, AS WELL AS THE SUNDAY
14 NIGHT EVENT, ARE IMPORTANT CIRCUMSTANCIAL EVIDENCE AS TO
15 THE HEAT OF PASSION EVIDENCE THAT OCCURRED AT 10:00
16 O'CLOCK ON SUNDAY NIGHT.

17 THEREFORE, PART OF THE CIRCUMSTANCIAL
18 EVIDENCE CONCERNING MRS. MENENDEZ IS HER TRIP UP THE
19 STAIRS ON THURSDAY NIGHT, HER CONFRONTATION WITH ERIK
20 AND LYLE, SAYING "NOBODY HELPED ME," WHEN IT WAS MADE
21 CLEAR THAT SHE KNEW ABOUT THE ONGOING MOLESTATIONS.

22 THIS THEN SO CONCERNED LYLE AND ERIK
23 MENENDEZ THAT NIGHT TO WHERE THEY TALKED ABOUT IT,
24 LOCKED THE DOOR, LOOKED OUT FOR THE FATHER.

25 THIS IS THEN MAGNIFIED ON SUNDAY NIGHT WHEN
26 THERE IS THE HEATED ARGUMENT BETWEEN LYLE MENENDEZ AND
27 JOSE MENENDEZ AT THE FOOT OF THE STAIRS, WHEN THE
28 CONVERSATION RELATES TO, "YOU'RE NOT GOING TO TOUCH ERIK

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1 AGAIN," AND MR. MENENDEZ SAYING, "HE'S NOT YOUR BROTHER,
2 HE'S MY SON."

3 THIS ARGUMENT THEN -- THIS PRECEDED, OF
4 COURSE, LYLE MENENDEZ RUNNING UP THE STAIRS. BUT IT'S
5 ALSO AT THAT TIME WHEN HE TURNED TO HIS MOTHER AND SAID,
6 "ARE YOU GOING TO LET THIS HAPPEN?"

7 AND SHE SAID, "YOU RUINED THIS FAMILY."

8 NOW, THERE IS PROVOCATION THERE, BOTH ON
9 THURSDAY AND SUNDAY REGARDING BOTH JOSE MENENDEZ AND
10 MARY MENENDEZ IN THIS PARTICULAR MATTER AS TO LYLE
11 MENENDEZ' CONCERN. AND I WOULD LIKE THE COURT TO
12 CONSIDER ALL OF THE CIRCUMSTANCIAL EVIDENCE, MOST
13 PARTICULARLY OF THAT WEEK.

14 THERE IS OTHER CIRCUMSTANCIAL EVIDENCE
15 THROUGHOUT THE TRIAL AS TO THE LIFELONG RELATIONSHIP
16 BETWEEN MRS. MENENDEZ AND LYLE MENENDEZ, INCLUDING THE
17 TESTIMONY GIVEN BY ALAN ANDERSEN, WHEN MRS. MENENDEZ LET
18 LYLE MENENDEZ TAKE A WHIPPING WITH THE BELT FOR AN EVENT
19 THAT SHE KNEW ALAN ANDERSEN WAS RESPONSIBLE FOR, AND
20 CUTTING THE FLOWERS, AND THAT LYLE MENENDEZ WAS NOT
21 RESPONSIBLE FOR.

22 THERE WERE OTHER INCIDENTS THROUGHOUT THE
23 LENGTHY TRIAL CONCERNING WHAT MRS. MENENDEZ WAS LIKE IN
24 RELATION TO LYLE MENENDEZ, CULMINATING IN THE LAST WEEK,
25 AND I THINK THAT'S WHAT THE BORCHERS DOCTRINE IS ALL
26 ABOUT.

27 SO I WANT THE COURT TO CONSIDER ALL OF THAT
28 EVIDENCE IN DETERMINING THE PROVOCATION.

1 THE COURT: OKAY. ANYTHING ON HEAT OF PASSION?

2 MS. ABRAMSON: WELL, THE ONLY THING I WAS GOING
3 TO SAY, YOUR HONOR, WASN'T SO MUCH ON THAT. I THINK THE
4 PROVOCATION TO MY CLIENT IS PRETTY OBVIOUS WHEN SOMEONE
5 IS SENDING HIM TO HIS ROOM, AND HIS WHOLE FAMILY HAS
6 BEEN DISCUSSING HIS MOLESTATION, AND HIS PARENTS ARE
7 BELLIGERANT ABOUT IT, AND HIS FATHER IS INSISTENT ABOUT
8 HE HAS A RIGHT TO DO IT, AND HIS MOTHER OBVIOUSLY
9 AGREES.

10 BUT THE COURT AT ONE TIME EXPRESSED SOME
11 NOTION THAT A HEAT OF PASSION DEFENSE WOULDN'T BE
12 AVAILABLE TO MY CLIENT BECAUSE I HAVE STYLED HIM AS AN
13 UNREASONABLE PERSON BECAUSE OF HIS MENTAL DISEASE OR
14 DISORDER, AND IF THE COURT IS STILL THINKING ALONG THOSE
15 LINES, I JUST HAVE A VERY BRIEF ARGUMENT TO MAKE AND IT
16 IS AS FOLLOWS:

17 THAT IT WOULD BE A FAIRLY LUDICROUS CONCEPT
18 IN THE LAW THAT SOMEONE WHO HAS BEEN VICTIMIZED BY
19 ANOTHER PERSON, AND BEEN PLACED IN THIS STATE OF HAVING
20 A MENTAL DISORDER, SUCH AS MY CLIENT SUFFERS FROM, WOULD
21 HAVE LESS RIGHT TO AVAIL HIMSELF OF A PROVOCATION THEORY
22 THAN SOMEONE WHO HAD NOT BEEN PLACED IN THAT CONDITION
23 BY THE DECEDENTS.

24 TO PUT IT MOST SIMPLY, IT IS OUR POSITION
25 THAT THE PROVOCATION HERE WOULD HAVE AROUSED A
26 REASONABLE PERSON; THEREFORE, IT'S IRRELEVANT FOR THE
27 PURPOSE OF PROVOCATION THEORY WHETHER ONE CONSIDERS MY

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1 GIVEN A HISTORY OF PROVOCATION, WHICH WE
2 ARE ENTITLED TO REPLY UPON, A LONG HISTORY, AS WELL AS A
3 SHORTER HISTORY OF BOTH THE WEEK BEFORE AND THE MONTHS
4 BEFORE WHEN SEXUAL ASSAULTS WERE STILL GOING ON, GIVEN
5 THAT HISTORY OF PROVOCATION, ANYONE THREATENED WITH A
6 SEXUAL ASSAULT AND THE FACT THAT IN THIS FAMILY THERE
7 WAS AN EUPHEMISM FOR "I AM ABOUT TO RAPE YOU," WHICH WAS
8 "GO TO YOUR ROOM," DOESN'T NEGATE THAT, SO LONG AS THE
9 TERMS ARE UNDERSTOOD, AND A REASONABLE PERSON IN THE
10 SAME SITUATION, WITH THAT SAME PROVOCATION, WOULD HAVE
11 UNDERSTOOD WHAT THOSE WORDS MEANT.

12 SO LONG AS THE PROVOCATION IS ADEQUATE FOR
13 A REASONABLE PERSON, IT CANNOT BE LESS THAN ADEQUATE FOR
14 AN UNREASONABLE ONE, AND THAT IS MY POINT.

15 I DON'T THINK THERE CAN BE ANY QUARREL,
16 GIVEN THE CASE AUTHORITY AND WHAT IS SUFFICIENT
17 PROVOCATION, THAT IT CAN BE SIMPLY VERBAL, ALTHOUGH IN
18 THIS CASE THE HISTORY OF PROVOCATION IS MORE THAN THAT;
19 THAT IT CAN BE A RACIAL SLUR HAS BEEN HELD TO BE
20 SUFFICIENT PROVOCATION.

21 I DON'T THINK THERE IS ANY QUESTION THAT
22 THREATENING SOMEONE BELLIGERANTLY, ASSERTING YOUR
23 RIGHT -- AND FORGET ABOUT THREATS -- BELLIGERANTLY

24 ASSERTING YOUR RIGHT TO HAVE SEX WITH YOUR SON, I SHOULD
25 THINK IS SUFFICIENT PROVOCATION FOR ANYBODY, REASONABLE
26 OR UNREASONABLE.

27 MY CLIENT SHOULD NOT SUFFER BECAUSE HE WAS
28 VICTIMIZED BY THE DECEDENTS, AND HAD BY THEN CREATED AN

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1 ANXIETY DISORDER THAT MADE HIM VERY REACTIVE; WHEREAS, A
2 PERSON WHO WAS NOT SO VICTIMIZED COULD AVAIL HIMSELF OF
3 A PROVOCATION THEORY.

4 I DON'T THINK THAT THERE IS ANY QUESTION
5 THAT THERE IS SUFFICIENT PROVOCATION, AND THAT IT IS
6 PROVOCATION OF A KIND THAT WOULD RESULT IN AN ORDINARILY
7 REASONABLE PERSON HAVING HIS PASSIONS INFLAMED.

8 NOW, MAYBE THE EMOTION OF PASSION THAT AN
9 ORDINARILY NORMAL PERSON MIGHT HAVE HAD WOULD HAVE BEEN
10 DIFFERENT THAN THAT WHICH MY CLIENT HAD. AN ORDINARY,
11 NORMAL PERSON THREATENED WITH SEXUAL ASSAULT MIGHT GET
12 ANGRY, MIGHT BE ENRAGED, MIGHT BE FILLED WITH HATE, AND
13 YET THE LAW ALLOWS THAT.

14 MY CLIENT, BECAUSE OF HIS HISTORY WITH
15 THESE PEOPLE AND THE FACT THAT HE NEEDED TO SUPPRESS
16 ANGER HIS ENTIRE LIFE, REACTED WITH TERROR. THE LAW
17 DOESN'T DISTINGUISH BETWEEN ONE OVERWHELMING EMOTION
18 THAT CLOUDS REASON AND INTERFERENCE WITH THE ABILITY OF
19 REFLECTIVE THOUGHT AND DELIBERATION.

20 SO IT DOESN'T MATTER THAT HIS REACTION,
21 BECAUSE OF HOW HE HAD BEEN TRAINED BY THESE PEOPLE, WAS
22 FEAR RATHER THAN HATE. INDEED, IT WOULD BE HARD TO
23 UNDERSTAND A LAW THAT SAYS HATERS GET MANSLAUGHTER,
24 TERRIFIED VICTIMS GET MURDER.
25 AND SO I ONLY WANTED TO -- I THINK,
26 ACTUALLY, THE POINT IS MADE IN THE BRIEF THAT WE FILED.
27 BUT I JUST WANTED TO MAKE IT CLEAR THAT TO DISTINGUISH
28 SOMEONE WITH A MENTAL DISORDER FROM SOMEONE WHO DOESN'T

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1 HAVE ONE, AND DEPRIVE HIM OF A DEFENSE, WHEN A
2 REASONABLE PERSON WOULD HAVE BEEN JUST AS AROUSED, I
3 THINK, WOULD REALLY BE INAPPROPRIATE.
4 THE COURT: AND THE PEOPLE'S POSITION?
5 MR. CONN: YES.
6 AS WE INDICATED IN OUR BRIEF, I THINK THAT
7 THERE IS A HUGE DISTINCTION TO BE DRAWN BETWEEN KITTY
8 AND JOSE MENENDEZ IN THIS REGARD: THAT THERE WAS
9 ABSOLUTELY NO PROVOCATION FROM KITTY MENENDEZ THAT WOULD
10 HAVE WARRANTED A PERSON TO RESPOND IN A PASSIONATE
11 STATE.
12 KITTY MENENDEZ, ACCORDING TO THE TESTIMONY
13 OF ERIK MENENDEZ HIMSELF, SIMPLY TURNED AND WENT INSIDE
14 THE DEN. THERE WAS NO THREAT FROM HER. THERE WAS NO
15 INDICATION ON HER PART THAT SHE WAS GOING TO DO ANYTHING

16 TO HIM, OR PARTICIPATE IN ANY WAY TO THIS ALLEGED THREAT
17 FROM HIS FATHER, AND I DON'T THINK THAT HE CAN NOW SAY
18 THAT SIMPLY BECAUSE SHE WAS THERE, AND WE REGARDED HER
19 AS SOMEONE ASSOCIATED WITH MY FATHER IN SOME WAY, THAT
20 THEREFORE I ALSO HAD A HEAT OF PASSION DIRECTED AGAINST
21 MY MOTHER.

22 I THINK THAT THERE IS ABSOLUTELY NO BASIS
23 FOR EITHER DEFENDANT IN THIS CASE TO RECEIVE A HEAT OF
24 PASSION INSTRUCTION AS IT RELATES TO KITTY MENENDEZ.

25 BUT TURNING TO JOSE MENENDEZ, I THINK THAT,
26 ONCE AGAIN, THE HEAT OF PASSION INSTRUCTION SHOULD NOT
27 APPLY. THE PROVOCATION WAS NOT DEFINITE ENOUGH. THERE
28 WAS NO INDICATION ON THE PART OF JOSE MENENDEZ THAT HE

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1 WAS GOING TO ASSAULT HIS SON.

2 THE DEFENDANT SEEKS TO RELY UPON THE
3 POSSIBILITY THAT PERHAPS HIS FATHER WAS GOING TO ASSAULT
4 HIM. MORE IMPORTANTLY, THE DEFENDANT, AFTER GOING TO
5 HIS ROOM AND GETTING HIS GUN, WENT OUTSIDE THE HOME. HE
6 WAS OUTSIDE THE HOME, KNOWING THAT ALL OF THESE ASSAULTS
7 ALWAYS OCCURRED INSIDE THE HOME, IN HIS BEDROOM. SO HE
8 HAD NO REASON TO BELIEVE THAT HIS FATHER WAS GOING TO
9 COME OUT RUNNING FROM THE HOUSE AND ASSAULT HIM IN THE
10 FRONT OF THE HOUSE.

11 I THINK THAT THERE IS NO BASIS UPON WHICH

12 HE CAN ARGUE THAT HE WAS TRULY ACTING ON RELIANCE UPON A
13 FEAR OF SEXUAL ASSAULT, AND I THINK EVEN IN HIS OWN
14 TESTIMONY HE PRECLUDES THAT POSSIBILITY BY INDICATING IN
15 HIS OWN TESTIMONY THAT HE WAS AFRAID.

16 MR. LEVIN ASKED HIM, "WHAT WERE YOU AFRAID
17 OF?"

18 "I WAS AFRAID OF DYING."

19 "WHO WERE YOU AFRAID WAS GOING TO KILL
20 YOU?"

21 "ANSWER: MY MOM AND MY DAD."

22 SO I THINK THAT HE MADE IT CLEAR THOUGHTOUT
23 HIS TESTIMONY THAT WHAT HE WAS RESPONDING TO AT THAT
24 POINT WAS THIS ALLEGED FEAR OF DEATH FROM HIS PARENTS.

25 SO I THINK THAT HE ELIMINATES THAT THEORY
26 AND CANNOT NOW RELY UPON THAT THEORY.

27 AND AS TO LYLE MENENDEZ, ONCE AGAIN, WE
28 ARGUE THAT HEAT OF PASSION CANNOT BE GIVEN AS TO HIM

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1 INsofar AS KITTY MENENDEZ IS CONCERNED, FOR THE SAME
2 REASON IT DOESN'T APPLY TO ERIK MENENDEZ.

3 BUT AS TO LYLE MENENDEZ AND HIS KILLING OF
4 JOSE MENENDEZ, IT SHOULD NOT BE GIVEN, BECAUSE HE MADE
5 IT VERY CLEAR THROUGH THE TESTIMONY OF ERIK MENENDEZ,
6 WHICH HE SEEKS TO RELY UPON WHEN IT HELPS HIS POSITION.
7 BUT WHEN HE FINDS SOMETHING IN THE TESTIMONY OF ERIK

8 MENENDEZ THAT HE DISAGREES WITH, HE WANTS THE COURT TO
9 DISREGARD THAT.

10 HE WOULD LIKE THIS COURT TO PREMISE A HEAT
11 OF PASSION INSTRUCTION BE GIVEN TO HIM BASED UPON THE
12 TESTIMONY OF ERIK MENENDEZ, AND YET HE CONCEDES THAT
13 ERIK MENENDEZ TESTIFIED THAT LYLE MENENDEZ, WHEN HE MET
14 HIM AT THE TOP OF THE STAIRS, TOLD HIM NOT TO WORRY
15 ABOUT THE MOLESTATION AFTER ERIK MENENDEZ TOLD HIM: "I
16 CAN'T LET IT HAPPEN. I CAN'T LET HIM COME INTO MY
17 ROOM."

18 HE SAID LYLE MENENDEZ TOLD ME: "DON'T
19 WORRY ABOUT THAT NOW. IT'S HAPPENING NOW. THEY WERE
20 WAITING FOR ME TO GET HOME. IT'S HAPPENING NOW."

21 SO IT'S VERY CLEAR THAT LYLE MENENDEZ WAS
22 NOT MOTIVATED BY THIS THREAT OF ASSAULT. LYLE MENENDEZ
23 WAS ONLY MOTIVATED BY THIS SUPPOSED FEAR OF DEATH.

24 THERE IS INSUFFICIENT OBJECTIVE
25 CIRCUMSTANCES TO WARRANT A TRUE SELF-DEFENSE
26 INSTRUCTION, AND I WOULD SUBMIT THERE IS INSUFFICIENT
27 OBJECTIVE CIRCUMSTANCES TO WARRANT A HEAT OF PASSION
28 INSTRUCTION, BECAUSE THE ORDINARILY REASONABLE MAN WOULD

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1 NOT SEE ANY THREAT OF DEATH UNDER THESE CIRCUMSTANCES.

2 SO I WOULD ASK THAT THE INSTRUCTION NOT BE
3 GIVEN AS TO EITHER DEFENDANT.

4 MS. ABRAMSON: I JUST WANT TO COUNTER SOMETHING
5 THAT COUNSEL IS SAYING.
6 THE TEST IS WHETHER OR NOT THERE IS
7 PROVOCATION TO AROUSE SOMEONE. ONCE YOU'RE IN THAT
8 AROUSED STATE, OKAY, THE FACT THAT THERE MAY BE
9 ADDITIONAL INFORMATION THAT WILL SHIFT THE FOCUS OF YOUR
10 TERROR FROM THE SAME VICTIMS I THINK IS IRRELEVANT.
11 FIRST OF ALL, MY CLIENT TESTIFIED
12 REPEATEDLY THAT HE WENT INTO THE IMPASSIONED STATE, IF
13 YOU WILL, OVER THE COURSE OF THAT ENTIRE CONFRONTATION
14 BETWEEN HIS PARENTS AND HIMSELF, AND HIS BROTHER;
15 THROUGH HIS FATHER'S DEFIANT ASSERTION OF HIS RIGHT TO
16 MOLEST HIM, THROUGH HIS FATHER'S ORDERING HIM TO HIS
17 ROOM, AND THEN WHEN HIS BROTHER WAS ASKED BY LYLE
18 MENENDEZ: "ARE YOU GOING TO LET THIS HAPPEN?"
19 THE FACT THAT HER RESPONSE WAS TO BLAME
20 LYLE MENENDEZ FOR THE SITUATION, INDICATED VERY CLEARLY
21 THAT SHE WAS A FULL AIDER AND ABETTOR CO-CONSPIRATOR
22 WITH HER HUSBAND IN WHATEVER RETRIBUTIVE ACTION THEY
23 WERE ABOUT TO TAKE.
24 MY CLIENT SAID REPEATEDLY THAT WHETHER IT
25 WAS GOING TO BE A SEXUAL ASSAULT OR DEATH, IT WAS GOING
26 TO BE PUNISHMENT FOR THEIR THREAT TO REVEAL THE SEXUAL
27 SECRET.
28 SO IT DOESN'T MATTER IF HE'S FOCUSING ON A

1 SEXUAL ASSAULT OR FOCUSING ON DEATH. THE FACT OF THE
2 MATTER IS THAT IT HAS BEEN DEMONSTRATED TO HIM BY BOTH
3 OF HIS PARENTS THAT THEY ARE ANGRY, THEY ARE
4 BELLIGERANT, THEY ARE PUNITIVE. THEY ARE NOT GOING TO
5 ALLOW THIS SECRET TO COME OUT. THEY ARE UNREPENTANT.
6 THEY ARE DANGEROUS.

7 ALL OF THAT OVER THE COURSE OF THOSE FEW
8 DAYS, STARTING, WITH RESPECT TO MRS. MENENDEZ, WHEN SHE
9 ACKNOWLEDGES ANGRILY THAT SHE HAS KNOWN ALL ALONG WHAT'S
10 HAPPENED, WHEN SHE'S ASKED: "WHY DIDN'T YOU DO ANYTHING
11 TO STOP IT," SHE COMES OUT WITH HER HATE-FILLED
12 RESPONSE THAT SHE WANTS HER CHILDREN DEAD.

13 ERIK TESTIFIED AND TOLD DR. WILSON THAT HE
14 THOUGHT THAT THURSDAY NIGHT SHE WAS THE ONE WHO MOST
15 WANTED HIM DEAD.

16 YOU SIMPLY CANNOT CRACK OUT OF THAT WEEK
17 JUST THE CONFRONTATION OF SUNDAY NIGHT, WITHOUT LOOKING
18 BACK ON ALL THE PROVOCATIVE ACTS OVER THE PREVIOUS WEEK.
19 AND FRANKLY, OVER THE PREVIOUS WEEK, MOST OF THE
20 PROVOCATION IS COMING FROM THE MOTHER.

21 I MEAN, IT IS TRUE THAT DURING THE THURSDAY
22 CONVERSATION WITH LYLE MENENDEZ, JOSE MENENDEZ IS
23 THREATENING; THAT HE THEN ATTACKS ERIK MENENDEZ; THAT HE
24 COMES UP TO HIS ROOM SATURDAY NIGHT AND BANGS ON THE
25 DOOR.

26 BUT THE MOST PROVOCATIVE CONDUCT OF ALL IS
27 BY THE MOTHER, WHO IS NOW MAKING IT VERY CLEAR SHE GOES
28 ALONG WITH WHAT'S HAPPENED TO THEM. SHE GOES ALONG WITH

1 THE PROGRAM TO SHUT THEM UP. SHE TELLS ERIK MENENDEZ,
2 YOU KNOW, "YOU'RE THE REASON THIS FAMILY WON'T WORK
3 OUT." SHE TELLS LYLE MENENDEZ IT'S ALL HIS FAULT. SHE
4 IS THE AGENT PROVOCATEUR OF THIS FAMILY.

5 AND SO THERE IS MORE THAN AMPLE VERBAL
6 PROVOCATION FROM HER, PLUS A HISTORY OF INDIFFERENCE TO
7 THEIR ABUSE, AND INFLECTING OF ABUSE BY HERSELF ON HER
8 SONS, AND HER CONSTANT THEME OF HATING THEM FOR HAVING
9 BEEN BORN.

10 I DON'T THINK THERE IS ANY QUESTION THAT HE
11 UNDERSTANDS WITHIN THIS FAMILY CONFRONTATION THAT THERE
12 IS PROVOCATION THAT WOULD AROUSE SOMEONE TO A STATE OF
13 PASSION, EITHER TO DEFEND THEMSELVES OR TO STRIKE OUT.

14 IF THE STATE OF PASSION HERE HAD BEEN ANGER
15 BECAUSE SHE HAD KNOWN AND DIDN'T HELP THEM, I SUBMIT
16 UNDER THE LAW THAT WOULD HAVE BEEN ENOUGH. HER VERY
17 WORDS ON THURSDAY NIGHT WOULD HAVE BEEN ENOUGH. AND IF
18 SHE WAS SHOT DEAD ON THE SPOT THURSDAY NIGHT, I DON'T
19 THINK THERE WOULD BE ANY QUESTION ABOUT IT.

20 BUT THE FACT THAT SHE WASN'T KILLED THEN,
21 AND THAT THE DEFENDANTS HOPED THAT THERE WOULD BE
22 RESOLUTION TO THIS SITUATION; THAT THE LETHALITY OF THE
23 SITUATION WOULD DRAIN AWAY. BUT THE PARENTS KEPT THE
24 ANTE UP; HER REPEATED PROVOCATIVE REMARKS SO THAT ON
25 SUNDAY NIGHT THE FACT IS IT'S NOW AN ACCUMULATION OF

26 PROVOCATIONS THAT HAVE RESULTED, NOT IN RAGE BY MY
27 CLIENT, OR IN RETALIATION FOR HER FAILURE TO PROTECT
28 HIM, OR HER HATRED, BUT IN FEAR; THAT IT IS CLEAR TO HIM

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1 NOW THAT SHE IS ALIGNED WITH THE FATHER, WHO HAS
2 THREATENED TO KILL HIM HUNDREDS OF TIMES IF HE REVEALED
3 THIS SECRET, AND HE HAS REVEALED IT, AND THERE IS NO
4 REPENTANCE SHOWN AT ALL BY THE PARENTS.

5 I DON'T THINK THERE IS ANY -- THE
6 PROSECUTION, OF COURSE, WOULD LIKE TO LOOK AT JUST THE
7 LAST MOMENT: IS IT PROVOCATIVE TO CLOSE THE DEN DOORS?

8 WELL, UNDER THE CIRCUMSTANCES OF THIS
9 FAMILY DURING THIS WEEK, THE DEMEANOR ALONE OF THE
10 PARENTS WAS SUFFICIENT PROVOCATION TO AROUSE IN SOMEONE
11 THE HEAT OF PASSION OF FEAR OF DEATH OR RAGE AT BETRAYAL
12 AND ABUSE, EITHER ONE, BY EITHER DEFENDANT, FITS THE
13 PROVOCATION, HEAT OF PASSION THEORY.

14 MR. CONN: IF I MAY RESPOND TO THAT.

15 THE COURT: GO AHEAD.

16 MR. CONN: THE PROBLEM WITH THE WAY THAT COUNSEL
17 ANALYZES THE PRIOR PROVOCATION IS THAT SHE TREATS IT AS
18 IF YOU TAKE ALL PRIOR PROVOCATION, AND YOU SUPERIMPOSE
19 ALL OF THAT PRIOR PROVOCATION AT THE MOMENT THAT THE
20 SHOOTING TAKES PLACE.

21 I KNOW THAT SHE RELIES A GREAT DEAL ON THE

22 PENA CASE, BUT WHAT THE PENA CASE STANDS FOR IS THE
23 PROPOSITION THAT PRIOR ACTIONS CAN BE CONSIDERED,
24 BECAUSE IT BEARS UPON THE WAY IN WHICH THE DEFENDANT
25 WOULD HAVE VIEWED THAT ONE SPECIFIC CIRCUMSTANCE THAT IS
26 CURRENTLY BEFORE HIM. THAT'S ALL. IT DOESN'T SAY THAT
27 YOU TAKE ALL THE PRIOR PROVOCATION THROUGHOUT THE
28 HISTORY OF THE RELATIONSHIP, AND YOU SOMEHOW CONSIDER

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1 THAT IN THE AGGREGATE, AND YOU THEN DECIDE IF THERE WAS
2 PROVOCATION AT THAT POINT IN TIME SUCH THAT A REASONABLE
3 MAN WOULD HAVE RESPONDED IN A PASSIONATE STATE.
4 WE NEED LOOK ONLY TO THAT INDIVIDUAL ACT AT
5 THE MOMENT OF THE SHOOTING, WHAT DID KITTY MENENDEZ DO
6 AT THAT PARTICULAR MOMENT? SHE WENT INSIDE THE DEN WITH
7 JOSE MENENDEZ. THAT IS ALL THAT SHE DID. THEY CAN VIEW
8 THAT IN LIGHT OF THE HISTORY OF THE RELATIONSHIP, BUT
9 THEY DON'T INCORPORATE PRIOR ABUSE AND THEN SAY, UNDER
10 THOSE CIRCUMSTANCES, WHETHER A REASONABLE PERSON WOULD
11 RESPOND IN A PASSIONATE STATE OF ANGER TO THE WHOLE
12 HISTORY OF THE RELATIONSHIP.
13 THE ACTUAL PROVOCATION IS WHAT SHE DID AT
14 THAT POINT IN TIME, AND THERE WAS NO PROVOCATION
15 WHATSOEVER UNDER THE LAW.
16 SO I DON'T SEE HOW SHE CAN RELY UPON THE
17 PRIOR HISTORY IN THE MANNER WHICH SHE SEEKS TO RELY UPON

18 THAT PRIOR HISTORY.

19 AND THEN SHE ARGUES THAT BECAUSE JOSE
20 MENENDEZ AND KITTY MENENDEZ ARE HUSBAND AND WIFE, AND
21 SOMEHOW ASSOCIATED, THAT THEREFORE THE DEFENDANT WOULD
22 HAVE BEEN PROVOKED TO THE SAME EXTENT BY HIS MOTHER THAT
23 HE WAS PROVOKED BY HIS FATHER.

24 THAT SIMPLY DOESN'T FOLLOW, NOR DOES IT
25 FOLLOW IN HER ARGUMENT THAT ONCE YOU ARE AROUSED -- SHE
26 ARGUES THAT ONCE YOU ARE AROUSED TO A PASSIONATE STATE,
27 YOU THEN CAN SHIFT THE FOCUS OF THAT AROUSAL TO ANOTHER
28 PERSON.

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1 HERE, WHAT WE HAVE IS KITTY MENENDEZ
2 ESSENTIALLY AS AN INNOCENT BYSTANDER. IF COUNSEL WERE
3 CORRECT, IF YOU WERE IN A HEAT OF PASSION BECAUSE
4 SOMEONE HAD SAID SOMETHING OFFENSIVE TO YOU, AND THERE
5 WAS A PERSON ON THE STREET, AND THERE WAS A PERSON
6 STANDING NEARBY WHO COULD HAVE PREVENTED IT, AND WHOM
7 CHOSE NOT TO PREVENT IT, AND ALLOWED THAT PERSON TO
8 ASSAULT YOU OR OFFEND YOU, THEN YOU COULD DIRECT YOUR
9 ANGER AT THAT PERSON, TOO, AND SAY WELL, THAT PERSON
10 COULD HAVE STOPPED IT, FAILED TO STOP IT, AND THEREFORE
11 I AM ENTITLED TO THE HEAT OF PASSION FOR KILLING ALL
12 THOSE INNOCENT BYSTANDERS WHO FAILED TO STOP THE
13 BEHAVIOR. THAT WOULDN'T FOLLOW.

14 SO I WOULD THINK -- I BELIEVE THAT AS YOU
15 COULD NOT RELY UPON THE FACT THAT THE INNOCENT
16 BYSTANDERS FAILED TO STOP THE OFFENSIVE BEHAVIOR AGAINST
17 YOU IN OBTAINING A HEAT OF PASSION INSTRUCTION, THE
18 DEFENDANTS CANNOT RELY UPON KITTY MENENDEZ' SILENCE AND
19 LACK OF ACTION, UNDER THESE CIRCUMSTANCES, TO OBTAIN A
20 HEAT OF PASSION INSTRUCTION.

21 MR. GESSLER: YOUR HONOR, MAY I ASK WHAT HAPPENED
22 TO BORCHERS, WHAT HAPPENED TO BERRY? WHAT HAPPENED TO
23 THAT WHOLE LINE OF CASES WHICH GO TO PROVOCATION OVER A
24 LONG PERIOD OF TIME, AND THE JURY INSTRUCTIONS WHICH ARE
25 BASED UPON THAT? THEY HAVE NOT BEEN MENTIONED BY THE
26 PROSECUTOR.

27 HE MENTIONS ONLY PENA, WHICH IS APPLICABLE,
28 BUT APPLICABLE REALLY ONLY TO FEAR BASED ON PAST EVENTS

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1 OF FEAR. BORCHERS AND BERRY IS APPLICABLE TO THE ENTIRE
2 LINE OF PROVOCATION, OVER ALL OF THE EVIDENCE THAT IS
3 PRESENTED HERE, AND MOST PARTICULARLY THE THURSDAY AND
4 SUNDAY NIGHT TIE-INS THAT MS. ABRAMSON MENTIONED ON
5 BEHALF OF BOTH DEFENDANTS, AND AS IT PERTAINS TO EACH OF
6 THE TWO DECEASEDS.

7 ADDITIONALLY, WE ARE NOT TALKING ABOUT AN
8 INNOCENT BYSTANDER HERE. THAT HAS NO ANALOGY WHATEVER
9 TO THE ARGUMENT MADE BY MS. ABRAMSON. WE ARE NOT

10 TALKING ABOUT SOMEBODY ON THE STREET CORNER WHO FAILED
11 TO STOP AN ALTERCATION. WE ARE TALKING ABOUT A CLEAR
12 LEADER.

13 IF THAT PERSON ON THE STREET, IF WE WANT AN
14 ANALOGY, WAS CHEERING ON THE AGGRESSOR, THEN PROBABLY
15 THERE WOULD BE -- IN FACT, CERTAINLY THERE WOULD BE HEAT
16 OF PASSION DIRECTED TO THAT PERSON, TOO, FOR THAT ACTION
17 AT THAT TIME.

18 THAT'S WHAT WE'RE TALKING ABOUT WHEN WE
19 TALK ABOUT MRS. MENENDEZ AND HER ACTIONS ON THURSDAY
20 NIGHT, AND HER ACTIONS ON SUNDAY NIGHT, WHEN INSTEAD OF
21 SAYING: "NO, I'M NOT GOING TO LET THIS HAPPEN," OR
22 "JOSE, DON'T DO THIS," OR "LET'S TALK ABOUT THIS," SHE
23 SAID TO LYLE MENENDEZ: "YOU RUINED THIS FAMILY."

24 THAT ALONE, PARTICULARLY IN CONJUNCTION
25 WITH WHAT HAPPENED ON THURSDAY NIGHT, IS CERTAINLY
26 PROVOCATION. PROVOCATION AT THE TIME, PLUS BORCHERS AND
27 BERRY PROVOCATION, WHICH IS THE LINE OF CASES.

28 THERE'S BEEN NO MENTION BY THE DISTRICT

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1 ATTORNEY OF SAHARA, WHICH TALKS ABOUT THE TENDENCY, THE
2 PROPER TENDENCY TO LEAVE PROVOCATION UP TO THE JURY WHEN
3 WE HAVE EVIDENCE SUCH AS WE HAVE HERE.

4 THERE'S BEEN NO MENTION BY HIM OF BARTON,
5 IN WHICH WE HAVE THE EXACT CHANGE OF EMOTIONS, THE

6 UNDERSTANDING THAT WE ARE NOT COMPARTMENTALIZED UP HERE
7 IN OUR MINDS WHEN WE GET INVOLVED IN HEAT OF PASSION,
8 AND WHEN WE GOT INVOLVED IN FEAR, BUT THAT ALL THESE
9 THINGS ARE GOING IN ON OUR MINDS AT ONCE.

10 WITH MR. BARTON, THE PROVOCATION THERE WAS
11 SOMETHING THAT DIDN'T EVEN OCCUR IN HIS PRESENCE. IT
12 OCCURRED TO HIS DAUGHTER. AND AS REPORTED TO HIM, IT
13 WAS ONLY THAT THIS MAN, MR. SANCHEZ, HAD CUT HER OFF AND
14 THEN SPIT ON HER CAR.

15 THE COURT: HE HAD A FULL CONFRONTATION WITH
16 MR. SANCHEZ WELL BEYOND WHAT HAPPENED TO HIS DAUGHTER.

17 MS. ABRAMSON: IN WHICH HE WAS THE AGGRESSOR
18 THROUGHOUT.

19 THE COURT: WHATEVER. THERE WAS A LOT MORE TO IT
20 THAN WHAT HAPPENED TO HIS DAUGHTER, INCLUDING A BELIEF
21 THAT MR. SANCHEZ HAD A BLADE IN HIS HAND, AND PUSHED
22 FORWARD, AND MR. BARTON FELL BACK ON THE CAR, AND ALL
23 SORTS OF THINGS HAPPENED WELL BEYOND WHAT HAPPENED TO
24 HIS DAUGHTER.

25 MR. GESSLER: ALL SORTS OF THINGS HAPPENED
26 BECAUSE MR. BARTON DECIDED TO GET A GUN AND ESCALATE THE
27 OCCASION THERE FROM WHAT HE HAD LEARNED FROM HIS
28 DAUGHTER OCCURRED WITH MR. SANCHEZ.

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1 BUT WHAT THE COURT POINTS OUT IS YOU CAN

2 HAVE HEAT OF PASSION ORIGINALLY FROM THE ARGUMENT, AND
3 TURN INTO UNREASONABLE FEAR DURING THE COURSE OF THE
4 CONFRONTATION. IT RECOGNIZES THAT HUMAN EMOTIONS ARE
5 NOT AS COMPARTMENTALIZED, AND THEY ARE NOT ONE LITTLE
6 INCIDENT, ALL SEGREGATED FROM ALL THE REST OF YOUR LIFE,
7 THAT THE DISTRICT ATTORNEY WOULD ASK YOU TO BELIEVE.

8 WHAT WE ARE ASKING YOU TO CONSIDER IS THE
9 BRIEF THAT WE FILED CONSIDERING THE BORCHERS/BERRY LINE
10 OF CASES, AND HOW THAT AFFECTS PEOPLE; THE BARTON CASE
11 AND HOW THAT AFFECTS PEOPLE; THE SAHARA CASE AND HOW
12 THAT AFFECTS PROVOCATION.

13 THE COURT: OKAY. ANYTHING FURTHER?

14 OKAY. WE'LL TAKE A RECESS. WE WILL RESUME
15 AT 1:30.

16 (PROCEEDINGS WERE ADJOURNED
17 AT 12:10 P.M. TO 1:30 P.M.
18 OF THE SAME DAY)

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1 VAN NUYS, CALIFORNIA; FRIDAY, FEBRUARY 16, 1996

2 1:45 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 COURT: ALL RIGHT. WE HAVE EVERYBODY BACK,
8 AND WE'LL DEAL WITH THE ISSUES WE WERE DISCUSSING THIS
9 MORNING.

10 ANYTHING FURTHER ON THE ISSUE OF THE FIRST

11 SUBJECT WE'VE BEEN DISCUSSING, IMPERFECT SELF-DEFENSE?

12 MR. CONN: NO.

13 MS. TOWERY: DOES THE COURT WISH US TO ADDRESS

14 THE COURT'S DRAFTED INSTRUCTION WE WERE PROVIDED WITH?

15 THE COURT: NO, NOT AT THIS POINT.

16 OKAY. ON THE SUBJECT OF IMPERFECT

17 SELF-DEFENSE, WE HAD EXTENSIVE ARGUMENT ON THAT ISSUE

18 THIS MORNING. IT WAS ALSO THE SUBJECT OF BRIEFING, AND

19 THE SUBJECT OF EARLIER DISCUSSIONS IN THIS COURT WHICH,

20 AS I INDICATED BEFORE, OCCURRED ON AUGUST THE 1ST OF '95

21 PRIOR TO THE COMMENCEMENT OF THIS TRIAL IN RELATIONSHIP

22 TO HEARINGS ABOUT ADMISSIBILITY OF EVIDENCE.

23 AND AS I VIEW IT, THE FOCUS IS ON WHETHER

24 OR NOT THE DEFENDANTS HAVE INTRODUCED SUBSTANTIAL

25 EVIDENCE OF AN ACTUAL BELIEF OF IMMINENT DANGER OR

26 PERIL, AS THAT CONCEPT HAS BEEN DEFINED IN THE CASE OF

27 PEOPLE VERSUS ARIS, AND AS MODIFIED IN THE CASE OF IN RE

28 CHRISTIAN S.

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1 AND IN MAKING THIS ANALYSIS, THE COURT IS

2 REQUIRED TO, AND DOES ACCEPT, THE EVIDENCE AS PRESENTED

3 BY THE DEFENSE AS TO THE MENTAL STATE ASCRIBED, SINCE

4 THAT IS THE EVIDENCE PRESENTED THAT THE JURY WOULD

5 CONSIDER. AND I ANALYZED TO DETERMINE WHETHER OR NOT

6 THAT STATE OF EVIDENCE JUSTIFIES FINDING THAT THERE HAS

7 BEEN SUBSTANTIAL EVIDENCE PRESENTED OF AN ACTUAL BELIEF
8 OF IMMINENT PERIL, USING THE DEFINITION AS I REFERRED TO
9 IT PREVIOUSLY.

10 AFTER REVIEWING THE EVIDENCE PRESENTED AND
11 AS OUTLINED BY COUNSEL, ACCEPTING THE VERSION AS
12 PRESENTED BY THE DEFENDANT IN HIS TESTIMONY, AND AS
13 PRESENTED BY OTHER WITNESSES AND CORROBORATING EVIDENCE,
14 IT APPEARS TO ME THAT THERE IS NOT SUBSTANTIAL EVIDENCE
15 OF IMMINENT PERIL AS A MATTER OF LAW; THAT THE
16 DEFENDANT'S VERSION OF THE EVENTS ASCRIBED BY HIM
17 DOESN'T MEET THE DEFINITION OF IMMINENT PERIL.

18 THIS IS A JUDICIALLY CREATED EXCEPTION TO
19 MALICE AFORETHOUGHT, AND ONE THAT IS NARROWLY CONSTRUED,
20 AS IN RE CHRISTIAN S. SAYS IT SHOULD BE.

21 AND LOOKING AT THE EVIDENCE HERE, I JUST
22 DON'T SEE THAT THERE HAS BEEN PRESENTED SUBSTANTIAL
23 EVIDENCE OF IMMINENT DANGER TO JUSTIFY GIVING OF AN
24 INSTRUCTION ON IMPERFECT SELF-DEFENSE.

25 MS. ABRAMSON: THE COURT'S IGNORING THE EVIDENCE
26 THAT THERE WAS NO FIRING UNTIL AFTER MY CLIENT WAS IN
27 THE ROOM, SAW HIS FATHER COMING TOWARDS HIM, AND
28 BELIEVED HE HAD A GUN, AND THOUGHT HE WAS ABOUT TO BE

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1 SHOT AT?

2 THE COURT: I AM NOT IGNORING THAT. BUT I DON'T

3 BELIEVE THAT THAT'S IMMINENT DANGER.

4 THAT'S NOT IMMINENT DANGER. HE PUT HIMSELF
5 IN THAT SITUATION. YOU CAN'T LOOK AT IT FROM THE
6 PERSPECTIVE OF A PERSON PUTTING HIMSELF INTO THE ACTUAL
7 CIRCUMSTANCE, AND SAYING AT THAT POINT HE HAS CREATED
8 THE IMMINENT DANGER.

9 IT HAS TO BE LOOKED AT FROM THE OBJECTIVE
10 FACTS, AND THE OBJECTIVE FACTS DO NOT CAUSE THE COURT TO
11 MAKE A FINDING OF IMMINENT DANGER.

12 MS. ABRAMSON: AS IT APPEARS IN 5.17, THERE IS NO
13 WAY THAT ANYONE WITH AN UNREASONABLE BELIEF COULD EVER
14 MEET THE COURT'S DEFINITION OF IMMINENCE. THIS COURT
15 HAS WRITTEN IN NOT ONLY AN OBJECTIVE STANDARD OF
16 IMMINENCE, AN OBJECTIVE DEFINITION OF WHAT IS IN HIS
17 MIND OBJECTIVELY, BUT AN ABSOLUTELY OBJECTIVE STANDARD
18 OF IMMINENCE, AND BEYOND THAT, A STANDARD OF REAL DANGER
19 THAT DOESN'T EVEN APPLY TO PERFECT SELF-DEFENSE, BASED
20 ON THIS DEFINITION.

21 THE COURT: I AM NOT APPLYING THAT. I AM
22 APPLYING THE DEFINITION AS SET FORTH BY THE CALIFORNIA
23 SUPREME COURT IN IN RE CHRISTIAN S. THAT WAS A DRAFT
24 THAT I SHOWED YOU OF SOMETHING I PREPARED
25 CONTEMPORANEOUS WITH OUR DISCUSSIONS IN AUGUST OF '95.
26 IT HAS NOTHING TO DO WITH MY CURRENT THINKING ON THE
27 DEFINITION OF IMMINENT PERIL. THAT DEFINITION IS
28 DERIVED FROM THE CALIFORNIA SUPREME COURT AND ITS

1 DEFINITION.

2 MS. ABRAMSON: SO THE COURT IS SAYING THAT FOR
3 THERE TO BE IMPERFECT SELF-DEFENSE, NEVERTHELESS,
4 IMMINENCE MUST ALWAYS BE OBJECTIVELY REASONABLE.

5 THE COURT IS REDEFINING IMPERFECT
6 SELF-DEFENSE TO INDICATE THAT THE UNREASONABLENESS CAN
7 NEVER EMBRACE THE IMMINENCE COMPONENTS, IF I UNDERSTAND
8 IT CORRECTLY.

9 THE COURT: NO. I AM SAYING THAT THERE IS NOT
10 SUBSTANTIAL EVIDENCE WORTHY OF SUBMISSION TO A JURY OF
11 IMMINENT DANGER IN THIS CASE; AND, THEREFORE, IT'S NOT
12 AN INSTRUCTION THAT CAN BE GIVEN TO THE JURY.

13 MS. TOWERY: JUST SO THE RECORD IS CLEAR, YOUR
14 HONOR, IS THE COURT SAYING THERE IS NOT SUBSTANTIAL
15 EVIDENCE OF THE DEFENDANT'S BELIEF IN IMMINENT DANGER,
16 OR THERE IS NOT SUBSTANTIAL EVIDENCE OF IMMINENT DANGER?

17 THE COURT: THAT LOOKING AT IT OBJECTIVELY, THAT
18 WHAT THE DEFENDANT SAID DOES NOT CONSTITUTE IMMINENT
19 DANGER.

20 MS. TOWERY: SO THE COURT IS NOT RULING THAT
21 THERE IS NOT SUBSTANTIAL EVIDENCE OF THE DEFENDANT'S
22 BELIEF IN IMMINENT DANGER; IS THAT CORRECT?

23 THE COURT: I DON'T THINK YOU CAN BIFURCATE THE
24 TWO, IT HAS TO BE TAKEN TOGETHER, AND HIS BELIEF IS WHAT
25 HIS BELIEF IS.

26 BUT YOU HAVE TO APPLY OBJECTIVE ANALYSIS TO
27 HIS BELIEF AND DETERMINE WHETHER OR NOT THAT BELIEF

28 CONSTITUTES OR MEETS THE DEFINITION OF IMMINENT DANGER,

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1 AND IT DOES NOT.

2 MS. TOWERY: ISN'T THE COURT MAKING A CREDIBILITY
3 DETERMINATION?

4 THE COURT: NO. IT'S A LEGAL DECISION ON THE
5 APPLICATION OF THE DEFINITION OF IMMINENT DANGER TO
6 WHATEVER THE DEFENDANT SAYS HE BELIEVED.

7 MS. ABRAMSON: SO THE COURT IS SAYING THAT AS A
8 MATTER OF LAW THE BELIEF THAT AT ANY SECOND PEOPLE CAN
9 COME OUT OF A ROOM WITH GUNS BLAZING AND SHOOT YOU IS
10 NOT A FEAR OF IMMINENT DANGER? THAT'S WHAT THE COURT IS
11 SAYING.

12 THE COURT: FOR AN APPLICATION OF IMPERFECT
13 SELF-DEFENSE, THAT IS NOT IMMINENT DANGER.

14 MR. GESSLER: I WOULD ASK ONE THING, YOUR HONOR.

15 I WOULD MENTION THAT THE DANGER AT THE END
16 OCCURRED WHEN THE YOUNG MEN WENT INTO THE ROOM, AND I
17 WOULD JUST POINT OUT THAT MR. BARTON ALSO WENT INTO
18 WHATEVER DANGER THERE WAS WHEN HE SOUGHT OUT
19 MR. SANCHEZ AT THE CAR WITH HIS GUN, AND THEN MAY OR MAY
20 NOT HAVE SEEN SOMETHING THAT LOOKED LIKE A KNIFE IN THE
21 HANDS OF MR. SANCHEZ.

22 SO I DON'T THINK THE FACT THAT THEY WENT
23 INTO THE DANGER IS DETERMINATIVE AS TO WHETHER OR NOT

24 THEY WERE DEFENDING THEMSELVES FROM THEIR BELIEF IN
25 IMMINENT DANGER.
26 THE COURT: WELL, IN BARTON, AS I SAID, THERE WAS
27 TESTIMONY FROM THE DEFENDANT THAT HE SAW THE BLADE IN
28 THE HAND OF THE VICTIM.

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1 MS. TOWERY: BUT OBJECTIVELY THERE WASN'T A BLADE
2 IN THE HAND OF THE VICTIM.

3 THE COURT: WELL, ON THAT THE SUPREME COURT IS
4 UNCLEAR. THERE WERE SCREWDRIVERS FOUND IN THE VEHICLE
5 AND THINGS OF THAT NATURE.

6 BUT EVERY CASE IS DECIDED ON ITS FACTS, AND
7 THIS CASE, LOOKING AT IT FROM HOW IT'S BEEN PRESENTED,
8 THE EVIDENCE PRESENTED HERE, THERE IS NOT SUBSTANTIAL
9 EVIDENCE TO MEET THE TEST OF IMMINENT DANGER.

10 MR. LEVIN: YOUR HONOR, WHAT ABOUT AN ANALOGOUS
11 SITUATION WHERE A POLICE OFFICER, WHO HAS CERTAIN
12 OBLIGATIONS, ENTERS A HOUSE WHERE HE BELIEVES A
13 BARRICADED SUSPECT IS THERE. HE ENTERS THE HOUSE, AND
14 HE THEN, ONCE HE ENTERS, HE MAKES ADDITIONAL
15 OBSERVATIONS WHERE HE BELIEVES HE NOW HAS THE NECESSITY
16 TO DEFEND HIS LIFE. HE SHOOTS AND KILLS THE PERSON, AND
17 THERE IS NO GUN.

18 THESE THINGS HAPPEN EVERY SINGLE DAY, AND
19 THE ISSUE IS NOT WHETHER OR NOT THE OFFICER HAS THE

20 RIGHT TO MAKE THE ARREST, THE ISSUE IS WHAT WERE THE
21 OBSERVATIONS THAT THE OFFICER REASONABLY BELIEVED IN AT
22 THE TIME HE FIRED HIS WEAPON. AND THAT'S PRECISELY WHAT
23 HAPPENED IN THIS CASE.

24 ERIK MENENDEZ DIDN'T ENTER THE ROOM TO KILL
25 HIS PARENTS, AND HE DIDN'T TESTIFY THAT HE DID. HE
26 ENTERED THE ROOM BELIEVING THAT HE WAS GOING TO BE
27 KILLED. BUT HE DIDN'T FIRE HIS WEAPON UNTIL HE FORMED
28 AND MADE THE ADDITIONAL OBSERVATION THAT HE THOUGHT THEY

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1 WERE COMING TOWARDS HIM.

2 THE COURT: OKAY. I UNDERSTAND WHAT YOU'RE
3 SAYING, BUT MY ANALYSIS IS AS I'VE SAID IT.

4 LET'S MOVE ON TO THE NEXT ISSUE, WHICH IS
5 HEAT OF PASSION. THAT'S AN ISSUE THAT HAS TO BE
6 ADDRESSED AS TO EACH DEFENDANT.

7 LET ME SAY THAT MY RULING ON IMMINENT
8 DANGER AND THE CONCEPT OF UNREASONABLE SELF-DEFENSE
9 APPLIES TO BOTH DEFENDANTS, BUT CERTAINLY THE DEFENDANT,
10 LYLE MENENDEZ, IS IN A MUCH WEAKER POSITION THAN ERIK
11 MENENDEZ ON THE ENTIRE ISSUE, BASED ON THE EVIDENCE
12 THAT'S BEEN PRESENTED HERE. AND LOOKING AT IT IN
13 TOTALITY, THERE IS -- IF THERE IS NOT SUBSTANTIAL
14 EVIDENCE AS TO ERIK MENENDEZ, AND THERE IS NOT, THERE IS
15 EVEN LESS AS TO LYLE MENENDEZ ON THAT SUBJECT.

16 MR. GESSLER: I RESPECTFULLY DISAGREE WITH THE
17 COURT ON THE ANALYSIS OF THE FACTS AS PRESENTED, WHERE
18 LYLE MENENDEZ IS THE ONE THAT SAID: "IT'S HAPPENING
19 NOW. IT'S HAPPENING NOW."

20 THE COURT: RIGHT.

21 MR. GESSLER: AND HAD SUCH A STATE OF FEAR ON HIS
22 FACE AS RECOGNIZED BY HIS BROTHER.

23 MS. TOWERY: ALSO, IF THE COURT IS FOCUSING ON
24 THE OBJECTIVE ANALYSIS OF IMMINENCE AS OPPOSED TO THE
25 BELIEF OF THE PARTICULAR DEFENDANT, I DON'T SEE HOW THE
26 ANALYSIS COULD BE ANY DIFFERENT FOR ERIK MENENDEZ THAN
27 LYLE MENENDEZ.

28 THE COURT: BECAUSE THE TESTIMONY IS DIFFERENT.

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1 THE EVIDENCE IS DIFFERENT AS TO EACH. WE HAVE ONE
2 DEFENDANT WHO TOOK THE WITNESS STAND.

3 MR. GESSLER: OBJECTIVE IS OBJECTIVE. SUBJECTIVE
4 IS SUBJECTIVE. AND OBJECTIVE CERTAINLY IS NO DIFFERENT.

5 THE COURT: I AM SAYING THERE IS A WEAKER
6 SUBJECTIVE ELEMENT FOR LYLE MENENDEZ.

7 MR. GESSLER: I THINK CIRCUMSTANTIALLY, IF WE
8 LOOK AT IT THAT WAY, THERE MAY BE MORE FOR LYLE
9 MENENDEZ. HE DIDN'T TESTIFY AS TO ANY FEAR OF FUTURE
10 DANGER. HE TESTIFIED "IT'S HAPPENING NOW."

11 THE COURT: YES, HE SAID THAT.

12 MR. GESSLER: THAT'S SUBJECTIVE.

13 THE COURT: I AM SAYING OVERALL, LOOKING AT THE
14 EVIDENCE, THERE IS LESS EVIDENCE OF SUBJECTIVE BELIEF AS
15 TO LYLE MENENDEZ THAN THERE IS TO ERIK MENENDEZ. BUT I
16 AGREE WITH YOU, THE OBJECTIVE IS THE SAME, THAT PART OF
17 IT.

18 ALL RIGHT. LET'S MOVE ON TO HEAT OF
19 PASSION.

20 AS TO HEAT OF PASSION, THERE ARE DIFFERENT
21 ARGUMENTS AND DIFFERENT ISSUES. HEAT OF PASSION,
22 MANSLAUGHTER IS A STATUTORY CRIME, A LESSER CRIME TO
23 MURDER, AND IT IS -- HAS A DIFFERENT DERIVATION AND A
24 DIFFERENT HISTORY THAN IMPERFECT SELF-DEFENSE, WHICH WAS
25 JUDICIALLY CREATED.

26 AND IN ANALYZING WHETHER THERE IS
27 SUBSTANTIAL EVIDENCE AS TO MANSLAUGHTER, HEAT OF PASSION
28 MANSLAUGHTER, THE ANALYSIS REALLY HAS TO START WITH

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1 LOOKING AT EACH DEFENDANT VIS-A-VIS EACH VICTIM. I
2 THINK IT SHOULD BE ANALYZED SEPARATELY, NOT LUMPED
3 TOGETHER. BOTH VICTIMS ARE TREATED EQUALLY, AND BOTH
4 DEFENDANTS ARE TREATED EQUALLY, AND IT IS TWO AGAINST
5 TWO, AND EVERYTHING IS IDENTICAL AS TO BOTH DEFENDANTS
6 AND BOTH VICTIMS. THE ANALYSIS HAS TO BE BIFURCATED IN
7 THAT REGARD.

8 AND LOOKING AT THE EVIDENCE, AND AGAIN, NOT
9 WEIGHING CREDIBILITY, JUST ANALYZING WHAT IS PRESENTED
10 HERE, AND DETERMINING WHETHER OR NOT THERE IS
11 SUBSTANTIAL EVIDENCE TO SUPPORT AN INSTRUCTION OF
12 MANSLAUGHTER ON THE THEORY OF HEAT OF PASSION DUE TO
13 PROVOCATION -- ADEQUATE PROVOCATION.
14 FIRST, AS TO ERIK MENENDEZ IN RELATIONSHIP
15 TO THE VICTIM JOSE MENENDEZ. BASED ON THE EVIDENCE
16 PRESENTED HERE, IT SEEMS TO ME THAT THERE IS SUBSTANTIAL
17 EVIDENCE WORTHY OF CONSIDERATION BY THE JURY THAT WOULD
18 JUSTIFY INSTRUCTING ON THE THEORY OF HEAT OF PASSION AS
19 TO JOSE MENENDEZ, AS TO THE DEFENDANT ERIK MENENDEZ.
20 GOING TO THE DEFENDANT LYLE MENENDEZ IN
21 RELATIONSHIP TO JOSE MENENDEZ, AS TO WHETHER THERE IS
22 SUBSTANTIAL EVIDENCE, THE EVIDENCE IS DIFFERENT. THE
23 EVIDENCE IS -- HAS BEEN PRESENTED IN A DIFFERENT WAY.
24 THERE ARE GAPS IN WHAT WAS MADE KNOWN TO
25 LYLE MENENDEZ, AND WHAT IT WAS THAT HE WAS THINKING AND
26 HIS EMOTIONS, VERSUS WHAT HAS BEEN PRESENTED AS TO ERIK
27 MENENDEZ. THAT IS JUST THE WAY THE EVIDENCE HAS BEEN
28 PRESENTED.

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1 AND THE ISSUE IS WHETHER OR NOT THERE HAS
2 BEEN SUBSTANTIAL EVIDENCE TO JUSTIFY INSTRUCTIONS AS TO
3 HEAT OF PASSION, MANSLAUGHTER AS TO JOSE MENENDEZ FOR

4 THE DEFENDANT LYLE MENENDEZ. IT'S A CLOSER QUESTION.

5 BUT AGAIN, THE COURT FINDS THAT THERE IS
6 SUBSTANTIAL EVIDENCE JUSTIFYING THE INSTRUCTION ON HEAT
7 OF PASSION AS TO LYLE MENENDEZ AND THE VICTIM, JOSE
8 MENENDEZ.

9 THAT THEN BRINGS US TO THE VICTIM, MARY
10 LOUISE MENENDEZ, AS TO WHETHER OR NOT THERE IS
11 SUBSTANTIAL EVIDENCE JUSTIFYING INSTRUCTIONS ON
12 MANSLAUGHTER, AND THE THEORY OF ADEQUATE PROVOCATION AND
13 HEAT OF PASSION.

14 AS TO LYLE MENENDEZ FIRST, LOOKING AT THE
15 EVIDENCE PRESENTED, EVALUATING IT, GIVING FULL CREDENCE
16 TO THE DEFENSE VERSION OF THE EVENTS, AND CREDIBILITY
17 NOT BEING AN ISSUE FOR THE COURT TO RESOLVE, THE COURT
18 CONCLUDES THAT THERE IS INSUFFICIENT EVIDENCE OF
19 ADEQUATE PROVOCATION AS TO THE DEFENDANT, LYLE MENENDEZ,
20 IN REGARD TO THE VICTIM, MARY LOUISE MENENDEZ.

21 I JUST DON'T CONCLUDE AS A MATTER OF LAW
22 THAT THERE IS SUFFICIENT EVIDENCE TO JUSTIFY AN
23 INSTRUCTION AS TO MARY LOUISE MENENDEZ AND THE
24 DEFENDANT, LYLE MENENDEZ.

25 AS TO THE DEFENDANT, ERIK MENENDEZ, IN
26 RELATIONSHIP TO THE VICTIM, MARY LOUISE MENENDEZ. I
27 FIND, APPLYING THE SAME STANDARD IN ANALYZING THE
28 SITUATION, THAT THERE IS INSUFFICIENT EVIDENCE TO

1 JUSTIFY AN INSTRUCTION ON HEAT OF PASSION AND ADEQUATE
2 PROVOCATION AS TO MARY LOUISE MENENDEZ AND THE
3 DEFENDANT, ERIK MENENDEZ. I DON'T BELIEVE THAT THERE
4 HAS BEEN SUFFICIENT EVIDENCE PRESENTED TO THE TRIER OF
5 FACT -- TO THE JURY -- TO JUSTIFY AN INSTRUCTION ON
6 MANSLAUGHTER AS TO THE DEFENDANT, ERIK MENENDEZ, AND THE
7 VICTIM, MARY LOUISE MENENDEZ.

8 THEREFORE, THE COURT WILL NOT GIVE
9 INSTRUCTIONS ON MANSLAUGHTER AS TO THE VICTIM, MARY
10 LOUISE MENENDEZ.

11 AS FAR AS THE LEVEL OF MANSLAUGHTER ON THE
12 VICTIM, JOSE MENENDEZ, THIS WAS DISCUSSED -- I DON'T
13 KNOW WHAT THE POSITION IS OF THE PARTIES NOW ON WHETHER
14 OR NOT YOU ARE PURSUING VOLUNTARY OR INVOLUNTARY
15 MANSLAUGHTER ON THE PART OF YOUR CLIENT, FIRST OF ALL,
16 MR. GESSLER.

17 MR. GESSLER: WE ARE PURSUING INVOLUNTARY ALSO,
18 YOUR HONOR.

19 THE COURT: OKAY. AND AS TO THE DEFENDANT, ERIK
20 MENENDEZ?

21 MS. ABRAMSON: THE SAME.

22 THE COURT: OKAY. WHAT IS YOUR THEORY OF
23 INVOLUNTARY MANSLAUGHTER AS TO YOUR CLIENT?

24 MR. GESSLER: AS TO LYLE MENENDEZ, THERE'S BEEN
25 NO EVIDENCE OF HIS INTENT TO KILL, OTHER THAN THE
26 CIRCUMSTANCIAL EVIDENCE OF WHERE THE PELLETS LANDED.

27 THE COURT: OKAY. AS TO THE DEFENDANT, LYLE
28 MENENDEZ, I DON'T FIND THAT THERE IS ANY SUBSTANTIAL

1 EVIDENCE TO JUSTIFY AN INSTRUCTION ON INVOLUNTARY
2 MANSLAUGHTER AS TO THE VICTIM, JOSE MENENDEZ. I JUST
3 DON'T SEE THAT THERE'S ANY SUCH EVIDENCE THAT WOULD
4 SUPPORT GIVING OF AN INVOLUNTARY MANSLAUGHTER.

5 AS TO ERIK MENENDEZ, HIS TESTIMONY WAS
6 PRESENTED TO THE JURY, AND THE QUESTION IS WHETHER OR
7 NOT THERE IS SUBSTANTIAL EVIDENCE TO JUSTIFY INVOLUNTARY
8 MANSLAUGHTER AS TO THE DEFENDANT, ERIK MENENDEZ.

9 DID YOU WISH TO ARGUE THAT POINT?

10 MS. ABRAMSON: THE RECORD SPEAKS FOR ITSELF, AND
11 YOU'RE GOING TO DO WHAT YOU'RE GOING TO DO.

12 MR. LEVIN: WELL, YOUR HONOR, I THINK IT WAS
13 REALLY CLEAR ON THAT POINT, WHERE WE HAD GONE BACK AND
14 FORTH WITH MR. CONN TRYING TO PIN ERIK MENENDEZ DOWN
15 WITH RESPECT TO HIS INTENT.

16 WHAT ERIK MENENDEZ MADE CLEAR THROUGHOUT
17 THE ENTIRETY OF HIS TESTIMONY WAS THAT HE DIDN'T HAVE AN
18 INTENT TO KILL. HE HAD AN INTENT TO STOP. HE WAS
19 GOING -- HE DID HAVE TO SHOOT. HE WAS GOING TO SHOOT TO
20 STOP THEM.

21 THERE IS NO EVIDENCE AT ALL IN THIS RECORD
22 THAT ERIK MENENDEZ INTENDED TO KILL JOSE MENENDEZ, AND
23 FOR THAT REASON, WE BELIEVE THAT INVOLUNTARY
24 MANSLAUGHTER IS APPROPRIATE.

25 THE COURT: WHAT ABOUT AIDING AND ABETTING HIS

26 BROTHER?

27 MR. LEVIN: WELL, THE ONLY THEORY --

28 MS. ABRAMSON: ON SOMETHING HE DIDN'T KNOW ABOUT.

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1 MR. LEVIN: EXACTLY. BUT THE ONLY THEORY ON
2 AIDING AND ABETTING HIS BROTHER WOULD BE IF THERE WAS
3 SOME COMMUNICATION, SOME EVIDENCE OF A CONSPIRACY THAT
4 THEY HAD PLANNED BEFOREHAND TO ENGAGE IN THIS ACT. ALL
5 THE EVIDENCE WE HAVE IN THIS RECORD IS THAT LYLE
6 MENENDEZ SAID, "IT'S HAPPENING NOW." ERIK MENENDEZ MADE
7 THE INDEPENDENT DECISION THAT HE HAD TO ARM HIMSELF AND
8 GO TO HIS CAR.

9 THERE IS ABSOLUTELY NO EVIDENCE IN THIS
10 RECORD THAT LYLE MENENDEZ AND ERIK MENENDEZ HAD AGREED
11 TO DO ANYTHING. IN FACT, THE EVIDENCE IS THAT ERIK
12 MENENDEZ ENTERED THE ROOM FIRST.

13 SO I DON'T THINK THAT THERE IS ANY EVIDENCE
14 THAT ERIK MENENDEZ WAS AIDING AND ABETTING ANYTHING WITH
15 RESPECT TO THE SHOOTING.

16 THE COURT: WASN'T THERE LOADING OF WEAPONS
17 OUTSIDE BEFORE THEY WENT IN?

18 MR. LEVIN: AGAIN, IT HAS TO BE VIEWED FROM THE
19 STANDPOINT OF WHAT WE KNOW FROM THE EVIDENCE ABOUT WHAT
20 HIS INTENT WAS. LOADING THE WEAPONS DOES NOT -- DOES
21 NOT DETERMINE -- IS NOT DETERMINATIVE IN AND OF ITSELF

22 OF AN INTENT TO KILL.

23 THE PROSECUTION HAS NO EVIDENCE OF WHAT
24 THEIR INTENT WAS. IT HAS TO BE GLEANED FROM THE STATE
25 OF THE CASE AND FROM THE TESTIMONY OF ERIK MENENDEZ IN
26 CROSS-EXAMINATION. HIS INTENTION WAS TO GO BACK INTO
27 THE HOUSE TO ENTER THE ROOM. HE WAS IN A PANIC, THOUGHT
28 HIS LIFE WAS IN DANGER, AND HE WAS GOING TO STOP WHAT HE

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1 BELIEVED TO BE IMMINENT DEATH, AND HE ONLY FIRED HIS
2 WEAPON WHEN HE MADE THE OBSERVATIONS WE TALKED ABOUT
3 EARLIER.

4 AS FAR AS THE RELOAD, I THINK IT'S
5 IRRELEVANT, IN THAT THE MEDICAL TESTIMONY IS THAT KITTY
6 MENENDEZ WAS DEAD. THAT WAS A POSTMORTEM WOUND.

7 THE COURT: WE ARE JUST TALKING ABOUT JOSE
8 MENENDEZ AT THIS POINT.

9 MR. LEVIN: I KNOW. AND IT'S NOT RELEVANT TO
10 JOSE MENENDEZ. BUT I DON'T THINK THERE IS ANY EVIDENCE
11 AT ALL IN THIS RECORD THAT ONE COULD FIND ERIK MENENDEZ
12 HAD THE INTENT TO KILL JOSE MENENDEZ, EVEN ON AN AIDING
13 AND ABETTING THEORY.

14 THE COURT: WHAT IS THE PEOPLE'S POSITION?

15 MR. CONN: YES. WE WOULD ASK THAT THE JURY NOT
16 BE INSTRUCTED IN REGARD TO INVOLUNTARY MANSLAUGHTER.

17 I THINK THAT THE EVIDENCE IS SUFFICIENT TO

18 ELIMINATE THAT INSTRUCTION FROM THIS TRIAL, BASED ON THE
19 THEORY OF AIDING AND ABETTING; ALSO, BASED ON THE THEORY
20 OF THE PERSONAL RESPONSIBILITY OF THE DEFENDANT AS
21 DEMONSTRATED BY HIS TESTIMONY HERE IN COURT.

22 I ASKED HIM: "DO YOU DENY THAT IT WAS YOUR
23 INTENT AT THAT TIME TO KILL?"

24 AND HE SAID: "NO, I DO NOT DENY THAT."

25 SO BASED UPON HIS TESTIMONY HERE IN COURT,
26 THE EVIDENCE IS SUFFICIENT TO DENY THAT INSTRUCTION.

27 THE COURT: OKAY.

28 IN VIEWING THE EVIDENCE AND GIVING FULL

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1 WEIGHT TO THE DEFENDANT'S TESTIMONY, AND CREDIBILITY
2 ISSUES AGAIN ARE NOT FOR THE COURT TO RESOLVE. BASED
3 UPON THE NATURE OF THE CONDUCT INVOLVED HERE, BOTH OF
4 THE DEFENDANT AND THE CO-DEFENDANT, IT JUST SEEMS TO ME
5 THAT THERE IS INSUFFICIENT EVIDENCE TO JUSTIFY GIVING
6 INVOLUNTARY MANSLAUGHTER IN THIS CASE.

7 THEREFORE, THE COURT WILL NOT --

8 MS. ABRAMSON: YOUR HONOR, I WANT TO RETURN, NOW
9 THAT I'VE COMPOSED MYSELF. I WOULD LIKE TO RETURN TO
10 THE COURT'S PREVIOUS RULING THAT MY CLIENT IS NOT
11 ENTITLED TO MANSLAUGHTER INSTRUCTIONS CONCERNING MARY
12 LOUISE MENENDEZ.

13 AND SIMPLY TO MAKE THE RECORD ADEQUATE,

14 THERE IS AMPLE AUTHORITY IN THE CASES THAT VERBAL
15 PROVOCATION IS SUFFICIENT, EVEN IF IT IS THE ONLY ASPECT
16 OF PROVOCATION PRIOR TO A KILLING.

17 IN THIS CASE, WE HAVE A LIFELONG HISTORY OF
18 HOSTILE AND PROVOCATIVE CONDUCT BY MRS. MENENDEZ TOWARDS
19 ERIK MENENDEZ. BUT MORE IMPORTANTLY, WE HAVE THE EVENTS
20 THAT ARE PERSONAL TO HIM, AND EMOTIONALLY PROVOCATIVE TO
21 HIM, OF THAT FINAL WEEK, STARTING WITH NOT ONLY THE
22 REVELATION BY HIS MOTHER ON THURSDAY NIGHT THAT SHE WAS
23 AWARE OF HIS LIFELONG MOLESTATION, BUT THE FACT THAT SHE
24 DID NOT CARE; HER BELLIGERANCE, HER ANGER, HER TELLING
25 HIM THAT SHE HATED HIM AND WISHED HE WASN'T BORN, HER
26 BLAMING HIM FOR THIS EVENT OVER WHICH HE HAD NO CONTROL,
27 SET HER UP AS A HOSTILE AND BELLIGERANT AND BAITING
28 PERSON.

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1 THAT ALONE WOULD BE SUFFICIENT PROVOCATION,
2 EVEN IF HE WAITED TWO DAYS TO KILL HER. BUT IT WASN'T
3 THE ONLY PROVOCATION.

4 ON SATURDAY NIGHT, SHE IS ANGRY AND HOSTILE
5 AND CONFRONTATIONAL, AND TELLS HIM IT IS HIS FAULT THAT
6 THE FAMILY WILL NOT WORK OUT. IT IS CLEAR THAT SHE IS
7 REASSERTING THAT HIS MOLESTATION IS NOT ONLY OF NO
8 MOMENT TO HER, BUT SHE IS BLAMING HIM FOR IT.

9 THEN WHEN HIS FATHER PROVOKES HIM -- AND

10 THIS COURT HAS FOUND THERE IS SUFFICIENT PROVOCATION TO
11 GO TO THE JURY BASED ON MR. MENENDEZ SAYING: "GO TO
12 YOUR ROOM" -- WHAT IS IT THAT MRS. MENENDEZ DOES? WHEN
13 ASKED IF SHE CARES, BASICALLY SHE INDICATES IT'S ALL
14 LYLE'S FAULT.

15 THAT IS SUFFICIENTLY PROVOCATIVE, COMING
16 AFTER HER OTHER REMARKS, SHOWING HER COMPLICITY IN THIS
17 ABUSE AND HER ANGER AT THE THREAT OF ITS BEING REVEALED,
18 TO PASS MUSTER AS A JURY INSTRUCTION.

19 I HAVE LOOKED OVER THE OTHER CASES DEALING
20 WITH VERBAL PROVOCATION, AND WHAT THE COURTS HAVE HELD
21 SUFFICIENT OVER THE YEARS ARE THINGS THAT CAN ONLY BE
22 CHARACTERIZED AS EXTREMELY MINOR VERBAL SLIGHTS, HAVE
23 NEVERTHELESS BEEN ENOUGH, GIVEN A SET OF FACTS AND
24 CIRCUMSTANCES.

25 WE ARE DEALING HERE WITH SOMEONE WHO
26 SUFFERED AT THE HANDS OF BOTH OF HIS PARENTS FOR YEARS,
27 WHO HAS BEEN FORCED TO BELIEVE -- WHERE HIS MOTHER WAS
28 NEVER ANY HELP TO HIM, WHERE SHE WAS THE ONE WHO CARRIED

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1 OUT THE FATHER'S PUNISHMENTS -- AND THIS IS BEFORE THE
2 JURY -- WHERE SHE WOULD SUBJECT HIM TO PUNISHMENTS FOR
3 HER OWN FAILURES -- AND THAT'S BEFORE THE JURY -- WHERE
4 A THREAT FROM THE FATHER, WITH THE MOTHER ACTING IN
5 COMPLICITY, MAKES HER A CO-CONSPIRATOR OF THAT THREAT,

6 JUST AS DANGEROUS.

7 I CANNOT SEE HOW YOU CAN DIVORCE -- I MEAN,
8 IF SHE HAD PLEADED WITH HER HUSBAND, "NO." IF SHE WAS
9 ABSENT FROM THESE CONVERSATIONS, IF THERE HAD BEEN NO
10 REVELATION OF HER KNOWLEDGE AND COMPLICITY, AND HER
11 ANGRY RESPONSE, I WOULD AGREE WITH YOU.

12 BUT THE FACT IS THAT ALL THE WAY THROUGH
13 SHE IS DEMONSTRATING THE SAME HOSTILITY AS HER HUSBAND,
14 AND IT IS THAT HOSTILITY WHICH IS PROVOCATORY.

15 SO IT IS A QUESTION FOR THE JURY AS TO
16 WHETHER THAT IS SUFFICIENTLY -- IS SUFFICIENT
17 PROVOCATION FOR MANSLAUGHTER.

18 I THINK IT IS ABSOLUTELY IMPROPER FOR THE
19 COURT TO RESOLVE THIS ISSUE, AND TAKE IT FROM THE HANDS
20 OF THE JURY. I MEAN, I CAN'T -- YOUR HONOR, IT IS A
21 LIFELONG SERIES OF PROVOCATIONS, AND A KNOWLEDGE OF A
22 PERSON'S ANIMOSITY THAT GOES BEYOND THE ORDINARY CASE,
23 WHEN MERE VERBAL PROVOCATION HAS BEEN HELD TO BE ENOUGH.
24 IT IS KNOWING, INDEED, WHAT A PERSON'S AGENDA IS, AND
25 NOT JUST DEALING BASED ON THE APPEARANCE OF WORDS, WHICH
26 HAS IN SO MANY CASES BEEN FOUND TO BE SUFFICIENT. I
27 DON'T THINK YOU CAN DIVORCE IT FROM ALL OF THAT, EVEN
28 USING A REASONABLE PERSON STANDARD, WHEN IF SOMEONE SAYS

1 "I'M GOING TO RAPE YOU," AND THE PERSON WHO IS WITH THEM

2 SAYS, "AND IT'S YOUR FAULT, NOT HIS," I DON'T KNOW WHAT
3 MORE YOU NEED TO SHOW AN ACTING IN CONCERT.
4 MR. GESSLER: I WOULD AGREE WITH THOSE REMARKS,
5 YOUR HONOR, ON BEHALF OF LYLE MENENDEZ. AND UNDER THE
6 SAHARA CASE THAT WE PREVIOUSLY SUBMITTED TO THE COURT
7 CONCERNING THE POINTS AND AUTHORITIES CONCERNING THE
8 WISDOM OF HAVING THE JURY DECIDE SUCH THINGS AS
9 PROVOCATION, PARTICULARLY DEPENDING ON THE LINE OF CASES
10 FROM CALIFORNIA CITED IN OUR DOCUMENTS, WHICH HAVE FAR
11 MORE TRIVIAL VERBAL INSULTS THAN OCCURRED HERE, AT THE
12 TIME THIS SEXUAL MOLESTATION WAS ABOUT TO HAPPEN, AND
13 MRS. MENENDEZ WAS BLAMING LYLE FOR IT, RATHER THAN
14 TAKING ERIK'S SIDE AND HELPING HIM OUT IN ANY WAY.

15 BUT BE THAT AS IT MAY, I THINK WE HAVE
16 ADEQUATE PROVOCATION, PARTICULARLY UNDER SAHARA, GIVEN
17 THE FACTS THAT ARE BEFORE THE JURY. BUT IT IS MAGNIFIED
18 BY THE FACT THAT WE OFFERED EVIDENCE BY DIANE
19 VANDERMOLLEN, A COMPLAINT BY LYLE MENENDEZ WHEN HE WAS A
20 CHILD, I BELIEVE OF FIVE OR SEVEN, CONCERNING SEXUAL
21 MOLESTATION BY HIS FATHER ON HIM. AND WHEN DIANE
22 VANDERMOLLEN RELAYED THAT COMPLAINT TO MRS. MENENDEZ,
23 MRS. MENENDEZ TURNED A DEAF EAR AND SAID, "OH, THAT'S
24 NOT HAPPENING."

25 NOW, THAT TYPE ACTIVITY IS VERY AKIN TO
26 WHAT HAPPENED NOW WHEN MRS. MENENDEZ IS TURNING A DEAF
27 EAR, AND IN EFFECT ACTING IN COMPLICITY WITH JOSE
28 MENENDEZ ON THE NIGHT OF AUGUST 20TH, KNOWING THAT JOSE

1 MENENDEZ WANTS TO CARRY ON FURTHER UNWANTED SEXUAL
2 ADVANCES AND SEXUAL ACTIVITY WITH ERIK MENENDEZ, AND
3 CERTAINLY PLAYS A PART IN THAT LIFELONG PROCESS OF HEAT
4 OF PASSION THAT IS TALKED ABOUT IN BORCHERS AND IN
5 BERRY.

6 AND SO THAT HAS BEEN DENIED US. AND EVEN
7 THOUGH, AS I SAY, I BELIEVE THE EVIDENCE PRESENTED TO
8 THE JURY IS SUFFICIENT FOR PROVOCATION TO HAVE THEM
9 DETERMINE THIS VERY VITAL ISSUE, ESPECIALLY IF WE ALSO
10 HAD IN THE EVIDENCE, THAT I BELIEVE WAS WRONGFULLY
11 EXCLUDED BY THE COURT, CONSIDERING THE SEXUAL COMPLAINTS
12 AND A DEAF EAR TURNED BY MARY MENENDEZ TO THAT, THAT
13 THAT WOULD SUFFICE.

14 AND, THEREFORE, I AM ASKING TO REOPEN IN
15 ORDER TO BRING BACK DIANE VAN VANDERMOLLEN TO PUT ON THAT
16 EXTRA EVIDENCE, WHICH WAS DENIED BY THE COURT WHEN WE
17 ATTEMPTED TO PRESENT IT EARLIER ON.

18 ALSO, YOUR HONOR, I AM MAKING THESE
19 ARGUMENTS UNDER THE FEDERAL CONSTITUTION, THE 6TH, 8TH,
20 AND 14TH AMENDMENTS, AS DESCRIBED PARTICULARLY IN BECK
21 VERSUS ALABAMA.

22 AS THE COURT KNOWS, BECK VERSUS ALABAMA
23 GIVES GREAT IMPORTANCE TO LESSER-INCLUDED OFFENSES BEING
24 PRESENTED TO THE JURY WHEN THERE IS A CAPITAL CASE.

25 GRANTED, IN THAT STATE THE STATUTE SAID YOU
26 COULD NOT PRESENT LESSER-INCLUDED OFFENSES. BUT IT'S NO

27 DIFFERENT IN ITS END RESULT, IF THE COURT PREVENTS THE
28 LESSER-INCLUDED OFFENSE FROM GOING TO THE JURY, THAN IF

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1 A STATUTE DOES. THE ESSENCE IS WHERE LIFE AND DEATH ARE
2 AT STAKE, THE JURY SHOULD HAVE THE BENEFIT OF BRINGING
3 FORTH THE LESSER-INCLUDED OFFENSES, IF THEY ARE AT ALL
4 AVAILABLE.

5 AND CERTAINLY IN THIS CASE WE BELIEVE THAT
6 WITH MARY MENENDEZ, VOLUNTARY MANSLAUGHTER UNDER
7 BORCHERS, HEAT OF PASSION, AND UNDER ESTABLISHED
8 CALIFORNIA LAW UP UNTIL NOW IS AVAILABLE TO HIM.

9 WE RAISE THE 8TH AND 14TH AMENDMENTS
10 BECAUSE AGAIN, THE COURT HAS, OF COURSE, THE DUTY, IN
11 THIS CASE OF A CAPITAL CASE, TO APPLY STATE LAW AS IT
12 HAS BEEN TRADITIONALLY APPLIED UP UNTIL NOW; AND IT IS
13 OUR VIEW THAT UNDER STATE LAW, AS APPLIED IN ALL KNOWN
14 CASES UP UNTIL NOW, IN MANY CASES WITH LESS PROVOCATION
15 THAN MARY MENENDEZ GAVE HERE, THAT VOLUNTARY
16 MANSLAUGHTER HAS BEEN GIVEN AS AN OPTION TO THE JURY.

17 WE BELIEVE IT'S A CONSTITUTIONAL VIOLATION
18 AT THIS POINT NOT TO AFFORD LYLE MENENDEZ A CHANCE FROM
19 THIS JURY TO EVALUATE THE CONDUCT OF MARY MENENDEZ
20 TOWARD HIM IN THE VOLUNTARY MANSLAUGHTER CONTEXT.

21 THE COURT: OKAY.

22 MS. TOWERY: YOUR HONOR --

23 MS. ABRAMSON: YOUR HONOR, I WOULD ALSO INDICATE
24 THAT MY OBJECTIONS ARE BASED UNDER THE FEDERAL
25 CONSTITUTION AS WELL.
26 MS. TOWERY: AND ALSO JUST TO CLARIFY
27 MR. GESSLER'S REFERENCE TO THE OFFER OF PROOF REGARDING
28 DIANE VANDERMOLEN, THE FRESH COMPLAINT OCCURRED IN 1976,

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1 WHEN LYLE MENENDEZ WAS EIGHT YEARS OLD.
2 THE COURT: YES. CERTAINLY WE'VE HELD EXCESSIVE
3 HEARINGS ON THAT IN THIS TRIAL.
4 AS TO THIS ISSUE REGARDING MARY LOUISE
5 MENENDEZ, I HAVE GIVEN IT A LOT OF THOUGHT, AND I WILL
6 CONSIDER IT FURTHER. I WON'T SAY THAT IT IS SET IN
7 CONCRETE, AND I WILL CONSIDER YOUR ARGUMENTS FURTHER,
8 AND IF I HAVE A CHANGE, I'LL LET YOU KNOW ON TUESDAY ON
9 THAT SUBJECT.
10 BUT LET ME SAY THIS: THAT BOTH DEFENDANTS
11 ARE NOT IN THE SAME BOAT. EACH DEFENDANT IS SEPARATE.
12 THE PROVOCATION ISSUE IS DIFFERENT AS TO EACH, AND IT
13 DOESN'T WORK THAT THEY'RE BOTH TOGETHER, DOING THINGS
14 EQUALLY, AND WITH THE SAME STATE OF MIND, AND THE SAME
15 LEVEL OF PROVOCATION, AND THE SAME EVIDENCE. EACH ONE
16 IS DIFFERENT.
17 MS. ABRAMSON: JUDGE, I WOULD JUST LIKE TO BE
18 HEARD A LITTLE FURTHER.

19 I AGREE WITH THAT REMARK. I AM NOT
20 PREPARED TO ARGUE THIS CASE ON TUESDAY IF MY ONLY OPTION
21 ON MARY LOUISE MENENDEZ IS SECOND-DEGREE MURDER. WE ARE
22 PURSUING WHETHER WE CAN TAKE A WRIT BASED ON WHAT THE
23 COURT HAS SAID TODAY. I AM SHOCKED THAT THE COURT WOULD
24 NOT CONSIDER A MOTHER'S ADMISSION THAT SHE KNEW HER SON
25 WAS BEING MOLESTED, AND DIDN'T CARE, NOT SUFFICIENT
26 PROVOCATION. I CAN'T CONCEIVE OF ANYTHING A PARENT
27 COULD SAY TO A CHILD THAT WOULD GO TO A STATE OF UPSET,
28 AND FEAR AND UNCERTAINTY, MORE CLEARLY THAN, "I DON'T

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1 CARE YOU'VE BEEN RAPED FOR YEARS," WHICH IS PRECISELY
2 WHAT SHE SAID, AND FOLLOWED UP WITH HATING HIM.

3 I DON'T HAVE ANY DOUBT WHATSOEVER THAT THIS
4 COURT HAS BEEN LESS THAN CONVINCED, IS A FAIR WORD, BY
5 OUR DEFENSE, AND THAT IF WE HAD WAIVED JURY -- IF WE HAD
6 BEEN FOOLISH ENOUGH TO WAIVE JURY IN THIS CASE, THAT
7 THIS COURT DOES HAVE ITS OWN VIEW OF THE EVIDENCE, AND
8 THAT'S FINE.

9 BUT AS THE ARBITER OF WHICH LAW APPLIES IN
10 THIS CASE, I THINK WHAT THE COURT IS DOING IS MAKING A
11 JUDGMENT CALL THAT IT IS NOT PERSUASIVE PROVOCATION TO
12 THIS COURT, AND THAT'S FINE. BUT IT IS NOT FOR THIS
13 COURT TO DECIDE WHETHER PROVOCATION IS PERSUASIVE. IT
14 IS FOR 12 JURORS WITH THEIR LIFE EXPERIENCE, OF WHAT A

15 MOTHER -- HOW DOES A PERSON REACT TO THIS KIND OF
16 BLATANT HATRED, FRANKLY, FROM A MOTHER? WHAT CAN ONE
17 EXPECT TO BE THE EMOTIONAL RESPONSE? AND IF THE
18 EMOTIONAL RESPONSE COMES WITHIN ANY OF THE REALM OF WHAT
19 A PERSON CAN BE EXPECTED TO REACT TO IS PASSION, THAT'S
20 ALL THE LAW REQUIRES.

21 THE COURT: ALL RIGHT.

22 I DO UNDERSTAND THE DIFFERENCE BETWEEN THE
23 ROLE OF THE COURT IN DECIDING WHAT LEGAL RULES TO APPLY
24 AND GIVE TO THE JURY, AND THE ROLE OF THE JURY ONCE
25 HERE, AND MY DECISIONS HERE ARE BASED ONLY UPON WHAT LAW
26 SHOULD BE APPLIED, BASED UPON THE EVIDENCE PRESENTED
27 HERE, AND WHETHER THERE IS SUBSTANTIAL EVIDENCE TO
28 JUSTIFY THOSE INSTRUCTIONS.

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1 MR. GESSLER: ONE FURTHER POINT ON YOUR HONOR'S
2 RECONSIDERATION, AND LOOKING AT EACH DEFENDANT
3 DIFFERENTLY, IS OF COURSE THE EVIDENCE PRESENTED AS THE
4 MAIN PART OF THE PEOPLE'S CASE THROUGH JAMIE PISARCIK;
5 THAT LYLE MENENDEZ SAID THAT HE HAD BEEN MOLESTED BY HIS
6 MOTHER, AND THAT ALSO I THINK PLAYS A PART CERTAINLY IN
7 THE ROLE HERE -- THE LIFELONG ROLE OF PROVOCATION UNDER
8 THE BORCHERS AND BERRY STANDARD THAT WE'RE APPLYING
9 HERE.

10 THE COURT: OKAY. AS FAR AS --

11 MR. LEVIN: YOUR HONOR, JUST ONE OTHER POINT.

12 THE COURT: YES.

13 MR. LEVIN: THE LAST ACT VIEWED BY ERIK MENENDEZ
14 WAS MARY MENENDEZ COMPLYING WITH JOSE MENENDEZ' ORDER TO
15 ENTER THE ROOM, AND I THINK THAT THAT IS ABSOLUTELY
16 ESSENTIAL IN ANALYZING IN CONTEXT THE FACTS AS THEY
17 UNFOLD.

18 BUT IN ANALYZING THAT HEAT OF PASSION
19 ARGUMENT WITH RESPECT TO WHAT IT WAS THAT ERIK MENENDEZ
20 BELIEVED, LOOKING AT WHAT HIS MOTHER HAD SAID TO HIM,
21 LOOKING AT WHAT HIS MOTHER HAD DONE, AND THE LAST THING
22 HE SEES IS JOSE MENENDEZ SAYING, "COME ON, KITTY," AND
23 HOW THAT WAS VIEWED BY ERIK MENENDEZ WHEN SHE WENT RIGHT
24 INSIDE.

25 MS. ABRAMSON: THE FATHER AT THAT POINT IS
26 INCLUDING HER IN HIS THREAT AND SHOWING HER COMPLICITY.

27 THE COURT: OKAY.

28 MS. ABRAMSON: NOW, YOUR HONOR, AS I HAVE SAID, I

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1 AM NOT GOING TO WAIT UNTIL TUESDAY TO FIND OUT -- I DO
2 NOT FEEL PREPARED TO ARGUE THIS CASE UNDER THIS NEW AND
3 QUITE SHOCKING RULING ON TUESDAY, AND IF -- I CERTAINLY
4 WANT THE COURT TO RECONSIDER WHAT IT PRELIMINARILY HAS
5 INDICATED IT WOULD DO CONCERNING MANSLAUGHTER
6 INSTRUCTIONS, BOTH THE SELF-DEFENSE -- IMPERFECT

7 SELF-DEFENSE AND THE HEAT OF PASSION INSTRUCTION

8 CONCERNING MARY LOUISE MENENDEZ.

9 I CERTAINLY DO WANT THE COURT TO GIVE IT

10 MORE THOUGHT, AND I WANT THE OPPORTUNITY TO PULL OUT

11 EVERY CASE, AND FIND EVERY FACT IN EVERY CASE THAT'S

12 EVER BEEN SAID TO BE SUFFICIENT PROVOCATION IN EVERY

13 STATE OF THE UNION.

14 THE COURT: I AM NOT GOING TO ENTERTAIN ANY MORE

15 ARGUMENT ON THE ISSUE. IT'S BEEN BRIEFED AND ARGUED,

16 AND THE ONLY THING THAT WILL OCCUR IS MY THINKING ABOUT

17 IT FURTHER. THE ARGUMENT WILL BE TUESDAY. THERE WON'T

18 BE A DELAY.

19 MS. ABRAMSON: WHAT AM I GOING TO ARGUE, IF I

20 DON'T KNOW WHAT YOU'RE GOING TO INSTRUCT? HOW AM I

21 GOING TO ARGUE?

22 THE COURT: YOU CERTAINLY KNOW WHAT THE ISSUES

23 ARE, THE EVIDENCE, AND YOU CERTAINLY CAN ARGUE THE

24 EVIDENCE.

25 MS. ABRAMSON: WE ARE TRYING TO PURSUE IF WE HAVE

26 A RIGHT TO A WRIT AT THIS POINT. IF WE DO, WE'LL BE

27 SEEKING A STAY.

28 THE COURT: OKAY. BUT THE ARGUMENT IS SCHEDULED

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1 TUESDAY, AND WE WILL GO AHEAD.

2 DO THE PEOPLE WANT TO SAY SOMETHING? YOU

3 WERE STANDING UP.

4 MR. CONN: JUST FURTHER ARGUMENT ON THE ISSUE.

5 IF THE COURT WANTS FURTHER ARGUMENT, I WILL --

6 THE COURT: IF YOU WANT TO SAY ANYTHING, YOU MAY.

7 MS. CONN: I JUST FEEL IT SHOULD BE NOTED FOR THE

8 RECORD THAT, AS THE COURT HAS NOW RULED, THAT THE

9 DEFENDANTS ARE NOT ENTITLED TO THE HEAT OF PASSION

10 INSTRUCTION. THE DEFENSE, IN THEIR ARGUMENT IN AN

11 EFFORT TO PERSUADE THE COURT TO CHANGE ITS MIND, ARE

12 BASICALLY CHANGING THE FACTS OF THE CASE. I MEAN, NOW

13 THE DEFENSE IS ARGUING THAT WHAT WE HAVE HERE IS THE

14 EFFECT OF: "I KNOW YOU WERE RAPED." THOSE WORDS ARE

15 NOW BEING ATTRIBUTED TO KITTY MENENDEZ. KITTY MENENDEZ

16 DID NOT SAY THOSE WORDS ON AUGUST THE 20TH OF 1989.

17 THEN THEY SAID: "WHAT WE HAVE HERE IS THE

18 EQUIVALENT OF JOSE MENENDEZ SAYING, 'I AM GOING TO RAPE

19 YOU', AND KITTY MENENDEZ THEN SAYING 'AND IT IS YOUR

20 FAULT.'"

21 AGAIN, THESE ARE NOT THE FACTS OF THE CASE.

22 IN AN EFFORT TO BOLSTER THEIR ARGUMENT, THEY ARE NOW

23 TOTALLY CHANGING THE FACTS OF THE CASE. THE FACTS OF

24 THE CASE IS THAT KITTY MENENDEZ FOLLOWED JOSE MENENDEZ

25 INTO THE DEN, AND THESE CONVERSATIONS THAT THEY ARE NOW

26 ATTRIBUTING TO KITTY MENENDEZ AND TO JOSE MENENDEZ

27 SIMPLY DID NOT OCCUR.

28 SO I ASK THE COURT TO ABIDE BY ITS RULING;

1 AND, IN FACT, WHEN YOU LOOK AT THE WORDS USED BY JOSE
2 MENENDEZ, JOSE MENENDEZ NEVER SAID, "I AM GOING TO RAPE
3 YOU." HE TOLD ERIK MENENDEZ TO GO TO HIS ROOM.

4 AND I THINK WE SHOULD ALSO BEAR IN MIND
5 THAT I DON'T THINK THERE'S BEEN ANY EVIDENCE IN THIS
6 TRIAL THAT KITTY MENENDEZ KNEW CERTAIN CODE WORDS.

7 ERIK MENENDEZ SAID, "WELL, IN MY MIND THOSE
8 WORDS MEANT TO ME I WAS GOING TO BE MOLESTED WHEN I WENT
9 TO MY ROOM."

10 THERE IS NO EVIDENCE IN THIS TRIAL THAT
11 KITTY MENENDEZ KNEW THAT THE WORDS "GO TO YOUR ROOM"
12 MEANS THAT JOSE MENENDEZ WAS THEN GOING TO RAPE ERIK
13 MENENDEZ IN HIS ROOM. THERE'S BEEN EVIDENCE THAT
14 PERHAPS SHE KNEW WHAT WAS GOING ON OVER THE YEARS, BUT
15 NOT THAT THOSE SPECIFIC WORDS HAD ANY SPECIFIC MEANING
16 TO HER.

17 SO AGAIN, IN THE ABSENCE OF EVIDENCE THAT
18 SHE KNEW THEY WERE MAGIC WORDS, AND WHETHER OR NOT SHE
19 KNEW THAT THEY WERE MAGIC WORDS, SHE IS STILL AN
20 INNOCENT BYSTANDER WHO TURNED AND WENT INTO THE DEN, AND
21 DID NOTHING; AND THEY ARE SAYING THAT THE HEAT OF
22 PASSION APPLIES TO AN INNOCENT BYSTANDER, AND IT SIMPLY
23 DOES NOT.

24 TURNING TO GO INTO THE DEN WITH JOSE
25 MENENDEZ IS NOT CONDUCT THAT WOULD PROVOKE THE ORDINARY
26 REASONABLE MAN TO RESPOND IN A PASSIONATE STATE.

27 MR. LEVIN: YOUR HONOR, MR. CONN IN

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1 IT AS FOLLOWING JOSE MENENDEZ INTO THE ROOM, TURNING AND
2 GOING INTO THE ROOM. HE CALLS HER AN INNOCENT
3 BYSTANDER.

4 THAT IS NOT THE STATE OF THE EVIDENCE. THE
5 STATE OF THE EVIDENCE IS THAT AT THAT LAST CRITICAL
6 SECOND, THE LAST TIME THAT ERIK MENENDEZ SAW HIS MOTHER,
7 SHE WAS RESPONDING TO AN ORDER, AND THE ORDER WAS, "COME
8 ON, KITTY," AND SHE THEN RESPONDED TO THAT ORDER.

9 THAT'S QUITE A BIT DIFFERENT THAN FOLLOWING
10 HIM INTO THE ROOM, OR TURNING AND WALKING INTO THE ROOM.

11 THE COURT: ALL RIGHT. LET'S MOVE ON TO THE
12 INSTRUCTIONS REGARDING CONSPIRACY.

13 THE CASE OF PEOPLE VERSUS SWAIN HAS BEEN
14 DECIDED. THE ISSUE ON CONSPIRACY, IN ADDITION TO THE
15 SPECIFIC INSTRUCTIONS THAT DEAL WITH THAT, HAVE TO DO
16 WITH WHETHER THERE SHOULD BE AN INSTRUCTION ON
17 SECOND-DEGREE, OR JUST AN INSTRUCTION ON CONSPIRACY TO
18 COMMIT MURDER. AND THE PEOPLE FILED A MEMORANDUM ON
19 THAT SUBJECT WITHOUT REFERRING TO SWAIN.

20 WHAT IS THE CURRENT THINKING OF THE
21 PROSECUTION?

22 MR. CONN: WELL, I THINK THAT SWAIN REINFORCES
23 OUR POSITION SOMEWHAT, ALTHOUGH IT DOESN'T SPECIFICALLY

24 DECIDE IT IN OUR FAVOR. AND THE COURT NOTED IT HAD AN
25 OPPORTUNITY TO FINALLY CLARIFY THIS ISSUE, AND IT
26 AVOIDED THE ULTIMATE ISSUE BEFORE IT THAT WOULD BE
27 HELPFUL TO US IN THIS CASE, ALTHOUGH IT MAY HAVE DECIDED
28 THE ULTIMATE ISSUE AS IT RELATES TO THAT CASE.

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1 BUT I FEEL THAT, NEVERTHELESS, THERE IS
2 SUFFICIENT LANGUAGE IN THE SWAIN OPINION TO SUPPORT ALL
3 OF THE ARGUMENTS THAT I PRESENTED IN MY POSITION, AND
4 THAT IS --

5 THE COURT: LET ME ASK YOU THIS: WHY IS THERE A
6 NEED FOR A FINDING BY THE JURY AS TO DEGREE OF MURDER IN
7 CONSPIRACY?

8 IF THE PUNISHMENT IS 25 YEARS TO LIFE, WHY
9 DOES THE JURY HAVE TO FIND A LEVEL OR A DEGREE?

10 MR. CONN: I THINK THAT THAT WAS MERELY THROWN
11 OUT MORE AS A FALL-BACK POSITION RATHER THAN MY PRIMARY
12 POSITION.

13 MY PRIMARY POSITION IS THAT I THINK THE LAW
14 IS SUFFICIENTLY CLEAR THAT THERE CAN ONLY BE A
15 CONSPIRACY TO COMMIT MURDER WHICH IS PUNISHABLE BY 25
16 YEARS TO LIFE. OUT OF AN OVER-ABUNDANCE OF CAUTION, AND
17 AS A FALL-BACK POSITION, I THINK THAT THE JURY COULD
18 MAKE A SPECIAL FINDING ONLY TO PRESERVE ANY APPELLATE
19 ISSUE IN THE CASE OF IF WE WERE NOT CERTAIN AS TO THE

20 CORRECT APPROACH TO THIS.

21 BUT I HAVE NO PROBLEM WITH THE JURY SIMPLY
22 BEING INSTRUCTED IN REGARD TO CONSPIRACY TO COMMIT
23 MURDER, AND IF THEY DO MAKE THAT FINDING, THE DEFENDANT
24 SHOULD BE PUNISHED BY 25 TO LIFE.

25 THE COURT: WHAT IS THE DEFENSE POSITION AS TO
26 WHETHER THE JURY SHOULD BE GIVEN AN OPTION OF FIRST AND
27 SECOND-DEGREE CONSPIRACY, OTHER THAN SWAIN, SAYS THERE
28 HAS TO BE A FINDING OF INTENT TO KILL?

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1 MR. GESSLER: I DON'T THINK SWAIN HELPS MUCH AT
2 ALL, AND I DON'T THINK SWAIN CHANGES HORN.

3 I'M NOT ASKING FOR FIRST AND SECOND-DEGREE.
4 WE ARE ASKING FOR MANSLAUGHTER, WHICH IS MENTIONED IN
5 THE HORN CASE, AND ALTHOUGH THAT MAY BE -- IT'S BEEN
6 CRITICIZED OCCASIONALLY HERE, IT CERTAINLY HAS NOT BEEN
7 OVERRULED BY OUR STATE SUPREME COURT, AND IT WAS NOT
8 SPECIFICALLY OVERRULED IN SWAIN. IT'S VERY UP IN THE
9 AIR ALSO AS TO WHETHER TRULY THE ONLY SENTENCE FOR A
10 CONSPIRACY TO MURDER IS 25 YEARS.

11 THAT STILL HAS NOT BEEN DECIDED. THEY TALK
12 ABOUT IT, AND IT'S THROWN OUT WITH CONCURRENCE, BUT
13 THERE IS NO LEGAL, HARD LAW SAYING YES, IT IS
14 NECESSARILY 25 YEARS TO LIFE. THAT'S STILL AN OPEN
15 QUESTION.

16 THE COURT: OKAY. BUT IF THERE -- I DON'T --
17 PERSONALLY, I DON'T SEE -- AND IT'S MY VIEW THAT THERE
18 IS NO SUCH THING AS CONSPIRACY TO COMMIT MANSLAUGHTER.
19 IT JUST DOESN'T MAKE SENSE, QUITE FRANKLY.
20 MR. GESSLER: IT DID TO HORN.
21 THE COURT: IT DID, BUT IT DOESN'T MAKE SENSE.
22 AND THE INSTRUCTION THAT WAS TAILORED IN THE FIRST TRIAL
23 DOESN'T MAKE SENSE EITHER. BUT TO GET IT TO A
24 MANSLAUGHTER WITH A SPECIAL INSTRUCTION SUBMITTED CITING
25 HORN --
26 MR. GESSLER: I THINK THE COURT GAVE THAT
27 INSTRUCTION IN THE FIRST TRIAL.
28 THE COURT: I KNOW. AND LOOKING BACK ON IT, EVEN

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1 WHILE THE JURY WAS DELIBERATING IN THAT CASE, I REALIZED
2 IT DIDN'T MAKE SENSE AND IT WAS WRONG. IT REALLY
3 DOESN'T MAKE SENSE.
4 MR. GESSLER: IT DID TO THE SIX JUSTICES IN HORN
5 WHEN IT WAS DECIDED, YOUR HONOR, AND I THINK THOSE SIX
6 JUSTICES' COLLECTIVE WISDOM IS PRETTY GOOD. AND AS MANY
7 TRIAL COURTS HAVE SAID, ALTHOUGH THEY MAY DISAGREE WITH
8 CERTAIN SEARCH AND SEIZURE LAWS, OR WITH CERTAIN
9 HOLDINGS OF THE SUPREME COURT, UNDER AUTO EQUITY SALES
10 THE COURTS ARE ALWAYS BOUND TO FOLLOW WHAT THEY DON'T
11 WANT TO DO.

12 THE COURT: ABSOLUTELY. ABSOLUTELY. I AM
13 PERFECTLY COMMITTED TO FOLLOWING THE APPELLATE COURT
14 DECISIONS. BUT THE APPELLATE COURT DECISIONS IN THIS
15 CASE, INCLUDING HORN, DOESN'T STAND FOR THE PROPOSITION
16 THAT YOU'RE ARGUING FOR, AND THAT'S THE PROBLEM.

17 AND AS FAR AS HORN IS CONCERNED, IT REALLY
18 IS ON THIS ISSUE QUESTIONED, AND IT'S -- THE WEIGHT OF
19 ITS PRECEDENT IS VERY LIGHT AT THIS POINT UNDER -- AFTER
20 THE ANALYSIS IN SWAIN. IT REALLY IS. THAT'S THE NATURE
21 OF SWAIN.

22 MR. GESSLER: THEY DIDN'T ANALYZE IT IN SWAIN,
23 YOUR HONOR. IF THEY HAD WANTED TO DO SOMETHING TO HORN
24 AND SAY: "WE WERE WRONG, OR WE'RE CHANGING IT IN THIS
25 WAY," IT SEEMS LIKE THEY COULD HAVE SAID SO IN SWAIN.

26 BUT THEY DON'T. THEY DANCE ALL AROUND THE
27 ISSUE. HAVING DANCED AROUND THE ISSUE, HORN IS STILL
28 GOOD LAW.

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1 THE COURT: THEY TOOK THE ISSUE THAT: THE
2 PRECISE ISSUE IS NOT BEFORE US; THEREFORE, WE CAN'T
3 DECIDE IT AND WON'T DECIDE IT.

4 BUT CLEARLY FROM WHAT THEY SAY, THEY'RE
5 TALKING ABOUT HORN BEING BAD LAW, AND NOT THE LAW HERE.

6 SO MY INCLINATION IS JUST TO GIVE -- AND
7 THE DEFENDANT OBVIOUSLY WOULD BE THE BENEFICIARY OF THIS

8 TO THE EXTENT THAT I'M WRONG, OR THE PEOPLE ARE WRONG,
9 IF AN INSTRUCTION IS ONLY GIVEN ON CONSPIRACY TO COMMIT
10 MURDER, AND THERE IS NO FINDING BY THE JURY AS TO THE
11 DEGREE.

12 THEN IF THE LAW IS THAT THERE SHOULD BE A
13 FINDING ON DEGREE, THEN I GUESS THE DEFENDANT WOULD GET
14 THE BENEFIT THAT THE JURY HASN'T MADE A FINDING ON
15 DEGREE, AND IT WOULD BE SECOND-DEGREE, AND WHATEVER THE
16 PUNISHMENT WOULD BE FOR THAT.

17 MR. GESSLER: THAT DOESN'T SEEM TO BE TRUE UNDER
18 THAT ONE STRANGE CLAUSE IN CONSPIRACY, YOUR HONOR,
19 BECAUSE THE GENERAL LAW IS, OF COURSE, IF THE JURY
20 DOESN'T AGREE ON DEGREE, THE DEFENDANT BENEFITS BY THE
21 LESSER DEGREE BEING IMPOSED AS A MATTER OF LAW.

22 THERE IS THAT PHRASE THAT KEEPS CROPPING UP
23 AT THE END OF THE CONSPIRACY PART, THAT IF THEY
24 DISAGREE, IT'S THE LOWER DEGREE, EXCEPT IF IT'S MURDER,
25 WHICH WOULD IMPLY THAT IF THEY DON'T FIND IT, THEN
26 YOU'RE STUCK WITH FIRST INSTEAD OF SECOND.

27 IN OTHER WORDS, THE EXACT OPPOSITE OF THE
28 NORMAL RULE THAT WE'RE USED TO WOULD APPLY, AND I THINK

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1 THAT'S WHY THEY'VE GONE FOR AT LEAST --

2 THE COURT: WHAT IS THE PUNISHMENT FOR
3 SECOND-DEGREE?

4 MR. GESSLER: FOR CONSPIRACY TO COMMIT

5 SECOND-DEGREE MURDER?

6 MR. LEVIN: IT'S INDETERMINATE.

7 THE COURT: CONSPIRACY TO COMMIT SECOND-DEGREE,

8 IS THAT 25 TO LIFE?

9 MR. GESSLER: THAT'S UNDERMINED ALSO. THERE IS

10 NO CASE THAT SPECIFICALLY SAYS. THEY TALK ABOUT IT AS

11 IT HAS TO BE FIRST DEGREE OR NOTHING. THEY TALK ABOUT

12 "GEE, IF IT'S MURDER, IT'S 25 TO LIFE, EVEN IF THERE IS

13 CONSPIRACY TO COMMIT SECOND," BUT THERE IS NO HOLDING ON

14 THAT. THAT LAW HAS NOT BEEN DEFINITELY DECIDED.

15 BUT IF WE DON'T GET A CHANCE TO FIND OUT IF

16 IT'S FIRST OR SECOND, THEN WE'RE STUCK. WE WILL BE THE

17 FIRST PEOPLE TO KNOW, BUT IT'LL BE A RATHER UNFORTUNATE

18 WAY OF FINDING OUT, WHEN IN ESSENCE THE LAW SHOULD BE

19 ABLE TO PROVIDE THE BENEFIT TO A DEFENDANT OF CLARITY OF

20 JUDGMENT, AND KNOWING WHAT THE JURY HAS THOUGHT AND

21 DECIDED IN COMING TO THEIR VERDICT.

22 IF IN FACT THERE SHOULDN'T BE A -- IF IN

23 FACT IT'S A NULLITY, AND THE JURY SAYS CONSPIRACY TO

24 COMMIT SECOND-DEGREE, AND THE LAW SAYS, "SO WHAT, WE'RE

25 GOING TO THROW 25 YEARS AT THEM ANYWAY," THEN AT LEAST

26 WE CAN FIND OUT IF THAT'S WRONG, BECAUSE WE WILL KNOW

27 WHAT THE JURY FOUND.

28 BUT IF WE DON'T GET THE IDEA OF THE DEGREE

1 IN IN THERE, THEY'LL NEVER KNOW, AND THEY WILL BE STUCK
2 WITH 25 YEARS, WHEN MAYBE THAT WASN'T THE FAIR IDEA OF
3 WHAT THE JURY CAME TO.

4 THE COURT: ALL RIGHT.

5 I THINK THE MESSAGE IN SWAIN IS THAT THERE
6 IS NO NEED FOR AN INSTRUCTION ON DEGREE OF MURDER --
7 CONSPIRACY TO COMMIT MURDER. I THINK THE MESSAGE IS
8 THAT THE JURY SHOULD MAKE A FINDING AS TO WHETHER OR NOT
9 THERE IS CONSPIRACY TO COMMIT MURDER, PERIOD, WITHOUT
10 DEGREE.

11 I THINK THAT'S REALLY WHAT SWAIN SAYS, AND
12 THE NATURE OF ITS LANGUAGE, NOT ITS HOLDING, BECAUSE THE
13 COURT TOOK THE POSITION THAT THEY DIDN'T WANT TO GO TO
14 ISSUES THAT WERE NOT DIRECTLY BEFORE THEM, BUT I AM NOW.
15 WHAT I AM NOW TALKING ABOUT IS THE CONCURRING OPINION OF
16 JUSTICE MOSK ON THIS ISSUE.

17 MR. GESSLER: WELL, WE WILL OBJECT, YOUR HONOR,
18 TO ANY GIVING OF A CONSPIRACY INSTRUCTION WITHOUT GIVING
19 THE OPTION OF FINDING CONSPIRACY TO COMMIT MANSLAUGHTER,
20 AND WE'LL FURTHER OBJECT TO THE GIVING OF ANY FURTHER
21 INSTRUCTION ON CONSPIRACY TO COMMIT MURDER WITHOUT
22 DEFINING IT, OR GIVING THE JURY A CHANCE TO FIND THE
23 DEGREE OF THAT CONSPIRACY.

24 THE COURT: OKAY. THE OBJECTION IS NOTED. I
25 THINK WHAT HAS TO BE DONE IS THE INDICATION THAT THE
26 JURY MUST FIND EXPRESS MALICE RATHER THAN APPLIED MALICE
27 IN ORDER TO COME BACK WITH A VERDICT OF CONSPIRACY TO
28 COMMIT MURDER.

1 OKAY. LET'S TALK ABOUT OTHER INSTRUCTIONS
2 THEN.

3 I TAKE IT, MR. LEVIN, YOU WERE
4 INCORPORATING YOUR CLIENT'S POSITION IN THOSE REMARKS OF
5 MR. GESSLER ON THAT?

6 MR. LEVIN: YES, YOUR HONOR.

7 MR. GESSLER: YOUR HONOR, COULD WE TAKE A
8 10-MINUTE RECESS SO THAT I CAN DISCUSS FURTHER MATTERS
9 WITH CO-COUNSEL?

10 THE COURT: CERTAINLY. OKAY. WE WILL RESUME AT
11 10 TO.

12 MR. GESSLER: THANK YOU, YOUR HONOR.

13 THE COURT: THANK YOU.

14 (A RECESS WAS HELD FROM
15 2:35 P.M. TO 2:55 P.M.)

16

17 THE COURT: OKAY. EVERYBODY IS BACK. WE WILL
18 CONTINUE OUR DISCUSSIONS HERE.

19 WHAT WE COULD DO IS REFER TO THE
20 DEFENDANT'S SPECIALS FIRST, IF YOU LIKE, AND THEN GO
21 THROUGH THE PEOPLE'S SPECIFIC OBJECTIONS TO THEM.

22 THE ONLY REASON I SUGGEST THAT IS BECAUSE
23 THERE ARE FEWER DEFENSE INSTRUCTIONS THAN THERE ARE
24 PROSECUTION INSTRUCTIONS THAT YOU HAVE SUBMITTED.

25 MS. ABRAMSON: PROSECUTION SPECIALS?

26 THE COURT: NO, YOUR SPECIALS.

27 MS. ABRAMSON: I KNOW. I DON'T THINK THEY HAVE
28 ANY SPECIALS.

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1 THE COURT: WELL, THEY HAVE MODIFIED SOME
2 INSTRUCTIONS.

3 MS. ABRAMSON: WELL, THE PROBLEM IS, JUDGE, SINCE
4 HOPE SPRINGS ETERNAL, THANK GOD, THE PROBLEM WITH OUR
5 SPECIALS IS THAT MANY OF THEM ADDRESS -- WELL, NO,
6 THAT'S FINE, I GUESS.

7 THE COURT: ALL RIGHT. LET'S PROCEED THEN. WE
8 CAN GO THROUGH THEM.

9 DO YOU HAVE A PREFERENCE WHETHER WE GO WITH
10 YOURS OR ERIK MENENDEZ'?

11 MS. ABRAMSON: NO, GO WITH CO-COUNSEL. I HAVE
12 JOINED IN ALL OF CO-COUNSEL'S MODIFICATIONS.

13 THE COURT: THEY HAVE MORE OF THEM.

14 MS. ABRAMSON: THEY WERE A GROUP EFFORT, YOUR
15 HONOR, SO I HAVE OWNERSHIP RIGHTS TO BOTH SETS.

16 MS. TOWERY: ARE YOU GOING TO START WITH THE
17 MODIFIED CALJICS OR THE SPECIAL INSTRUCTIONS?

18 THE COURT: WELL, THE MODIFIED ONES, ARE THEY
19 SUBSTANTIAL MODIFICATIONS?

20 MR. GESSLER: I WOULD SAY THEY ARE SUBSTANTIAL.

21 THE COURT: WE CAN DO THAT THEN. YOU HAVE GIVEN

22 ME THOSE, TOO. SO IT DOESN'T MATTER. YOU MAY HAVE
23 GIVEN ME ALL OF THOSE, TOO. YOU GAVE ME THE MODIFIED
24 ONES, THE CALJICS.

25 MR. GESSLER: YES, WE DID.

26 THE COURT: OKAY.

27 LET'S START WITH 2.02, THE DEFENSE VERSION.

28 MR. GESSLER: OUR DIFFERENCE IN 2.02, YOUR HONOR,

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1 IS THAT WE LEFT OUT THE PARAGRAPH THAT HAS BEEN ADDED IN
2 THE, I THINK '95 VERSION, THAT YOU ALSO CAN'T FIND GUILT
3 OF A LESSER UNTIL THE MENTAL INTENT POINTS ONLY TO THAT,
4 AND I BELIEVE --

5 THE COURT: WHAT DID YOU LEAVE OUT? I DON'T SEE
6 WHAT YOU LEFT OUT.

7 MS. TOWERY: WE DIDN'T.

8 MR. GESSLER: AS FAR AS THE PROSECUTION-SUBMITTED
9 INSTRUCTION, OURS IS THE SAME, AND THAT WILL BE ALL
10 RIGHT.

11 MS. TOWERY: IT'S JUST A RETYPED VERSION OF 2.02
12 WITHOUT THE BLANKS.

13 THE COURT: OKAY. IT'S A STANDARD INSTRUCTION?

14 MS. TOWERY: YES, YES.

15 THE COURT: BOTH SIDES HAVE THE SAME INSTRUCTION?

16 MS. TOWERY: YES.

17 THE COURT: THIS IS A 1992 VERSION. OKAY.

18 SO HAVE YOU DONE THAT ON MANY OF THESE?

19 MS. TOWERY: I THINK THAT'S THE ONLY ONE WE JUST
20 TOOK THE BLANKS OUT OF. ON THE OTHER ONES WE ADDED
21 LANGUAGE.

22 THE COURT: OKAY. IF I HAVE SUFFICIENT TIME, I
23 WILL JUST PREPARE FROM THE COMPUTER A FINAL VERSION,
24 TAKING OUT BLANKS AND THINGS OF THAT NATURE, IF THE
25 COMPUTER COOPERATES.

26 OKAY. SO 2.02, BOTH VERSIONS ARE THE SAME,
27 SO WE DON'T HAVE TO WORRY ABOUT THAT ONE.

28 2.03, WE HAVE TWO VERSIONS, THE PEOPLE'S

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1 AND THE DEFENSE.

2 THE PEOPLE JUST GAVE THE STANDARD VERSION.
3 YOU'VE ADDED LANGUAGE.

4 MS. TOWERY: CORRECT. WE ADDED, BASICALLY, THE
5 NICOLAUS LANGUAGE, YOUR HONOR, THAT CONSCIOUSNESS OF
6 GUILT CANNOT BE USED TO DETERMINE THE DEFENDANT'S MENTAL
7 STATE AT THE TIME OF THE CRIME, OR THE DEGREE OF THE
8 OFFENSE COMMITTED.

9 AS THE COURT MAY RECALL, WE HAD QUITE A
10 HEATED WRITTEN BATTLE ABOUT THE USE OF CONSCIOUSNESS OF
11 GUILT EVIDENCE WHEN WE WERE LITIGATING THE ESCAPE PLANS.

12 THE COURT: RIGHT.

13 MS. TOWERY: AND THIS IS THE LANGUAGE THAT -- OR

14 PERHAPS NOT THE EXACT LANGUAGE, BUT THE ESSENCE OF WHAT
15 THE COURTS HAVE SAID ABOUT THE USE OF CONSCIOUSNESS OF
16 GUILT IN CONNECTION WITH THE DEFENDANT'S MENTAL STATE AT
17 THE TIME OF THE CRIME. IT JUST CLARIFIES THE
18 INSTRUCTIONS, SO THAT THERE'S NO ROOM FOR THE TYPE OF
19 ERROR ARGUED IN ALL OF THOSE CASES.

20 THE COURT: WHAT IS THE PEOPLE'S POSITION AS TO
21 THAT?

22 MR. CONN: YES. I BELIEVE THAT THIS IS -- THIS
23 WAS THE LANGUAGE THAT WE DISPUTED.

24 IT IS OUR POSITION THAT THE -- IT CAN BE
25 CONSIDERED IN DETERMINING THE DEFENDANT'S -- IT GOES TO
26 THE QUESTION OF THE DEFENDANT'S STATE OF MIND AT THE
27 TIME OF THE COMMISSION OF THE CRIME.

28 MS. TOWERY: I DON'T BELIEVE THAT WAS THE

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1 PEOPLE'S POSITION WHEN LITIGATING THE ADMISSIBILITY OF
2 THE ESCAPE PLANS, YOUR HONOR. I THINK THE PEOPLE'S
3 POSITION WAS QUITE TO THE CONTRARY.

4 THE COURT: WELL, THIS IS FALSEHOOD. WE ARE
5 TALKING ABOUT 2.03, NOT ESCAPE PLANS.

6 MS. TOWERY: WELL, IT'S STILL CONSCIOUSNESS OF
7 GUILT.

8 THE COURT: OKAY. SO THE ARGUMENTS YOU'RE SAYING
9 ARE THE SAME?

10 MS. TOWERY: YES, YES.

11 THE COURT: WELL, ISN'T THE ARGUMENT SOMEONE HAS
12 A CONSCIOUSNESS OF GUILT IF HE IS SAYING SOMETHING
13 UNTRUE ABOUT HIS INVOLVEMENT, AND THAT IS VIEWED AS
14 CIRCUMSTANCIAL EVIDENCE OF HIS STATE OF MIND THAT HE
15 COMMITTED A CRIME? THAT'S BASICALLY WHAT IT IS, ISN'T
16 IT?

17 MR. GESSLER: THAT HE COMMITTED A CRIME.

18 MS. TOWERY: A CRIME, RIGHT.

19 THE COURT: IT DOESN'T PROVE HIS STATE OF MIND AT
20 THE TIME OF THE CRIME, OR IT'S JUST CIRCUMSTANCIAL
21 EVIDENCE OF THE MENTAL PROCESS -- THE THOUGHT PROCESS OF
22 THE INDIVIDUAL, HOW HE ANALYZES HIS SITUATION BASED UPON
23 WHAT HE KNOWS ABOUT THE CASE.

24 MR. GESSLER: JUST THAT HE'S GUILTY OF SOMETHING.

25 THE COURT: YES.

26 MR. GESSLER: BUT IN THIS CASE WHERE IT'S GUILTY
27 OF WHAT IS THE MAIN SIGNIFICANCE OF THE TRIAL, IT
28 DOESN'T AID THE JURY AT ALL IN DETERMINING WHETHER HE

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1 FELT HE WAS GUILTY OF FIRST-DEGREE MURDER, SECOND-DEGREE
2 MURDER, OR MANSLAUGHTER.

3 SO THAT'S WHY WE HAVE ADDED THE SECOND
4 PARAGRAPH THERE, WHICH I THINK PUTS IT IN PERSPECTIVE.

5 MS. TOWERY: AND THE CASE LAW INDICATES THAT THE

6 JURY SHOULD NOT USE CONSCIOUSNESS OF GUILT EVIDENCE TO
7 DETERMINE THE DEFENDANT'S MENTAL STATE AT THE TIME OF
8 THE CRIME, AND THIS SIMPLY CLARIFIES WHAT COULD
9 OTHERWISE BE CONSIDERED MISLEADING LANGUAGE IN 2.03, AND
10 WHICH HAS BEEN ARGUED TO BE MISLEADING LANGUAGE IN 2.03
11 AND THESE CASES.

12 AND THE COURT SAYS, WELL, THE JURY IS NOT
13 LIKELY TO BE SO MISLED. AND THE INSTRUCTION DOESN'T SAY
14 THAT THEY CAN USE IT FOR THOSE PURPOSES. SO, THEREFORE,
15 THERE IS NO ERROR IN THE INSTRUCTION.

16 HOWEVER, GIVEN THE AMOUNT OF LITIGATION
17 THAT HAS ARISEN WITH RESPECT TO THIS ISSUE, IT SEEMS
18 PROPER TO INSTRUCT THE JURY THAT THEY CAN'T USE IT FOR
19 THESE PURPOSES, WHICH THE COURTS SAY IS AN IMPERMISSIBLE
20 USE.

21 THE COURT: SO BASICALLY WE'RE TALKING ABOUT THE
22 DEFINITION OR THE MEANING OF CONSCIOUSNESS OF GUILT.

23 MS. TOWERY: EXACTLY.

24 THE COURT: AS TO HOW THE JURY WOULD INTERPRET
25 THAT.

26 I AM SATISFIED THAT THE STANDARD
27 INSTRUCTION IS ADEQUATE. I THINK WHAT YOU'RE ADDING
28 HERE IS JUST MORE CONFUSING THAN HELPFUL. IT DOESN'T

1 TELL THE JURY THAT THEY'RE GOING TO FIND OR THEY SHOULD

2 FIND THE DEFENDANT GUILTY OR REFER TO HIS STATE OF MIND
3 AT THE TIME OF THE OFFENSE.

4 MS. ABRAMSON: THE PROBLEM IS, YOUR HONOR, IT
5 SUGGESTS THAT IT HAS SIGNIFICANCE, AND THEN DOESN'T TELL
6 THEM WHAT IT IS. IT SAYS ITS WEIGHT AND SIGNIFICANCE IS
7 A MATTER FOR YOUR DETERMINATION. AND THEREFORE, THEY
8 COULD FIND IT SIGNIFICANT ON DEGREE WHEN THEY'RE NOT
9 SUPPOSED TO BE ABLE TO DO THAT.

10 SO MAYBE THERE'S A SIMPLER WAY TO ADD A
11 SECOND SENTENCE.

12 THE COURT: I WILL BE WILLING TO LOOK AT
13 SOMETHING ELSE. BUT AS IT'S PHRASED, I JUST THINK IT'S
14 OPEN TO MORE CONFUSING INTERPRETATIONS AS YOU HAVE IT
15 THERE, THAN JUST LEAVING IT AS IT WAS.

16 MS. ABRAMSON: WHAT ABOUT JUST THE LAST SENTENCE:
17 "CONSCIOUSNESS OF GUILT MAY NOT BE CONSIDERED IN
18 DETERMINING DEFENDANT'S MENTAL STATE AT THE TIME OF THE
19 CRIME, OR THE DEGREE OF ANY OFFENSE COMMITTED, ONLY WITH
20 RESPECT TO WHETHER OR NOT HE COMMITTED IT."

21 MR. CONN: I WOULD OPPOSE THAT.

22 MS. ABRAMSON: OR COMMITTED AN OFFENSE.

23 MR. CONN: I WOULD OPPOSE THAT, BECAUSE I THINK
24 IT IS RELEVANT.

25 MS. ABRAMSON: OR COMMITTED THE ACT.

26 MR. CONN: I THINK IT IS RELEVANT FOR THE JURY TO
27 EVALUATE IT AND GIVE IT THE WEIGHT AND SIGNIFICANCE THAT
28 THEY FEEL IS APPROPRIATE TO THE DEFENDANT'S BEHAVIOR.

1 THE COURT: I THINK THE BOTTOM LINE IS,
2 REGARDLESS OF THE APPELLATE COURT'S DEALING WITH IT,
3 THEY HAVEN'T CAUSED ANY CHANGES TO BE MADE, ALTHOUGH
4 IT'S BEEN ADDRESSED ON MANY OCCASIONS. THAT'S IT.

5 SO I AM JUST GOING TO GIVE THE STANDARD
6 INSTRUCTION. I THINK WE'RE JUST GETTING INTO MORE
7 CONFUSION THAN HELP HERE.

8 MS. ABRAMSON: YOUR HONOR, BEFORE WE GO ANY
9 FARTHER, I WOULD LIKE TO MAKE SURE THE RECORD IS
10 COMPLETE BY SUBMITTING, AS AN EXHIBIT TO THESE
11 PROCEEDINGS, THE 5.17 REVISION THAT THE COURT HANDED OUT
12 EARLIER.

13 THE COURT: YES. AS I SAID, THAT WAS A DRAFT
14 THAT I DID IN AUGUST, AND IT DOES NOT REFLECT MY
15 ANALYSIS OF THE DEFINITION OF IMMINENT DANGER OR PERIL.
16 IT WAS JUST A DRAFT IN CASE WE -- FOR THE PURPOSE OF
17 DISCUSSION, IF WE EVER GOT TO THAT, FOR FURTHER
18 REFINEMENT OF THAT INSTRUCTION, IF I WAS GOING TO HAVE
19 GIVEN IT. THAT IS WHY I PREPARED THAT.

20 MS. ABRAMSON: DOES THE COURT BELIEVE IT HAS LAID
21 OUT ON THE RECORD WHAT ITS CURRENT INTERPRETATION OF
22 IMMINENT PERIL IS?

23 THE COURT: YES. MY CURRENT INTERPRETATION IS AS
24 SET FORTH IN THE CASE OF IN RE CHRISTIAN S.

25 MS. ABRAMSON: OKAY.

26 THE COURT: OKAY. LET'S GO ON TO 2.04. AND I

27 HAVE SAID THAT I HAVE THE VIEW THAT THERE IS AN

28 OBJECTIVE STANDARD IN REGARD TO AN INTERPRETATION OF

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1 IMMINENT DANGER OR PERIL.

2 MS. ABRAMSON: YES, YOUR HONOR.

3 THE COURT: THAT IT IS NOT TRULY A SUBJECTIVE

4 STANDARD, WHAT THE DEFENDANT THOUGHT, BUT HAS TO BE

5 VIEWED FROM AN OBJECTIVE ANALYSIS, USING THE DEFINITION

6 AS OUR APPELLATE COURTS HAVE DEFINED IMMINENT DANGER OR

7 PERIL.

8 OKAY. 2.04 I THINK IS THE SAME ARGUMENT.

9 MS. TOWERY: THAT'S CORRECT, AND 2.06.

10 THE COURT: SO THE SAME RULING THEN.

11 MS. TOWERY: 2.06 AS WELL, YOUR HONOR, IS THE

12 SAME ARGUMENT.

13 MR. GESSLER: WE WOULD OBJECT TO 2.06 TOTALLY,

14 YOUR HONOR.

15 THE COURT: YES. I HAVE SOME QUESTION.

16 WELL, NO. WE HAVE CONCEALING OF EVIDENCE

17 OR DESTROYING OF EVIDENCE. CERTAINLY YOU HAVE THE

18 WEAPONS, THE CLOTHES, EVERYTHING INVOLVED IN THE

19 COMMISSION OF THE CRIME. SO YOU HAVE DESTROYING OR

20 CONCEALING THAT, ONE WAY OR ANOTHER, YOU HAVE SOMETHING

21 THAT WAS DONE, WHETHER -- HOWEVER YOU WANT TO INTERPRET

22 IT.

23 MR. GESSLER: WELL, THAT COULD BE CONSIDERED THEN
24 UNDER 2.06, IF SOMEBODY WASHED HIS CLOTHES AFTER A
25 ROBBERY, OR RAN AWAY FROM A ROBBERY.
26 I MEAN, I THINK THIS IS NORMALLY MEANT FOR
27 SOMETHING AFTER THE ACTUAL COMPLETION OF THE CRIME, AND
28 NOT MATTERS TAKING PLACE DURING THE GETAWAY.

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1 THE COURT: THE FACT THAT YOU DUMP THE GUNS AFTER
2 THE CRIME? SURE, THAT SHOWS CONSCIOUSNESS OF GUILT.

3 MR. GESSLER: WITHIN MINUTES OF IT. WELL, THEY
4 DIDN'T STICK AROUND, NO. BUT THE JURY KNOWS THAT.

5 BUT I THINK THIS IS USUALLY THOUGHT OF AS
6 SOMETHING EXTRA, LIKE AFTER THE ARREST IS IMMINENT, OR
7 CHARGES ARE FILED, BUT NOT JUST CONTINUOUS COURSE OF
8 CONDUCT RIGHT AT THE TIME OF THE CRIME.

9 THE COURT: WELL, 2.06 HAS IN IT "OFFER TO
10 COMPENSATE A WITNESS," WHICH HAD TO DO WITH YOUR CLIENT,
11 "BY DESTROYING OR CONCEALING EVIDENCE," WHICH I THINK
12 DOES APPLY AS TO THE WEAPONS AND CLOTHING AND THINGS OF
13 THAT NATURE, AND THE SHELLS, AND DESTROYING -- THROWING
14 AWAY SHELLS ON MORE THAN ONE OCCASION THE DAY
15 AFTERWARDS.

16 SO I THINK 2.06 DOES APPLY AS MODIFIED BY
17 THE PROSECUTION.

18 2.07 IS ON YOUR LIST, THE PEOPLE'S LIST,

19 BUT IT IS NOT INCLUDED, BUT IS INCLUDED IN THE
20 MATERIALS.

21 MS. TOWERY: WE HAVE NOT BEEN PROVIDED WITH THE
22 PEOPLE'S LIST, YOUR HONOR. WE JUST GOT A PACKET OF
23 MATERIALS.

24 THE COURT: I HAD THEM PREPARE A LIST, BECAUSE
25 THAT'S WHAT THEY GAVE ME, A PACKET OF MATERIALS.

26 DO YOU HAVE ANOTHER COPY OF YOUR LIST?

27 2.07. CERTAINLY, THAT SHOULD BE GIVEN.

28 MS. NAJERA: IT IS IN THE PACKET, YOUR HONOR.

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1 THE COURT: IT WAS ON THE LIST, BUT NOT IN THE
2 PACKET.

3 MS. NAJERA: IT SHOULD HAVE BEEN ON THE LIST,
4 BECAUSE IT'S IN MY PACKET. IT WAS INADVERTENTLY LEFT
5 OUT.

6 THE COURT: I DON'T HAVE 2.07.

7 MS. NAJERA: DO YOU NEED A COPY NOW, YOUR HONOR?
8 I'VE GOT ONE.

9 THE COURT: NO, I CAN GET THAT. 2.07.

10 LET'S BACK UP HERE. WE STARTED AT 2.02.

11 1.00 THROUGH 2.02 ARE GOING TO BE GIVEN AS
12 THEY WERE SUBMITTED BY THE PROSECUTION, BECAUSE THERE
13 WAS NO DISPUTE.

14 THEN 2.07 WILL BE GIVEN. IT'S A STANDARD

15 INSTRUCTION, AND I DON'T KNOW IF IT REQUIRES ANY
16 MODIFICATIONS IN THIS CASE OR NOT. I DON'T THINK IT
17 DOES. WE IDENTIFIED CERTAIN EVIDENCE AS IT WAS
18 PRESENTED.

19 AND THEN 2.08. BOTH SIDES ARE REQUESTING
20 THAT ONE; IS THAT RIGHT? 2.08.

21 MS. TOWERY: THAT'S NOT ON OUR LIST.

22 NOW, THERE ARE CERTAIN STATEMENTS MADE BY
23 THE DEFENDANTS AFTER ARREST THAT WERE LIMITED ONLY AS TO
24 THE DECLARANT.

25 MS. ABRAMSON: GLENN STEVENS, RICHARD WENSKOSKI.

26 THE COURT: AND THOSE WERE IDENTIFIED AT THE
27 TIME?

28 MS. ABRAMSON: YES.

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1 THE COURT: DO YOU WANT A SEPARATE INSTRUCTION IN
2 ADDITION TO 2.07 WHICH TALKS ABOUT EVIDENCE LIMITED AS
3 TO PURPOSE? YOU WANT THIS ONE AS WELL?

4 MS. ABRAMSON: WHY DON'T WE JUST PUT THE WORD
5 "EVIDENCE", INCLUDING STATEMENTS.

6 THE COURT: WHICHEVER WAY YOU WANT. THEY'RE
7 SHORT INSTRUCTIONS. WE CAN GIVE THEM BOTH.

8 MS. ABRAMSON: ALL RIGHT, GIVE THEM BOTH.

9 THE COURT: 2.07 AND 2.08 WILL BE GIVEN.

10 2.09 WILL BE GIVEN, BECAUSE THERE WAS

11 EVIDENCE, ALTHOUGH LIMITED, AS TO PURPOSE. MORE OFTEN
12 IT WAS LIMITED AS TO ONE DEFENDANT OR THE OTHER THAN
13 ANYTHING ELSE, BUT THERE WAS SOME EVIDENCE, HEARSAY-TYPE
14 THINGS THAT WERE RECEIVED ONLY AS TO STATE OF MIND.
15 SEVERAL THINGS FOR STATE OF MIND, AT LEAST.

16 2.11 WILL BE GIVEN.

17 2.13 IS ON THE PEOPLE'S LIST.

18 MS. TOWERY: THAT'S ON OUR LIST AND NOT ON THE
19 PROSECUTION'S LIST. THAT'S THE GREEN INSTRUCTION, YOUR
20 HONOR.

21 THE COURT: OKAY. THE PEOPLE DIDN'T GIVE ME THAT
22 ONE EITHER, BUT IT'S ON THEIR LIST.

23 MS. TOWERY: AGAIN, WE DON'T HAVE THEIR LIST. WE
24 ONLY KNOW WHAT THE PACKET HAS.

25 THE COURT: I AM JUST GOING TO KEEP GOING THROUGH
26 THEIR LIST.

27 2.13 WILL BE GIVEN.

28 MS. ABRAMSON: ARE THEY SUPPOSED TO TURN OVER THE

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1 LIST RIGHT NOW?

2 MS. NAJERA: I HAVE ANOTHER COPY OF IT. YOU WERE
3 GIVEN ONE.

4 MS. ABRAMSON: YOU DIDN'T GIVE US ANYTHING.
5 ONE -- COULD WE HAVE TWO MAYBE? THERE'S FOUR OF US.

6 THE COURT: LET'S SEE. 2.20 IS THE NEXT

7 INSTRUCTION.

8 WHAT EVIDENCE DO WE HAVE OF CONDUCT NOT
9 AMOUNTING TO A FELONY OR A MISDEMEANOR-TYPE CONDUCT
10 HERE?

11 MS. ABRAMSON: GLENN STEVENS STEALING FROM THE
12 TILL.

13 THE COURT: IF YOU WANT THAT, THEN DO YOU ALSO
14 WANT SOME SEPARATE INSTRUCTION THAT -- NEW INSTRUCTION
15 THAT DEALS WITH THE WHEELER INSTRUCTION, AS IT'S CALLED?

16 WELL, ANYWAY, I WANT THIS TO BE INCLUDED
17 BECAUSE OF STEVENS.

18 OKAY. THEN 2.20 WILL BE GIVEN WITH THAT.

19 2.21.1 IS A STANDARD INSTRUCTION. THAT
20 WILL BE GIVEN.

21 2.21.2, WHICH THE PEOPLE DIDN'T PUT ON
22 THEIR LIST.

23 MS. TOWERY: IT'S IN THE PEOPLE'S PACKET.

24 THE COURT: YES. IT'S IN THE PACKET, BUT NOT ON
25 THE LIST. IT'S VERY HELPFUL TO DO IT THIS WAY.

26 MR. LEVIN: CAN WE JUST WRITE "CRAIG CIGNARELLI"
27 THE TOP?

28 THE COURT: 2.22.

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1 MS. TOWERY: THE COURT IS GIVING 2.21.2?

2 THE COURT: YES, SURE. AND 2.22.

3 2.27 AS MODIFIED.

4 MR. GESSLER: ON THAT WE HAVE A MODIFICATION.

5 THE COURT: WHAT DID YOU DO THERE?

6 MS. ABRAMSON: WE ADDED A 2.90 CLAUSE.

7 MS. TOWERY: RIGHT. WHICH, BY THE WAY, 2.90

8 WASN'T IN THE PEOPLE'S PACKET EITHER.

9 THE COURT: WELL, IT'S ON THEIR LIST. OKAY.

10 I AM NOT FAMILIAR WITH PEOPLE VERSUS

11 GAMMAGE.

12 MR. CONN: I HAVE IT HERE. I HAVE THE FOOTNOTE

13 HERE, YOUR HONOR, IF THE COURT WISHES TO READ IT.

14 THE COURT: WELL, YOU CAN READ IT TO ME, IF IT'S

15 NOT TOO LONG.

16 MR. CONN: IT'S NOT TOO LONG.

17 "THE COURT OF APPEAL IN THIS CASE

18 CRITICIZED THE USE OF THE LANGUAGE

19 REQUIRED TO BE ESTABLISHED BY THE

20 PROSECUTION, AND ADDITIONALLY URGED THIS

21 COURT TO RECONSIDER THE ENTIRE SECOND

22 SENTENCE OF THE INSTRUCTION.

23 "HOWEVER, THE INSTRUCTION HAS

24 RECENTLY BEEN REVISED TO MAKE THE POINTS

25 MOOT.

26 "IN PEOPLE VERSUS TURNER, A CASE

27 NOT INVOLVING SEX OFFENSES, THE TRIAL

28 COURT GAVE CALJIC 2.27 WITHOUT THE PHRASE

1 'REQUIRED TO BE ESTABLISHED BY THE
2 PROSECUTION'. THE DEFENDANT CONTENDED THE
3 ADMISSION WAS ERRONEOUS.

4 "WE FOUND NO ERROR, BUT SUGGESTED
5 THAT THE INSTRUCTION COULD BE marginally
6 IMPROVED TO HAVE A MORE NEUTRAL EFFECT AS
7 BETWEEN PROSECUTION AND DEFENSE, WHILE
8 STILL SATISFYING THE CONCERNS WE
9 IDENTIFIED IN RINCON-PINEDA."

10 THERE IS A SECOND PARAGRAPH.

11 "IN RESPONSE TO TURNER, CALJIC 2.27
12 HAS BEEN REVISED," AND IT QUOTES 2.27, AND
13 THEN SAYS: "AS A RESULT OF THIS REVISION,
14 WE NEED NOT CONSIDER THE COURT OF APPEALS
15 CRITICISM OF THE PRIOR VERSION OF THE
16 INSTRUCTION."

17 SO I DON'T THINK THAT CASE SUPPORTS THE
18 PROPOSAL THAT HAS BEEN SUBMITTED HERE. IT SEEMS TO BE
19 SAYING THAT 2.27 IS NOW ADEQUATE.

20 MS. ABRAMSON: THIS INSTRUCTION STILL DOESN'T
21 HAVE THE REQUIREMENT LANGUAGE.

22 THE COURT: NO. THE INSTRUCTION SAYS: "THE
23 TESTIMONY OF ONE WITNESS WHICH YOU BELIEVE CONCERNING
24 ANY FACT IS SUFFICIENT FOR THE PROOF OF THAT FACT."
25 THAT'S 2.27.

26 WHY IS THERE THIS THIRD PARAGRAPH? I DON'T
27 UNDERSTAND THE THIRD PARAGRAPH.

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1 YOUR HONOR, TO THE INSTRUCTION, TO AVOID CONFUSION TO
2 THE JURY.

3 THE COURT: WELL, THE LANGUAGE HERE IS THE
4 PROSECUTION BEARS THE BURDEN AS TO EACH MATERIAL ELEMENT
5 TO THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT.

6 SO YOU HAVE ADDED TWO PARAGRAPHS.

7 MS. TOWERY: RIGHT.

8 THE COURT: I WAS JUST LOOKING AT THE LAST ONE.

9 MS. TOWERY: IT EXPLAINS THE BURDEN OF PROOF. I
10 THINK IT'S AN ACCURATE STATEMENT OF THE LAW. THIS
11 INSTRUCTION WAS SUBMITTED TO THE COURT AT THE LAST TRIAL
12 AS A SPECIAL INSTRUCTION AS WELL.

13 THE COURT: I DON'T RECALL GIVING IT.

14 MS. TOWERY: NO, I DON'T THINK YOU DID.

15 THE COURT: AND I DON'T RECALL EVER SEEING IT. I
16 OBVIOUSLY DID. I AM JUST GOING TO GIVE 2.27. I JUST
17 DON'T SEE THAT.

18 THEN WE GO TO 2.50. LET'S SEE. BOTH SIDES
19 HAVE MODIFIED IT.

20 MS. TOWERY: THE DIFFERENCE IN THE MODIFICATIONS,
21 YOUR HONOR, RELATE TO PARAGRAPH THREE, AND THAT IS THE
22 PURPOSE FOR WHICH THE EVIDENCE CAN BE USED.

23 THE PEOPLE INSERTED WHY ERIK MENENDEZ WAS

24 SENT TO DR. OZIEL, AND ALSO INSERTED A FINANCIAL
25 RELATIONSHIP BETWEEN THE DEFENDANTS AND THEIR PARENTS.
26 MS. ABRAMSON: WHICH DOES SEEM TO BE STRETCHING
27 IT A BIT.
28 MS. TOWERY: WHICH DOES NOT COMPORT WITH THE ORAL

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1 INSTRUCTION THE COURT GAVE TO THE JURY AT THE TIME THE
2 EVIDENCE WAS RECEIVED.

3 MR. CONN: YES. BUT AT THE TIME THE EVIDENCE WAS
4 RECEIVED, I ARGUED THAT WE SHOULDN'T INSTRUCT THEM SO
5 NARROWLY, AND THE COURT SAID, "THAT'S FINE, JUST SUBMIT
6 A PROPOSAL BY THE END OF THE TRIAL, AND WE WILL DISCUSS
7 IT AT THAT TIME."

8 THE COURT: WHY IS THERE A NEED FOR ANYTHING MORE
9 THAN JUST A RELATIONSHIP OF THE DEFENDANTS TO THEIR
10 PARENTS?

11 I DON'T RECALL -- IN THE FIRST TRIAL IT WAS
12 THE COURT'S RULING THAT THE EVIDENCE WAS RECEIVED ALSO
13 BECAUSE OF THE RELATIONSHIP OF THE DEFENDANT -- THIS ONE
14 DEFENDANT AND OZIEL.

15 BUT THIS JURY DOESN'T KNOW THAT -- OR I
16 DON'T RECALL THAT THAT HAS BEEN BROUGHT OUT, THAT THAT'S
17 WHY THE DEFENDANTS WENT TO OZIEL. CORRECT ME IF I'M
18 WRONG. I DON'T RECALL THAT BEING INTRODUCED IN THIS
19 CASE. YOU FOLKS MAY HAVE A BETTER RECOLLECTION OF IT

20 THAN I WOULD, BUT I JUST DON'T RECALL IT COMING OUT,
21 UNLESS IT CAME OUT DURING THE DEFENDANT'S TESTIMONY.
22 MR. CONN: YES, I BELIEVE IT WAS.
23 MS. NAJERA: YES, YOUR HONOR. I BELIEVE WHERE IT
24 CAME OUT WAS WHEN MR. MENENDEZ WAS QUESTIONED ABOUT WHY
25 HE WENT TO SEE -- WHETHER OR NOT THIS MIGHT HELP HIM IN
26 HIS SENTENCING WITH REGARDS TO THE BURGLARIES, AND THERE
27 WAS SOME OBJECTIONS, AND THEY WERE OVERRULED, AND IT DID
28 COME OUT. IT DID COME OUT IN FRONT OF THIS JURY, YOUR

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1 HONOR.

2 MS. ABRAMSON: I STILL DON'T THINK IT'S RELEVANT
3 TO WHY. I DON'T THINK WHY HE WENT TO OZIEL IS RELEVANT
4 IN THIS TRIAL.

5 THE COURT: WHAT IS IT YOU ARE GOING TO USE IT
6 FOR IN ARGUMENT? DOES IT REALLY PROVE ANYTHING?

7 MR. CONN: WELL, NO. NO, I'M NOT GOING TO USE IT
8 IN ARGUMENT.

9 THE COURT: FOR THE PURPOSE OF INSTRUCTING, IT
10 HAS TO BE SOME USE OR SOMEBODY WANTS TO USE IT FOR
11 SOMETHING. IT SEEMS TO ME THAT IT REALLY WAS RECEIVED
12 IN RELATIONSHIP TO THE DEFENDANTS WITH THEIR PARENTS.

13 MR. CONN: RIGHT.

14 THE COURT: IT CERTAINLY CAME OUT THAT WAY, AS TO
15 WHY THEY MOVED FROM ONE PLACE TO ANOTHER, AND THE

16 ATTITUDE OF THE FATHER TOWARDS THE DEFENDANTS AND

17 VICE-VERSA, ALL THIS.

18 I DON'T SEE ANY REASON FOR IT TO BE

19 RECEIVED FOR ANY OTHER PURPOSE.

20 MR. CONN: OKAY.

21 THE COURT: SO THE DEFENSE INSTRUCTION -- AND

22 THAT'S THE ONLY PARAGRAPH THAT YOU HAVE ADDED THEN?

23 MS. TOWERY: RIGHT.

24 THE COURT: YOU HAVE ALSO MODIFIED IT, AND I

25 GUESS BOTH SIDES HAVE DONE THAT, MODIFIED THE VICTIMS'

26 NAMES?

27 MS. TOWERY: EXCUSE ME, YOUR HONOR. THE FIRST

28 PARAGRAPH IS IDENTICAL ON BOTH PROPOSED INSTRUCTIONS.

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1 THE COURT: OKAY.

2 MS. TOWERY: IN TERMS OF THE DESCRIPTION OF THE

3 BURGLARY.

4 THE COURT: ALL RIGHT. THEN 2.50 WILL BE GIVEN

5 AS MODIFIED BY THE DEFENSE.

6 MR. CONN: I WOULD ASK THAT 2.50, ADDING THE

7 WORDS "BROTHERS MENENDEZ" IN THE THIRD PARAGRAPH, NOT BE

8 USED, AND THAT THE MORE APPROPRIATE TERM "DEFENDANTS" BE

9 USED IN ITS PLACE.

10 THE COURT: I DIDN'T NOTICE THAT. I THINK THAT

11 "THE DEFENDANTS" WOULD BE A MORE APPROPRIATE WAY OF

12 IDENTIFYING THEM THAN BY NAME. SINCE IT APPLIES TO

13 BOTH, JUST "THE DEFENDANTS."

14 OKAY. 2.51.

15 MS. ABRAMSON: DO YOU WANT US TO MAKE THAT

16 CHANGE, YOUR HONOR?

17 THE COURT: I CAN DO THESE. AS LONG AS I HAVE

18 SOME TIME, AND I THINK I WILL DURING ARGUMENT, IF

19 NOTHING ELSE, TO DO A FINAL VERSION OF THESE

20 INSTRUCTIONS. I WILL DO ALL THE MODIFICATIONS WE ARE

21 TALKING ABOUT NOW, WHATEVER MODIFICATIONS THERE WILL BE,

22 SO YOU'RE AWARE OF THEM.

23 2.51, MOTIVE. THE STANDARD INSTRUCTION

24 WILL BE GIVEN.

25 2.52.

26 MS. TOWERY: I AM SORRY, YOUR HONOR. CAN WE BACK

27 UP FOR A SECOND?

28 YOU SAID 2.22 WOULD BE GIVEN?

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1 THE COURT: I'M SORRY?

2 MS. TOWERY: YOU SAID 2.22 WILL BE GIVEN?

3 THE COURT: YES, AND THEN 2.27, 2.50. AS

4 MODIFIED BY THE DEFENDANTS, 2.51 WILL BE GIVEN, WHICH IS

5 JUST THE STANDARD INSTRUCTION.

6 2.52.

7 MS. ABRAMSON: I HAVE ASKED FOR REVERSE FLIGHT.

8 THE COURT: OKAY. I REMEMBER YOU SAYING THAT.

9 MS. TOWERY: AND WE OBJECT TO THAT BEING GIVEN,
10 YOUR HONOR.

11 THE COURT: 2.52?

12 MS. TOWERY: YES.

13 THE COURT: AND YOUR OBJECTION IS WHAT?

14 MS. TOWERY: THERE IS NO EVIDENCE OF FLIGHT AFTER
15 THE COMMISSION OF THE CRIME.

16 THE COURT: WELL, THE EVIDENCE IS, THROUGH THE
17 TESTIMONY OF THE DEFENDANT, THAT THEY LEFT AND CAME
18 BACK.

19 MS. ABRAMSON: YES. BUT LEAVING AND COMING BACK
20 WHEN THE POLICE ARE NOT IN PURSUIT, AND THEN CALLING THE
21 POLICE, YOUR HONOR, IS NOT EVIDENCE OF FLIGHT IN ANY WAY
22 OF LOOKING AT IT.

23 THE COURT: WHAT IS THE PEOPLE'S POSITION?

24 MR. CONN: IT'S VERY CLEAR THAT IT'S FLIGHT. IF
25 YOU HAVE FLIGHT AND RETURN, THEN YOU DON'T HAVE FLIGHT?
26 I THINK IT'S VERY CLEAR THAT THERE WAS FLIGHT IN THIS
27 CASE.

28 THE PURPOSE OF THE INSTRUCTION IS TO ALLOW

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1 THE JURY TO CONCLUDE, AS A RESULT OF THE BEHAVIOR, THAT
2 THEY WERE ACTING IN A GUILTY STATE OF MIND. IF THE
3 DEFENDANTS HAD TRULY SHOT THEIR PARENTS IN A PASSIONATE

4 STATE, OR IN THE BELIEF OF SELF-DEFENSE, THEY WOULDN'T
5 HAVE FLED THE SCENE OF THE CRIME. THEY WOULD HAVE
6 SURRENDERED THEMSELVES TO THE POLICE.

7 SO THIS IS SOMETHING THAT THE JURY CAN TAKE
8 INTO CONSIDERATION, AND THE INSTRUCTION APPLIES.

9 MS. ABRAMSON: SEE, THAT'S THE ESSENTIAL FALLACY.
10 THERE IS NOTHING SUPPORTING THAT NOTION.

11 THE COURT: WELL, THE EVIDENCE, THOUGH, FROM THE
12 DEFENDANT IS THAT HE DID LEAVE AND COME BACK.

13 MS. ABRAMSON: BUT HE DID COME BACK, AND THEY
14 CALLED THE POLICE.

15 MR. LEVIN: IT WAS FOR THE PURPOSE OF DESTRUCTION
16 OF EVIDENCE, WHICH THEY ARE GETTING THAT INSTRUCTION.
17 SO THEY SHOULDN'T BE ABLE TO GET IT TWICE.

18 THE COURT: NO. WELL, THE DEFENDANT SAID HE HAD
19 MORE THAN ONE REASON TO LEAVE, ALIBI AND SOME OTHER
20 THINGS.

21 MR. LEVIN: THEY HAD OTHER THINGS.

22 THE COURT: THINGS TO DO, PEOPLE TO MEET.

23 MR. GESSLER: BUT IN THIS CASE, AS THE COURT
24 POINTED OUT, FLIGHT AFTER THE CRIME AND RETURN BEFORE
25 THE CRIME WAS EVEN DISCOVERED, WHICH IS DIFFERENT THAN
26 MOST FLIGHTS AFTER CRIME, AND THE PURPOSE WAS OBVIOUSLY
27 COVERED IN OTHER INSTRUCTIONS, TO DITCH THE RIFLES AND
28 THE SHELLS AND THINGS LIKE THAT.

1 MS. TOWERY: I WOULD ALSO POINT OUT IT WAS NOT AN
2 INSTRUCTION THAT WAS GIVEN IN THE LAST TRIAL, YOUR
3 HONOR.

4 MR. GESSLER: IN OTHER WORDS, THIS IS NOT THE
5 TYPE OF INSTRUCTION WHERE THE INNOCENT MAN STICKS AROUND
6 WHILE THE GUILTY MAN FLEETH. THEY FLED FOR A DIFFERENT
7 PURPOSE, AND I DON'T THINK THAT'S THE INTENT OF THIS
8 INSTRUCTION.

9 MR. CONN: I THINK IT WASN'T GIVEN IN THE FIRST
10 TRIAL BECAUSE IT WASN'T REQUESTED IN THE FIRST TRIAL.

11 MS. ABRAMSON: YES, IT WAS.

12 THE COURT: I HAVE NO IDEA IF IT WAS OR NOT. I
13 KNOW THERE WAS A DISCUSSION ABOUT THE REVERSE FLIGHT
14 INSTRUCTION. THAT WAS NOT GIVEN. BUT I DON'T RECALL
15 WHETHER THIS WAS GIVEN, OR THERE WERE ARGUMENTS RELATING
16 TO IT.

17 MS. CONN: I THINK JUST THE FLIGHT INSTRUCTION
18 ALLOWS THE JURY TO INFER WHAT THEY CAN FROM THE FACT OF
19 THE FLIGHT, AND THAT'S WHAT THE FLIGHT INSTRUCTION IS
20 DESIGNED TO DO, TO DIRECT THE JURY'S ATTENTION TO THE
21 FACT THAT THE DEFENDANTS DID IN FACT FLEE; AND THEN THEY
22 ATTACH THE WEIGHT TO THAT TO WHAT THEY FEEL IS
23 APPROPRIATE. THAT'S ALL IT DOES.

24 SO I THINK IT'S APPROPRIATE FOR THE JURY TO
25 HAVE THEIR ATTENTION DIRECTED TO THAT FLIGHT, SO THAT
26 THEY WILL ATTACH THE WEIGHT TO THAT FLIGHT THAT THEY
27 FEEL IS APPROPRIATE. IT DOESN'T TELL THEM HOW TO
28 EVALUATE THAT FLIGHT, IT JUST TELLS THEM THAT THAT IS

1 SOMETHING TO BE CONSIDERED HERE.

2 MS. ABRAMSON: I SUPPOSE MY CLIENT SURRENDERING
3 IS NOT SOMETHING TO BE CONSIDERED HERE, AND COMING BACK
4 AFTER BEING ACCUSED. I AM SURE THE PEOPLE WOULD ARGUE
5 VERY STRONGLY THAT THAT'S NOT EVIDENCE OF ANYTHING.

6 THE COURT: NO, NO. WE ARE TALKING ABOUT
7 DIFFERENT THINGS HERE, WHETHER AN INSTRUCTION IS TO BE
8 GIVEN.

9 FLIGHT IS AN INSTRUCTION THAT IS SPECIFIED
10 IN THE PENAL CODE. IT'S NOT JUST SOMETHING THAT CAME
11 OUT OF A CASE. IT'S SPECIFIED IT HAS TO BE GIVEN
12 BECAUSE IT'S THE LAW. IT'S DIFFERENT THAN A LOT OF
13 OTHER INSTRUCTIONS THAT WE TALK ABOUT. AND THE
14 SO-CALLED REVERSE FLIGHT, THERE ARE CASES THAT TALK
15 ABOUT THAT AS TO WHY IT DOESN'T GET GIVEN.

16 BUT RIGHT NOW WE ARE JUST FOCUSING ON
17 FLIGHT, AND YOU'RE SAYING THEY DIDN'T FLEE AS EVIDENCE
18 OF CONSCIOUSNESS OF GUILT.

19 MS. ABRAMSON: RIGHT.

20 THE COURT: IF THAT IS TRUE, THEN YOU CAN ADD A
21 SECOND SENTENCE, APPROVED IN PEOPLE VERSUS HILL, WHICH
22 SAYS: "WHETHER OR NOT EVIDENCE OF FLIGHT SHOWS A
23 CONSCIOUSNESS OF GUILT, AND THE SIGNIFICANCE TO BE
24 ATTACHED TO SUCH A CIRCUMSTANCE, ARE MATTERS FOR YOUR
25 DETERMINATION," WHICH IS ONE OF THE LESSER -- LEAST

26 USABLE-TYPE LANGUAGE IN CALJIC, BUT THAT'S WHAT THEY
27 PROPOSE IF THERE IS SOME DISPUTE AS TO WHY SOMEONE LEFT.
28 MS. ABRAMSON: WELL, EXCEPT IT ALMOST SUGGESTS

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1 THAT IT COULD BE CONSCIOUSNESS OF GUILT; WHEREAS, THIS
2 THING DOESN'T TELL YOU ANYTHING. I MEAN, 2.52 AS IT
3 STANDS DOESN'T TELL YOU YOU CAN CONSIDER IT AS
4 CONSCIOUSNESS OF GUILT. SO TO ADD THE HILL LANGUAGE
5 SEEMS TO MAKE IT WORSE.

6 THE COURT: THIS IS JUST THE STANDARD LANGUAGE
7 FROM THE PENAL CODE.

8 MS. ABRAMSON: I THINK THE PROBLEM HERE, YOUR
9 HONOR, IS THAT THEY DID NOT FLEE IN ANY MEANINGFUL WAY.
10 SO FACTUALLY IT DOESN'T EQUATE WITH FLIGHT. THEY WENT
11 BACK WITHIN AN HOUR.

12 THE COURT: WELL --

13 MS. ABRAMSON: I MEAN, IF THEY HAD LEFT THE
14 STATE, THEN THAT WOULD BE FLIGHT. BUT THEY WENT BACK
15 WITHIN AN HOUR, AND THEY CALLED THE POLICE. THEY COULD
16 HAVE FLED AGAIN.

17 THERE WERE NO POLICE THERE. THEY COULD
18 HAVE DISAPPEARED. THEY BROUGHT DOWN THE AUTHORITIES.

19 THE COURT: I THINK THE PEOPLE'S POSITION IS THE
20 FLIGHT WAS THAT TIME WHEN THEY WERE AWAY, AND THEY'RE
21 ENTITLED TO ARGUE THE FACT THAT THEY DID NOT CALL THE

22 POLICE RIGHT THEN. THEY LEFT AND THEN CAME BACK, AND
23 THAT WAS FLIGHT. AND WHATEVER THEY DID WHILE THEY WERE
24 AWAY, THEY DID, BUT THEY CAME BACK; AND THEN HAD A
25 VERSION OF EVENTS THAT THEY TOLD THE POLICE.

26 MS. ABRAMSON: YES. I AM WELL AWARE OF WHAT THE
27 PEOPLE'S ARGUMENT IS. I JUST DON'T FIND THEIR ARGUMENT
28 THAT PERSUASIVE. I KNOW WHAT THEY SAY, BUT THAT NEVER

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1 SEEMS TO COMPEL ME TO CHANGE MY MIND.

2 THE COURT: WE ARE TALKING NOW ONLY ABOUT AN
3 INSTRUCTION, AS TO WHETHER IT SHOULD BE GIVEN, AND I
4 THINK THERE IS A FACTUAL BASIS REQUIRING IT TO BE GIVEN.

5 SO IT WILL BE GIVEN, 2.52.

6 LET'S TALK ABOUT YOUR SPECIAL, YOUR
7 MODIFICATION. WELL, YOU ACTUALLY REQUESTED 2.52,
8 MS. ABRAMSON, AND THEN YOU ARE ASKING FOR IT TO BE
9 MODIFIED?

10 MS. ABRAMSON: NO. I AM ASKING FOR MY VERSION OF
11 2.52.

12 THE COURT: MAYBE I'M WRONG.

13 MS. ABRAMSON: NO, NO. I AM VERY CONSISTENT,
14 JUDGE. I ASKED FOR 2.52 MODIFIED. IT'S REALLY REVERSE.
15 IT'S THE ABSENCE OF FLIGHT.

16 THE COURT: OH, I'M SORRY. I MISSED THE WORD
17 "ABSENCE." OKAY.

18 MS. ABRAMSON: IT'S A BIG WORD.
19 THE COURT: YES. BUT THE CASE LAW IS AGAINST YOU
20 ON THIS. IT'S CERTAINLY A FACT THAT YOU CAN ARGUE, AND
21 THE EVIDENCE IS THERE. IT'S WELL-DOCUMENTED THROUGH
22 VARIOUS WITNESSES.
23 IT'S A QUESTION OF WHETHER THE DEFENSE IS
24 ENTITLED TO SUCH AN INSTRUCTION. THE CASE LAW IS CLEAR
25 THAT THE DEFENSE IS NOT.
26 THEREFORE, IT WILL NOT BE GIVEN.
27 OKAY. THEN 2.60 AND 2.61. THIS IS FOR THE
28 DEFENDANT, LYLE MENENDEZ.

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1 WHAT DO YOU WANT TO DO WITH THAT ONE?
2 MR. GESSLER: IT IS FOR THE DEFENDANT'S BENEFIT,
3 THESE PARTICULAR INSTRUCTIONS, YOUR HONOR. BUT WE WOULD
4 ASK THAT LINE 1 ON 2.60 BE STRICKEN; THAT IS, "DEFENDANT
5 IN A CRIMINAL TRIAL HAS A CONSTITUTIONAL RIGHT NOT TO BE
6 COMPELLED TO TESTIFY," AND THEN THAT THE REMAINDER BE
7 LEFT, ALONG WITH 2.61, WHICH I THINK FULLY EXPLAINS THE
8 DEFENDANT'S POSITION ON NOT TESTIFYING.
9 THE COURT: DO THE PEOPLE WANT TO BE HEARD ON
10 THAT?
11 MR. CONN: I THINK THAT THERE IS NO HARM IN
12 GIVING THE INSTRUCTION THE WAY IT IS. THIS IS THE WAY
13 THE INSTRUCTION HAS BEEN DRAFTED, AND IT'S A CORRECT

14 STATEMENT OF THE LAW. SO I DON'T THINK THAT THE

15 DEFENDANTS ARE ENTITLED TO THAT MODIFICATION.

16 THE COURT: I DON'T SEE WHY THEY CAN'T HAVE IT.

17 ALTHOUGH IT'S THE LAW, I DON'T SEE THAT IT MATTERS TO

18 THE PROSECUTION ONE WAY OR THE OTHER IF IT'S REMOVED.

19 BUT IF THE DEFENSE WANTS IT REMOVED, THEY

20 ARE CERTAINLY ENTITLED TO IT, SINCE IT'S THEIR REQUESTED

21 INSTRUCTION.

22 OKAY. 2.60 AND 2.61 WILL BE GIVEN AS

23 MODIFIED. 2.60 AS MODIFIED.

24 MS. ABRAMSON: I AM OBJECTING TO 2.62, YOUR

25 HONOR.

26 THE COURT: OKAY. THIS INSTRUCTION IS ALMOST

27 NEVER GIVEN. I HAVE NEVER GIVEN IT.

28 WHAT IS IT THAT THE PEOPLE ARGUE IS THE

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1 BASIS FOR THIS INSTRUCTION?

2 MR. CONN: WELL, I THINK THAT THERE WERE VARIOUS

3 TIMES THROUGHOUT THE TESTIMONY OF THE DEFENDANT WHEN I

4 ASKED HIM TO EXPLAIN CERTAIN THINGS, AND HE SPECIFICALLY

5 SAID: "I JUST HAVE NO EXPLANATION FOR THAT."

6 I DON'T RECALL SPECIFICALLY WHAT THOSE

7 MATTERS WERE OFF THE TOP OF MY HEAD, BUT I DO RECALL HIM

8 SAYING THAT. "I SIMPLY CAN'T EXPLAIN IT."

9 AND I INTEND TO GO THROUGH HIS TESTIMONY

10 AND FIND THE LOCATIONS IN HIS TESTIMONY WHERE HE USED
11 THAT PHRASE, SO THAT THE JURY CAN DRAW THE INFERENCES
12 FROM THAT FAILURE TO EXPLAIN THE EVIDENCE THAT THEY ARE
13 PERMITTED TO DO BY VIRTUE OF THIS INSTRUCTION.

14 MS. ABRAMSON: THAT'S NOT WHAT THIS INSTRUCTION
15 MEANS.

16 MY CLIENT'S STATEMENT WAS -- REALLY, WHAT
17 HE IS SAYING IS: "I DON'T HAVE A GOOD EXCUSE," OR
18 "THERE IS NO GOOD REASON I CAN TELL YOU. I DON'T KNOW
19 WHY THAT HAPPENED."

20 THAT'S NOT THE SAME AS FAILING TO EXPLAIN.

21 THE COURT: I AM NOT GOING TO GIVE THE
22 INSTRUCTION. THAT'S PURELY A MATTER FOR ARGUMENT. I
23 DON'T KNOW WHY THEY KEEP IT IN. IT'S CERTAINLY AN
24 ARGUMENT THAT CAN BE MADE.

25 OKAY. 2.70, THE DEFENSE HAS MODIFIED IN
26 SOME WAY. YOU HAVE ADDED A LAST SENTENCE.

27 MS. ABRAMSON: ORAL CONFESSION OR ORAL ADMISSION,
28 AND WE DON'T -- WE WANTED TO PUT IN THAT AN EXCULPATORY

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1 OUT-OF-COURT STATEMENT SHOULD NOT BE VIEWED WITH
2 CAUTION, ONLY INCRIMINATING ONES, BASICALLY. THAT'S OUR
3 UNDERSTANDING OF THE LAW.

4 THE COURT: BOTH SIDES SUBMITTED 2.70, BUT YOU
5 ARE ADDING THE LAST PARAGRAPH?

6 MS. TOWERY: EXACTLY.

7 MS. ABRAMSON: YES.

8 MR. CONN: AND WE WOULD OBJECT TO THE LAST

9 PARAGRAPH. THE PROBLEM WITH THE LAST PARAGRAPH IS IN

10 REGARD TO THE PHRASE, "IT SHOULD NOT BE VIEWED WITH

11 CAUTION."

12 THAT TELLS YOU THAT ANY STATEMENT MADE BY

13 THE DEFENDANT OUT OF COURT SHOULD NOT BE VIEWED WITH

14 CAUTION.

15 WELL, THAT'S SIMPLY INCORRECT. THAT LENDS

16 CREDIBILITY. THAT GIVES SPECIAL PROTECTION TO

17 STATEMENTS MADE BY THE DEFENDANT OUTSIDE OF COURT. IF

18 THEY SEEK TO -- IF THEY ARE MERELY SEEKING TO HAVE THE

19 JURY NOT APPLY THIS INSTRUCTION TO EXTRA-JUDICIAL

20 STATEMENTS, THEN I THINK THAT THE STATEMENT COULD BE

21 MODIFIED TO READ: "EXCULPATORY STATEMENTS ARE NOT

22 ADMISSIONS OR CONFESSIONS." I THINK THAT IS NEUTRAL

23 LANGUAGE WHICH DOES NOT GIVE SPECIAL PROTECTION AND

24 CREDIBILITY TO STATEMENTS MADE BY THE DEFENDANT OUT OF

25 COURT.

26 THE COURT: WHAT IS YOUR RESPONSE TO THAT, JUST

27 SAYING THAT EXCULPATORY STATEMENTS ARE NOT ADMISSIONS?

28 MS. ABRAMSON: THIS, I THINK, IS A COMPROMISE.

2 DEFENDANT IS NOT AN ADMISSION OR CONFESSION, AND IS NOT
3 SUBJECTED TO THIS RULE."

4 MS. TOWERY: OR YOU CAN SAY, "AND SHOULD BE
5 VIEWED AS ANY OTHER EVIDENCE."

6 MR. CONN: I JUST THINK THAT MOST OF THAT
7 LANGUAGE IS UNNECESSARY, AND IT GOES TOWARD
8 ACCOMPLISHING WHAT THEY ARE SEEKING TO ACCOMPLISH IN THE
9 PROPOSED STATEMENT; THAT IS, TO GIVE SPECIAL PROTECTION.

10 THE LANGUAGE THAT I AM PROPOSING
11 ACCOMPLISHES THAT PURPOSE WITHOUT GIVING ANY CREDIBILITY
12 TO EXTRA-JUDICIAL STATEMENTS.

13 THE COURT: OKAY. THE WHOLE PURPOSE OF THIS IS
14 JUST TO QUESTION THINGS THAT ARE NOT RECORDED MORE THAN
15 ANYTHING ELSE, AND FOR WHATEVER REASON YOU HAVEN'T
16 DIFFERENTIATED AN ORAL STATEMENT -- WHAT'S
17 TAPE-RECORDED, FROM AN ORAL STATEMENT THAT IS NOT.

18 DID YOU WANT TO DO THAT AS WELL?

19 MS. TOWERY: I'M SORRY?

20 THE COURT: WELL, ORAL STATEMENTS -- THE REASON
21 FOR THE CAUTIONARY INSTRUCTION IS THAT THEY CAN BE
22 RECORDED INACCURATELY OR THINGS OF THAT NATURE, MORE
23 THAN ANYTHING ELSE. YOU HAVE TAPE-RECORDED STATEMENTS
24 AS WELL.

25 MS. ABRAMSON: THOSE AREN'T ORAL STATEMENTS.
26 TAPE-RECORDING IS A MEMORIALIZATION. THIS MEANS PURELY
27 ORAL STATEMENTS, TO MY UNDERSTANDING.

28 MS. TOWERY: THIS DOESN'T REFER TO

1 TAPE-RECORDINGS.

2 THE COURT: YOU CAN SAY ANY EXCULPATORY,
3 OUT-OF-COURT STATEMENTS, AND/OR TAPE-RECORDED STATEMENTS
4 ARE -- WELL, NO. THEY ARE ADMISSIONS OR CONFESSIONS.

5 MS. ABRAMSON: WE DON'T WANT TO DO THAT, RIGHT?
6 IT'S A DIFFERENT ISSUE.

7 MS. TOWERY: THAT'S A DIFFERENT ISSUE.

8 MS. ABRAMSON: WE DON'T WANT TO HIGHLIGHT THE
9 ADMISSIBILITY OF THE TAPE-RECORDING OF THIS STATEMENT,
10 WHEN ONE OF THE TAPE-RECORDED STATEMENTS WE ARE SAYING
11 IS HIGHLY UNRELIABLE. IT STARTS IN THE MIDDLE AND ENDS
12 IN THE MIDDLE, AND WAS IN SOMEONE ELSE'S POSSESSION.

13 MS. TOWERY: BUT THE DISTINCTION WE ARE TRYING TO
14 MAKE HERE, YOUR HONOR, IS INCULPATORY VERSUS EXCULPATORY
15 OUT-OF-COURT STATEMENTS BY A DEFENDANT, AND ALL WE'RE
16 SEEKING TO DO IS TO ADVISE THE JURY THAT THEY DO NOT --
17 THEY'RE NOT REQUIRED TO VIEW EXCULPATORY OUT-OF-COURT
18 STATEMENTS BY A DEFENDANT WITH CAUTION.

19 I DON'T HAVE ANY PROBLEM WITH THE
20 PROSECUTION'S PROPOSED REVISION OF THE DISTINCTIVE
21 PARAGRAPH, BUT I THINK IT SHOULD SAY, "AN EXCULPATORY
22 OUT-OF-COURT STATEMENT MADE BY THE DEFENDANT IS NOT AN
23 ADMISSION OR A CONFESSION, AND SHOULD BE VIEWED IN THE
24 SAME MANNER AS ANY OTHER EVIDENCE IN THE TRIAL," WHICH I
25 THINK IS A CORRECT STATEMENT OF THE LAW.

26 THE COURT: OKAY. I WILL MODIFY THAT TO REFLECT

27 WHAT MS. TOWERY HAS JUST INDICATED. SO GIVE ME THAT
28 LANGUAGE AGAIN.

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1 MS. TOWERY: "SHOULD BE VIEWED IN THE SAME MANNER
2 AS ANY OTHER EVIDENCE IN THE TRIAL."

3 THE COURT: OKAY. THAT WILL BE GIVEN AS
4 MODIFIED.

5 2.71.5 WILL BE GIVEN.

6 MS. TOWERY: YOUR HONOR --

7 MR. GESSLER: WE OBJECT TO THAT.

8 THE COURT: OKAY. I'M SORRY?

9 MR. GESSLER: AS NOT HAVING A BASIS IN FACT AS TO
10 AN OCCASION ON WHICH ONE OF THESE YOUNG MEN WAS ACCUSED
11 AND AVOIDED IT.

12 THE COURT: WELL, THAT'S THE ADOPTIVE ADMISSIONS,
13 PRIMARILY IN THE OZIEL TAPE, I ASSUME THE PROSECUTION IS
14 REFERRING TO.

15 MR. CONN: YES, YOUR HONOR.

16 MS. ABRAMSON: BUT THERE IS NO ACCUSATIONS ON
17 THAT TAPE.

18 THE COURT: WELL, THERE CERTAINLY ARE STATEMENTS
19 OF INVOLVEMENT IN A CRIMINAL ACT, AND NO DENIALS. AN
20 ACCUSATION DOESN'T HAVE TO BE, "I ACCUSE YOU OF
21 SOMETHING." AN ACCUSATION CAN MEAN REFERENCE TO
22 CRIMINAL CONDUCT IN THE PRESENCE OF THE PERSON WHO IS

23 MENTIONED, AND THAT PERSON NOT DENYING IT.
24 MS. ABRAMSON: BUT JUDGE, I MEAN, 2.71.5
25 ACCURATELY REFLECTS THE CASE LAW THAT THERE IS ONLY AN
26 ADOPTIVE ADMISSION IF, IN THE FACE OF AN ACCUSATION
27 EXPRESSED DIRECTLY TO HIM, OR IN HIS PRESENCE CHARGING
28 HIM WITH THE CRIME FOR WHICH HE IS NOW ON TRIAL, OR

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1 TENDING TO CONNECT HIM; THAT HE HEARD THE ACCUSATION,
2 BLAH-BLAH-BLAH.

3 THERE ARE NO ACCUSATIONS ON THAT TAPE
4 RECORDING.

5 THE COURT: WELL, I THINK YOU'RE GIVING TOO
6 LIMITED A DEFINITION TO THE WORD "ACCUSATION".

7 CLEARLY WHEN ONE PERSON, AS I SAID, REFERS
8 TO THE CRIMINAL CONDUCT OF THE PERSON SITTING RIGHT NEXT
9 TO HIM, AND THAT PERSON DOESN'T SAY, "NO, I DIDN'T DO
10 IT," OR SAYS, "I DID DO IT," OR DOES SOMETHING TO CONCUR
11 IN IT, THOSE ARE ADOPTIVE ADMISSIONS.

12 MS. ABRAMSON: SEE, ONE OF THE PROBLEMS HERE IS
13 WE DON'T KNOW WHO WAS SITTING NEXT TO WHOM.

14 THE COURT: WELL, THAT'S SOMETHING FOR ARGUMENT.
15 THIS INSTRUCTION DOESN'T TELL THE JURY THEY SHOULD DO
16 SOMETHING IF THEY DON'T FIND THESE TO BE THE FACTS.
17 THEY HAVE TO FIND THE FACTS UNDERLYING IT BEFORE THEY
18 MAKE A DECISION TO APPLY THIS INSTRUCTION.

19 SO I AM GOING TO GIVE IT.
20 THE ONLY QUESTION I HAVE IS THE ISSUE OF
21 FALSE, EVASIVE OR CONTRADICTORY STATEMENTS. WHAT WAS IT
22 THE PEOPLE WERE REFERRING TO IN THAT?
23 MR. CONN: WE WEREN'T FOCUSED ON THOSE
24 WORDS. I WAS JUST CROSSING OUT WHAT I BELIEVE -- I
25 BELIEVE THAT THIS WAS A DUPLICATION OF THE INSTRUCTION
26 THAT WAS GIVEN IN THE FIRST TRIAL, AND I WASN'T FOCUSING
27 ON THOSE WORDS IN PARTICULAR.
28 THE COURT: WELL, ONLY TO THE EXTENT THAT THERE

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1 IS SOME EVIDENCE THAT THE STATEMENTS MADE BY THE
2 DEFENDANTS IN THAT SESSION WERE NOT TRUE, THAT THEY WERE
3 FALSE.

4 MS. ABRAMSON: BUT THAT DOESN'T MAKE THEM
5 ADOPTIVE ADMISSIONS. YOU SEE, THAT'S CONFUSING, BECAUSE
6 IT DOESN'T MAKE THEM ADOPTIVE ADMISSIONS; THAT THEY GAVE
7 FALSE, EVASIVE OR CONTRADICTORY STATEMENTS. IT MAKES
8 THEM NOT ADMISSIONS AT ALL.

9 THE COURT: I THINK REALLY WHAT YOU'RE ASKING FOR
10 IN THIS INSTRUCTION IS FAILED TO MAKE A DENIAL; ISN'T
11 THAT CORRECT?

12 MR. CONN: THAT'S TRUE.

13 THE COURT: OKAY. THEN I AM GOING TO DELETE THAT
14 SECOND CLAUSE THERE WHERE IT TALKS ABOUT CONTRADICTORY

15 STATEMENTS.

16 OKAY. 2.72 HAS TO BE GIVEN.

17 2.80. WE HAVE LAY OPINIONS, TOO, DON'T WE?

18 MR. GESSLER: YES, WE DO, YOUR HONOR.

19 THE COURT: SO WE NEED 2.81.

20 THEN 2.82 IS ON THEIR LIST.

21 MS. TOWERY: IT'S NOT IN THEIR PACKAGE, BUT WE
22 REQUESTED IT, YOUR HONOR.

23 THE COURT: OKAY. WE NEED 2.82, SINCE THERE WERE
24 ALL SORTS OF HYPOTHETICALS.

25 2.83.

26 MS. ABRAMSON: WE OBJECT TO 2.83, YOUR HONOR. WE
27 THINK IT INTERFERES WITH THE BURDEN OF PROOF AND
28 REASONABLE DOUBT TO SAY THAT THE WAY YOU RESOLVE A

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1 CONFLICT IS TO WEIGH ONE AGAINST THE OTHER.

2 THE PROSECUTION HAS THE BURDEN OF PROOF
3 BEYOND A REASONABLE DOUBT, AND IF THEY ARE TO PREVAIL,
4 THEIR EXPERTS HAVE TO BE BELIEVED BEYOND A REASONABLE
5 DOUBT, AS COMPARED TO OURS, AND NOT JUST A WEIGHING
6 PROCESS.

7 MS. TOWERY: WE WILL JOIN IN THAT OBJECTION.

8 MR. CONN: THIS INSTRUCTION DOESN'T ADDRESS
9 REASONABLE DOUBT.

10 MS. ABRAMSON: THAT'S THE PROBLEM.

11 MR. CONN: IT DOESN'T NEED TO. IT TALKS ABOUT
12 HOW YOU RESOLVE A CONTROVERSY CONCERNING A PARTICULAR
13 AREA OF THE CAUSE. THIS IS HOW YOU GO ABOUT IT. IT
14 DOESN'T HAVE TO REFER TO REASONABLE DOUBT, AND IT
15 DOESN'T REFER TO REASONABLE DOUBT.

16 BUT BY ITS FAILURE TO DO SO, IT DOESN'T
17 DETRACT IN ANY WAY FROM THE REASONABLE DOUBT
18 INSTRUCTION. SO WE ARE TALKING ABOUT APPLES AND
19 ORANGES.

20 MS. ABRAMSON: WE ARE TALKING ABOUT SOMEBODY
21 WHO'S GOT A BURDEN OF PROOF BEYOND A REASONABLE DOUBT,
22 AND THE OTHER SIDE HAS ONLY GOT AN OBLIGATION TO RAISE A
23 REASONABLE DOUBT.

24 THE WAY IT SHOULD READ IS: "TO RESOLVE ANY
25 CONFLICT THAT MAY EXIST IN THE TESTIMONY OF EXPERT
26 WITNESSES, YOU SHOULD REMEMBER THAT THE PROSECUTION HAS
27 THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT, AND ONLY
28 ACCEPT TESTIMONY OF THEIR EXPERTS IF YOU BELIEVE THEM

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1 BEYOND A REASONABLE DOUBT," AND ON AND ON.

2 I THINK IT'S JUST MISLEADING AND KIND OF
3 SILLY, BECAUSE CLEARLY THEY'RE GOING TO FIGURE OUT WHAT
4 DO THEY BELIEVE, AND WHO DO THEY BELIEVE, AND WHY, AND I
5 DON'T THINK IT'S A NECESSARY INSTRUCTION.

6 MR. CONN: I THINK THAT MANY OF THE INSTRUCTIONS

7 THAT WE HAVE ARE BASED UPON COMMON SENSE, AND WE CAN GO
8 THROUGH PROBABLY HALF OF THIS PACKAGE AND POINT OUT WHY
9 MANY OF THESE INSTRUCTIONS ARE JUST BASED ON NOTHING
10 MORE THAN COMMON SENSE.

11 THE COURT: MOST OF THEM SHOULDN'T BE GIVEN,
12 BECAUSE THEY REALLY CONFUSE MORE THAN HELP.

13 MS. ABRAMSON: I AM ASKING THIS ONE NOT BE GIVEN.
14 I THINK IT DOES CONFUSE, AND I DON'T THINK IT TELLS THEM
15 ANYTHING THEY CAN'T FIGURE OUT.

16 THE COURT: WELL, YOUR ARGUMENTS ON BURDEN OF
17 PROOF, YOU KNOW, IT'S IN CALJIC. IT'S NOT IN BAJI
18 ALONE, AND IT'S BEEN THERE A LONG TIME WITHOUT ONE
19 FOOTNOTE, ONE ANYTHING. IT'S THERE.

20 MS. ABRAMSON: WE'RE MORE DESPERATE THAN MOST.

21 THE COURT: NO ONE HAS THOUGHT OF YOUR ARGUMENTS.

22 MS. ABRAMSON: GIVE US CREDIT FOR BEING
23 INGENIOUS.

24 THE COURT: I DO. I AM GOING TO GIVE 2.83.

25 2.90 WILL BE GIVEN.

26 MS. ABRAMSON: CAN'T WE REWRITE THAT ONE?

27 THE COURT: WELL, IT'S BEEN REWRITTEN.

28 3.00 WILL BE GIVEN.

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1 I WOULD ASK THE DEFENSE TO SPEAK UP IF I
2 HIT SOMETHING YOU ARE OBJECTING TO, BECAUSE I DON'T WANT

3 TO GO BACK AND FORTH BETWEEN THE DOCUMENTS.

4 3.01 IS NOT IN THE PEOPLE'S MATERIAL.

5 MS. ABRAMSON: RIGHT.

6 THE COURT: IT'S ON THEIR LIST, AND IT SHOULD BE
7 GIVEN.

8 MR. GESSLER: WE ASKED FOR IT ANYWAY, YOUR HONOR.

9 MS. TOWERY: WE ASKED FOR IT, YOUR HONOR.

10 THE COURT: IT'S A STANDARD INSTRUCTION. IT
11 SHOULD BE GIVEN.

12 MS. TOWERY: MAY I ASK THAT AT SOME POINT THE
13 PEOPLE PROVIDE THE DEFENSE FOR LYLE MENENDEZ WITH A LIST
14 AS WELL.

15 THE COURT: OF COURSE.

16 MS. TOWERY: SO AT LEAST WE HAVE A COMPLETE
17 RECORD OF WHAT THEY'VE ASKED FOR.

18 MS. ABRAMSON: THE LIST IS INCOMPLETE. IT'S NOT
19 EVERYTHING THEY'RE ASKING FOR.

20 THE COURT: OKAY. THEN WE HAVE 3.02.

21 MR. GESSLER: I AM VERY CONFUSED BY 3.02, WHERE
22 WE HAVE TWO CONSPIRACIES, AND DEFENDANT AIDED AND
23 ABETTED SUCH CRIME. IT SEEMS TO ME YOU'RE EITHER A
24 CONSPIRATOR OR YOU'RE NOT.

25 MS. ABRAMSON: THIS IS VERY CONFUSING.

26 MR. GESSLER: ARE WE TRYING TO LIFT MURDER UP AS
27 THE NATURAL AND PROBABLE CONSEQUENCE FOR A CONSPIRACY TO
28 COMMIT MURDER?

1 THE COURT: I DON'T QUITE UNDERSTAND THIS ONE
2 EITHER, MR. CONN.

3 MR. CONN: I THINK THAT THE LAW PROVIDES THAT
4 WHERE YOU AID AND ABET A CRIME, AND THERE IS A NATURAL
5 AND PROBABLE CONSEQUENCE OF THAT CRIME, YOU ARE HELD
6 RESPONSIBLE FOR THE NATURAL AND PROBABLE CONSEQUENCE OF
7 THE CRIME THAT YOU AIDED AND ABETTED.

8 NOW, HERE WE ARE DEALING WITH A CONSPIRACY
9 TO COMMIT MURDER, WHICH DIDN'T OCCUR -- WHICH DIDN'T
10 BEGIN AT THE MOMENT THAT THE DEFENDANTS STARTED TO SHOOT
11 THEIR PARENTS TO DEATH. THIS IS SOMETHING THAT BEGAN
12 PRIOR TO THAT TIME.

13 THE COURT: WELL, ISN'T THAT COVERED BY THE LAW
14 OF CONSPIRACY THEN?

15 MS. ABRAMSON: YES.

16 THE COURT: WHY DO YOU NEED THIS?

17 MS. ABRAMSON: MOREOVER, CONSPIRACY IS AN
18 ANTICIPATORY CRIME. IT'S COMPLETE WHEN THE AGREEMENT IS
19 MADE AND AN OVERT ACT IS TAKEN, AND THE NATURAL AND
20 PROBABLE CONSEQUENCES OF CONSPIRACY IS AN OVERT ACT, AND
21 NOT THE ACTUAL COMMISSION OF THE CRIME.

22 MR. CONN: I THINK THAT -- I DON'T THINK THAT THE
23 INSTRUCTION ON CONSPIRACY SPECIFIES THAT AIDING AND
24 ABETTING A CONSPIRACY IS A BASIS FOR FINDING THE
25 DEFENDANTS GUILTY OF MURDER.

26 MR. GESSLER: WHO'S LEFT TO AID AND ABET, YOUR
27 HONOR? WE HAVE TWO PEOPLE HERE. THEY'RE SUPPOSED TO BE

-14803

1 THE COURT: WHAT IS THE CONCEPTUAL DIFFERENCE
2 BETWEEN AIDING AND ABETTING AND CONSPIRACY IN THIS CASE?

3 MR. CONN: WELL, I THINK THAT --

4 THE COURT: I UNDERSTAND THE POSITION IS CORRECT
5 THAT IF YOU HAVE AIDING AND ABETTING -- STRIKE THAT.

6 IF YOU HAVE CONSPIRACY, THE CRIME IS
7 COMPLETED ONCE THE AGREEMENT IS REACHED IN AN OVERT ACT,
8 AND YOU DON'T HAVE TO COMPLETE THE CRIME. BUT I DON'T
9 SEE HOW THIS ONE WORKS IN THIS CASE.

10 MR. CONN: WHAT THIS ONE DOES IS IT HOLDS THE --

11 MS. ABRAMSON: IT BOOTSTRAPS.

12 MR. CONN: -- THE NON-ACTING DEFENDANT
13 RESPONSIBLE FOR THE ACTOR IN THE COMMISSION OF THE
14 ACTUAL MURDER, BECAUSE --

15 THE COURT: IT'S A CONSPIRACY, BUT FOR THE
16 MURDER.

17 MR. CONN: THERE WAS A CONSPIRACY TO COMMIT
18 MURDER. IT IS OUR POSITION THAT IF THERE IS A
19 CONSPIRACY TO COMMIT MURDER, AND ONE OF THE DEFENDANTS
20 CARRIES THROUGH -- CARRIES OUT THAT MURDER, THE OTHER
21 DEFENDANT IS ALSO RESPONSIBLE FOR THAT MURDER.

22 MS. ABRAMSON: YOU ALREADY HAVE THAT UNDER AN
23 AIDING AND ABETTING THEORY, AND YOU DON'T NEED THAT

24 UNDER CONSPIRACY.

25 MR. GESSLER: YOU HAVE IT UNDER A CONSPIRACY

26 THEORY. THERE IS A WHOLE LIST OF INSTRUCTIONS WHEN A

27 CONSPIRATOR IS GUILTY OF AN ACT.

28 THE COURT: YES. ONCE YOU'RE IN THE CONSPIRACY,

-14802

1 UNTIL YOU BAIL OUT YOU'RE RESPONSIBLE FOR THE ACTS OF

2 THE CO-CONSPIRATOR.

3 MS. ABRAMSON: RIGHT. INCLUDING THE MURDER.

4 MR. GESSLER: 6.11, THE LAST PARAGRAPH GETS INTO

5 WHAT'S NATURAL AND PROBABLE CONSEQUENCES. IT GETS INTO

6 ORIGINALLY CONTEMPLATED. IT IS THE LAW OF CONSPIRACY.

7 THE COURT: SO THE LAW OF CONSPIRACY GOES BEYOND

8 JUST THE FINDING OF GUILT OF THE CONSPIRATOR TO COMMIT

9 MURDER, BUT ALSO MAKES ONE LIABLE FOR THE ACTIONS OF THE

10 CO-CONSPIRATOR.

11 MR. CONN: ALL RIGHT. I WILL WITHDRAW IT THEN.

12 THE COURT: OKAY. 3.02 WILL NOT BE GIVEN.

13 DO WE HAVE ANY BASIS FOR 3.03? THE PEOPLE

14 SUBMITTED IT, DETERMINATION OF LIABILITY.

15 MR. CONN: I DON'T SEE ANY.

16 THE COURT: YOU SUBMITTED IT. THAT'S WHY I AM

17 ASKING.

18 IS THE DEFENSE REQUESTING THIS ONE?

19 MS. TOWERY: NO, WE ARE NOT REQUESTING IT.

20 MR. GESSLER: NO.

21 THE COURT: SO 3.03 WILL NOT BE GIVEN.

22 3.31.

23 MS. TOWERY: WE HAD REQUESTED 3.30.

24 THE COURT: RIGHT. SINCE I HAVE RULED THAT THERE
25 IS NO INVOLUNTARY MANSLAUGHTER INSTRUCTIONS TO BE GIVEN,
26 THEN THERE IS NO BASIS FOR A 3.30.

27 OKAY. 3.31 IS A STANDARD INSTRUCTION THAT
28 WILL BE GIVEN. THE SAME WITH 3.31.5 AS TO MALICE

-14801

1 AFORETHOUGHT.

2 LET'S SEE HERE. YOU HAVE 4.71 ON YOUR
3 LIST. WHAT IS THAT?

4 MS. TOWERY: THIS IS THE PEOPLE'S LIST?

5 THE COURT: YES. "AT THE TIME OF THE OFFENSE" OR
6 SOMETHING.

7 MS. ABRAMSON: YES. THE "ON OR ABOUT," THAT'S
8 REALLY KIND OF WEIRD IN THIS CASE. WE KNOW EXACTLY WHEN
9 IT WAS.

10 THE COURT: WELL, THERE WAS SOME DISCUSSION IN
11 THE FIRST TRIAL WHEN IT WAS GIVEN. I DON'T RECALL WHAT.

12 "ON OR ABOUT A CERTAIN DATE" IS WHAT THIS
13 SAYS. THERE'S NEVER BEEN A QUESTION ABOUT THE DATE. I
14 THINK IT HAS TO DO WITH A CONSPIRACY OR SOMETHING, THE
15 DATE OF THE CONSPIRACY.

16 MS. ABRAMSON: MAYBE IT IS, THEN.

17 THE COURT: THERE WAS SOMETHING ABOUT THE NATURE

18 OF THE OVERT ACTS, OR SOMETHING THAT -- I THINK THEY

19 DATED THE CONSPIRACY THE DATE OF THE OFFENSE.

20 MR. GESSLER: THEY DID, YOUR HONOR.

21 THE COURT: AND THEN THEY HAD TO CORRECT IT WITH

22 THIS, BECAUSE THEY COULDN'T OR THEY DIDN'T GET THE GRAND

23 JURY TO DO ANYTHING TO MODIFY IT. THAT'S MY

24 RECOLLECTION.

25 MS. ABRAMSON: THANKS, JUDGE. NOW YOU'VE TOLD

26 THEM THEY WANT IT IN OPEN COURT.

27 THE COURT: I COULD BE WRONG, BUT THAT'S MY

28 RECOLLECTION, LOOKING AT THE CHARGES HERE.

-14800

1 MR. GESSLER: WE'LL ACCEPT YOUR RECOLLECTION,

2 YOUR HONOR.

3 THE COURT: THE QUESTION IS, I DON'T ACCEPT IT.

4 MY MEMORY FAILS ME REGULARLY.

5 YES. THEY DATE THE CONSPIRACY AUGUST THE

6 20TH, AND BACK DATE THE OVERT ACTS TO AUGUST THE 18TH.

7 MS. ABRAMSON: MOVE TO STRIKE THE CONSPIRACY

8 CHARGE, YOUR HONOR. IT'S A PHYSICAL IMPOSSIBILITY.

9 THE COURT: THAT'S WHY I HAVE THAT.

10 4.71 WILL BE GIVEN.

11 LET'S TAKE A BREAK UNTIL FIVE MINUTES AFTER

12 THE HOUR, AND WE WILL RESUME WITH THESE CONSPIRACY
13 THINGS.

14 MR. LEVIN: ARE WE GOING BEYOND 4:30, YOUR HONOR?

15 THE COURT: I WANT TO SEE IF WE CAN FINISH IT.

16 HOPEFULLY THINGS WILL PICK UP HERE.

17 MR. GESSLER: I WOULD ASK THE COURT, YOUR HONOR,
18 DURING THE RECESS TO CONSIDER AS PART OF THE CONSPIRACY
19 THEIR DEFINITION OF A CONSPIRACY, I THINK IT'S 6.23,
20 WHICH LEAVES OUT ALL OF THE OPERATIVE FACTS OF THE
21 INDICTMENT WHICH ARE INTENDED TO BE INCLUDED THERE,
22 INCLUDING THE DATE THEY HAVE CHOSEN, EVEN IF THEY DO GET
23 TO HAVE AN "ON OR ABOUT".

24 THE COURT: NO. I THINK WHATEVER THE LANGUAGE IS
25 IN THE PLEADING HAS TO GO IN THERE.

26 MR. GESSLER: YES, BUT IT ISN'T "AT THIS POINT."
27 IT'S JUST THE MURDER OF JOSE MENENDEZ AND MARY LOUISE
28 MENENDEZ. WHO KNOWS WHEN?

-14799

1 THE COURT: OKAY.

2 MR. CONN: AND IN REGARD TO THE SPECIAL
3 INSTRUCTION NO. 1 THAT WAS SUBMITTED BY THE DEFENSE, MY
4 ARGUMENT ON THAT INSTRUCTION IS GOING TO BE FAIRLY
5 SUBSTANTIAL, AND I HAD AN OPPORTUNITY TO JUST COMPLETE
6 TYPING THAT UP.

7 SO I WILL BE FILING A COPY OF A MOTION WITH

8 THE COURT CONCERNING THAT SPECIAL INSTRUCTION.

9 THE COURT: OKAY. OKAY.

10 ALL RIGHT. WE WILL TAKE A BREAK UNTIL FIVE
11 AFTER.

12 (A RECESS WAS HELD FROM
13 3:50 P.M. UNTIL 4:05 P.M.)

14

15 MS. ABRAMSON: YOUR HONOR, I WANT TO GIVE THE
16 COURT ORAL NOTICE THAT I AM REQUESTING TWO ADDITIONAL
17 INSTRUCTIONS.

18 THE COURT: YES.

19 MS. ABRAMSON: 3.32 AND 4.30.

20 THE COURT: OKAY. LET'S TALK ABOUT THEM NOW,
21 SINCE WE ARE BEYOND THOSE. 3.32.

22 WHAT IS THE PEOPLE'S POSITION ON 3.32?

23 MR. CONN: IT WAS NOT GIVEN IN THE FIRST TRIAL.

24 MS. ABRAMSON: IN THE FIRST TRIAL WE DID NOT HAVE
25 A RULING THAT WE DIDN'T HAVE MANSLAUGHTER, AND WE DIDN'T
26 PRESENT EVIDENCE OF A DISEASE OR MENTAL DEFECT.

27 WE HAVE ONE NOW, AND WE HAVE EVIDENCE TO
28 SUPPORT THE LEVEL AT WHICH MY CLIENT WOULD BE

-14798

1 FUNCTIONING AS A SUFFERER OF P.T.S.D. AND/OR GENERALIZED
2 ANXIETY DISORDER.

3 THE COURT: WELL, THAT'S WHAT IT WAS OFFERED FOR,

4 WAS TO SHOW MENTAL STATE.

5 MS. ABRAMSON: RIGHT.

6 THE COURT: SO WHAT IS THE PEOPLE'S POSITION?

7 MR. CONN: THE FIRST THING THAT COMES TO MIND IS

8 THAT WE WOULD OBJECT TO THE INSERTION OF

9 BATTERED-PERSON'S SYNDROME IN HERE.

10 MS. ABRAMSON: I AM NOT ASKING FOR

11 BATTERED-PERSON'S SYNDROME.

12 MR. CONN: YES. P.T.S.D.

13 MS. ABRAMSON: P.T.S.D., AND WE ASK THAT IT WOULD

14 READ:

15 "AT THE TIME OF THE COMMISSION OF

16 THE CRIMES CHARGED; NAMELY, MURDER IN

17 COUNTS I AND II, OR A LESSER CRIME

18 THERETO, NAMELY MANSLAUGHTER, YOU MAY

19 CONSIDER SUCH EVIDENCE SOLELY FOR THE

20 PURPOSE OF DETERMINING WHETHER THE

21 DEFENDANT, MY CLIENT, ACTUALLY FORMED AN

22 INTENT TO KILL; PREMEDITATED, DELIBERATED

23 OR HARBORED MALICE AFORETHOUGHT, WHICH ARE

24 ELEMENTS OF THE CRIMES CHARGED IN COUNTS I

25 AND II, AND THE LESSER CRIME OF

26 MANSLAUGHTER."

27 MS. TOWERY: THREE.

28 MS. ABRAMSON: THREE IS CONSPIRACY, YES.

1 SPECIFIC INTENT AND CONSPIRACY ALSO.

2 BUT I DON'T THINK WE OFFERED EVIDENCE AT
3 THE TIME OF THE FORMATION OF THE CONSPIRACY.

4 MS. TOWERY: IT'S ALLEGED TO BE AUGUST 20TH.

5 MS. ABRAMSON: OKAY. ALL OF THEM; ONE, TWO AND
6 THREE.

7 I CAN PREPARE THIS, YOUR HONOR, FOR EACH
8 COUNT SEPARATELY, AND -- RATHER FOR EACH CHARGE
9 SEPARATELY: MURDER, CONSPIRACY AND MANSLAUGHTER
10 SEPARATELY, AND PINPOINT THE MENTAL STATES OF THE THREE.

11 THE COURT: DO YOU REALLY NEED THAT? WOULDN'T IT
12 JUST BE EASIER TO SAY: "AT THE TIME OF THE COMMISSION
13 OF THE CRIMES CHARGED, OR LESSER OFFENSES," WITHOUT
14 IDENTIFYING THE MENTAL DISORDER AND WITHOUT IDENTIFYING
15 THE MENTAL STATE?

16 MS. ABRAMSON: NO. IT'S VERY IMPORTANT TO
17 IDENTIFY THE MENTAL STATE OF MALICE, YOUR HONOR. I
18 REALIZE THAT THIS HAS ALWAYS BEEN A VERY COMPLICATED
19 INSTRUCTION. IT MAY BE EASIER IF WE JUST WRITE IT OUT.

20 THE COURT: IF YOU WANT TO PRESENT ONE TO ME AS
21 YOU PROPOSE IT, THAT'S CERTAINLY WHAT SHOULD BE DONE.

22 MR. CONN: AND WE WILL -- WE DO OPPOSE THIS
23 INSTRUCTION, PARTICULARLY IN REGARD TO THE PHRASE
24 "MALICE AFORETHOUGHT."

25 MS. ABRAMSON: I'M SURE YOU DO.

26 MR. CONN: IF WE'RE PROCEEDING ON THE THEORY OF
27 BOTH EXPRESS AND IMPLIED MALICE HERE, I DON'T THINK THAT
28 THE MENTAL STATE CAN REFUTE IMPLIED MALICE.

1 MS. ABRAMSON: OH, I THINK IT CAN.

2 THE COURT: WELL, TO THE EXTENT THAT PROVOCATION
3 CAN BE CONSIDERED -- CAN REDUCE IT FROM A FIRST TO A
4 SECOND, IT ALSO REDUCES IT ON A COUNT TO MANSLAUGHTER.

5 MS. ABRAMSON: THAT'S RIGHT, JUDGE.

6 JUDGE, I HONESTLY THINK, TO BE PERFECTLY
7 CANDID WITH THE COURT, THAT THE MENTAL STATE EVIDENCE
8 ALONE SHOULD REQUIRE THE GIVING OF A MANSLAUGHTER
9 INSTRUCTION ON A PROVOCATION THEORY FOR MRS. MENENDEZ,
10 AND IF THAT OCCURS, THIS ISN'T NECESSARY.

11 MR. CONN: AND THAT IS THE PROBLEM.

12 MS. ABRAMSON: REALLY, IF YOU CONCEPTUALIZE WHAT
13 OUR EVIDENCE WAS --

14 THE COURT: I DON'T WANT TO TALK ABOUT IT ANYMORE
15 ON THAT SUBJECT.

16 MS. ABRAMSON: BUT THIS, I THINK, HAS TO BE
17 GIVEN, GIVEN OUR EVIDENCE.

18 THE COURT: DO ME A FAVOR THEN. PRESENT ME ON
19 TUESDAY WITH WHAT IT IS THAT YOU WANT.

20 MS. ABRAMSON: IF YOU'RE REACHABLE MONDAY, I CAN
21 GET IT THEN ALSO. I CAN FAX IT THROUGH TO ANYWHERE YOU
22 NEED IT.

23 THE COURT: I CAN GIVE YOU A FAX NUMBER, BUT
24 TUESDAY I THINK WILL BE FINE.

25 MS. ABRAMSON: THAT'S WHAT WE WILL DO.

26 THE COURT: I DON'T PERCEIVE THIS TO BE SOMETHING
27 THAT INTERFERES WITH GETTING AN ARGUMENT GOING, JUST
28 FINALIZING THE LANGUAGE.

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1 MS. ABRAMSON: IT WOULD HELP TO KNOW HOW I CAN
2 RELY ON THIS, BUT IT WON'T CHANGE WHAT I'M GOING TO
3 ARGUE.

4 THE COURT: IT'S AN INSTRUCTION THAT'S THERE. I
5 DON'T KNOW WHY IT WOULDN'T BE GIVEN.

6 MR. CONN: BUT I THINK THE PROBLEM IS IN THIS
7 PARTICULAR CASE WHERE VOLUNTARY MANSLAUGHTER IS NOT
8 BEING GIVEN AS TO KITTY MENENDEZ.

9 NOW, IF THEY ARE GIVING THIS INSTRUCTION AS
10 TO KITTY MENENDEZ, THIS INVITES THE JURY TO FIND THAT IT
11 IS NEITHER FIRST NOR SECOND-DEGREE.

12 MS. ABRAMSON: PRECISELY. THAT'S THE POINT.
13 THAT'S WHY YOU GET THIS INSTRUCTION.

14 THEREFORE, MAYBE THE PEOPLE WANT TO REVIEW
15 WHETHER THEY DON'T WANT MANSLAUGHTER GIVEN FOR KITTY
16 MENENDEZ.

17 MR. CONN: THAT IS WHY WE ARE OF THE OPINION THAT
18 THIS INSTRUCTION, IF IT IS GIVEN AT ALL, THE PHRASE
19 "HARBORED MALICE AFORETHOUGHT" SHOULD BE DELETED.

20 MS. ABRAMSON: I DON'T THINK YOU CAN CHANGE THE
21 LAW THAT WAY.

22 THE COURT: OKAY. WE ARE GETTING BOGGED DOWN ON
23 THIS ONE. SO IF YOU WANT TO SUBMIT IT IN WRITING, WE
24 CAN ARGUE IT.

25 WHAT IS THE BASIS OF 4.30?

26 MS. ABRAMSON: WELL, I THINK 4.30 RECOGNIZES WHAT
27 THE PEOPLE RECOGNIZED WHEN THEY PUT DR. DIETZ ON THE
28 STAND, WHICH IS THERE ARE -- THERE IS A DEGREE OF

-14794

1 AUTOMATIC BEHAVIOR THAT'S POSSIBLE FOR PEOPLE IN AN
2 EXTREME STATE OF AROUSAL.

3 I WOULD ASK TO MODIFY 4.30 TO FIT THE FACTS
4 OF THIS CASE. BUT I THINK THAT WE DO HAVE AN ARGUMENT
5 THAT MY CLIENT'S MENTAL STATE AT THE TIME, BASED ON HIS
6 MENTAL DISORDER, WAS AKIN TO UNCONSCIOUSNESS. HE WAS
7 GOING THROUGH OBVIOUS MOTOR ACTION, AND I WOULD PATTERN
8 THAT INSTRUCTION TO REFLECT A CONDITION OF EXTREME
9 HYPERAROUSAL DUE TO P.T.S.D.

10 THE COURT: OKAY. THAT REQUEST IS DENIED.
11 REFUSED.

12 3.32 YOU'RE GOING TO MODIFY?

13 MS. ABRAMSON: YES, YOUR HONOR.

14 THE COURT: OKAY. AND LET'S GO ON TO CONSPIRACY.

15 MR. GESSLER: WE HAD SELF-DEFENSE INSTRUCTIONS WE
16 SUBMITTED, YOUR HONOR.

17 THE COURT: OKAY. IT'S NO. 6.

18 MS. ABRAMSON: NO. WE SUBMITTED 5.10. 5.10,
19 5.12, 5.13, 5.14. THIS IS ON OUR LIST.
20 THE COURT: LET ME JUST FIND THE LIST. OKAY.
21 LET ME GET THE CALJIC.
22 ON THE REQUESTED INSTRUCTIONS, STARTING
23 WITH 5.10 THROUGH 5.16 DEALING WITH SELF-DEFENSE, THE
24 COURT'S POSITION TODAY IS THE SAME AS IT WAS AT THE
25 CONCLUSION OF THE FIRST TRIAL, THAT THERE IS
26 INSUFFICIENT EVIDENCE TO SUPPORT INSTRUCTIONS ON
27 SELF-DEFENSE, PERFECT SELF-DEFENSE; THAT THERE IS
28 INSUFFICIENT EVIDENCE THAT MEETS A REASONABLE MAN

-14793

1 STANDARD AS REQUIRED.
2 AND THEREFORE THOSE INSTRUCTIONS WILL NOT
3 BE GIVEN.
4 MS. TOWERY: IT WAS MORE THAN THAT, YOUR HONOR.
5 IT WAS 5.10, 5.12, 5.13, 5.14, 5.15, 5.16.
6 THE COURT: YES. I COVERED ALL THOSE.
7 MR. GESSLER: INCLUSIVE.
8 THE COURT: AND THEN I ALREADY SAID MY POSITION
9 ON 5.17, AND THEN CONTINUING ON TO 5.30 THROUGH 5.51.
10 LIKEWISE, THEY WILL NOT BE GIVEN BECAUSE OF
11 THE COURT'S FINDING AS A MATTER OF LAW THAT THERE IS
12 INSUFFICIENT EVIDENCE TO SUPPORT INSTRUCTIONS ON PERFECT
13 SELF-DEFENSE.

14 SO THOSE REQUESTS ARE DENIED.
15 SO LET'S GO TO 6.10. IT'S A STANDARD
16 INSTRUCTION. IT'LL BE GIVEN WITH THE INSERTION OF THE
17 APPROPRIATE CRIME.
18 6.11 WILL BE GIVEN.
19 6.12 WILL BE GIVEN.
20 6.13 WILL BE GIVEN. AND STOP ME IF I GO
21 BEYOND THOSE THAT ARE REQUESTED BY THE DEFENSE HERE.
22 6.17 IS THE NEXT ONE THE PEOPLE HAVE
23 REQUESTED.
24 MS. TOWERY: WE REQUESTED 6.15 AND 6.16.
25 THE COURT: OKAY. WE WILL GO BACK TO YOUR LIST.
26 THAT'S A STANDARD INSTRUCTION.
27 WHAT IS THE PEOPLE'S POSITION?
28 CO-CONSPIRATOR IS NOT LIABLE FOR THE ACTS THAT GO BEYOND

-14792

1 THE AGREED UPON OR CONTEMPLATED PLAN.
2 MR. CONN: I DON'T THINK WE NEED THAT ONE.
3 THE COURT: I'M SORRY?
4 MR. CONN: I DON'T THINK WE NEED THAT ONE. WE
5 WILL WITHDRAW IT.
6 THE COURT: THE DEFENSE IS REQUESTING IT.
7 MR. GESSLER: WE ARE ASKING FOR IT.
8 MR. CONN: I'M SORRY. 6.17?
9 THE COURT: I AM GOING TO GIVE IT. IT'S A

10 STANDARD INSTRUCTION DEALING WITH LIABILITY OF
11 CO-CONSPIRATORS, OR LACK OF LIABILITY.

12 AGAIN, THE NEXT ONE -- STOP ME IF I GO
13 BEYOND THOSE REQUESTED BY THE DEFENSE.

14 6.18 WILL BE GIVEN.

15 6.20 IS THE NEXT. IT'LL BE GIVEN.

16 6.21 WILL BE GIVEN.

17 6.23 IS THE ONE THAT MR. GESSLER MENTIONED.

18 MR. GESSLER: YES. I THINK THE CAPTION THERE IS
19 INTENDED TO COVER THE FACTS GIVEN IN AN INDICTMENT, NOT
20 JUST A DATE.

21 THE COURT: OKAY. SO YOU'RE SUGGESTING OR ASKING
22 THAT THIS BE MODIFIED TO INCLUDE "ON OR ABOUT THE DATE
23 OF AUGUST 20TH"?

24 MR. GESSLER: YES.

25 THE COURT: WHATEVER THE LANGUAGE IS IN THE
26 ACTUAL CHARGING DOCUMENT?

27 MR. GESSLER: EXACTLY.

28 THE COURT: WHICH SAYS: "ON OR ABOUT AUGUST 20,"

-14791

1 ET CETERA, "THE DEFENDANTS DID WILLFULLY AND UNLAWFULLY
2 CONSPIRE TOGETHER."

3 MS. TOWERY: "IN THE COUNTY OF LOS ANGELES."

4 THE COURT: YES, THAT'S THE ET CETERA, DID SUCH
5 AND SUCH.

6 OKAY. THAT'S THE LANGUAGE OF THE CHARGE.

7 MS. TOWERY: THAT'S WHAT WE ARE ASKING IS THE
8 LANGUAGE, JUDGE.

9 THE COURT: WHY IS IT YOU DIDN'T INCLUDE THAT,
10 MR. CONN?

11 MR. CONN: I THINK WHAT I DID WAS I DRAFTED THIS
12 BASED UPON THE ORIGINAL INSTRUCTION THAT WAS GIVEN IN
13 THE FIRST TRIAL. I DON'T HAVE A COPY OF THAT WITH ME.
14 BUT I AM NOT SURE THAT THAT WAS INCLUDED IN THE ORIGINAL
15 INSTRUCTION.

16 MR. GESSLER: WHETHER IT WAS OR NOT, WE ARE
17 REQUESTING THAT IT BE FILLED OUT FOR THIS TRIAL.

18 MS. ABRAMSON: RIGHT. IT WASN'T.

19 THE COURT: WELL, IT SEEMS TO INDICATE AT THE
20 BOTTOM, THE USE NOTE, THAT THE INSTRUCTION IS DEEMED FOR
21 USE WHETHER OR NOT THE INDICTMENT HAS BEEN READ.

22 SO IT INFERS THAT IT SHOULD HAVE THE SAME
23 LANGUAGE AS THE DOCUMENT, THE CHARGING DOCUMENT.

24 MR. GESSLER: I THINK THAT'S WHAT "HERE DELINEATE
25 THE CONSPIRACIES CHARGED" REALLY MEANS, AND THAT'S WHAT
26 WE'RE ASKING.

27 THE COURT: OKAY. IF SOMEONE WANTS TO PREPARE
28 THAT WITH THE ADDITIONAL LANGUAGE OF COUNT III, IF

1 THAT'S WHAT YOU'RE ASKING FOR, YOU CAN PROVIDE THAT.

2 MR. GESSLER: ALL RIGHT.

3 THE COURT: 6.24 IS A STANDARD INSTRUCTION. THE
4 DEFENSE HAS PROVIDED A MODIFICATION.

5 WHAT'S THE MODIFICATION, THE LAST
6 PARAGRAPH?

7 MS. TOWERY: YES.

8 THE COURT: WHY DO YOU NEED THAT? IT SAYS IT'S A
9 LIMITATION ONLY AS TO USE AGAINST THE OTHER PERSON.

10 MS. TOWERY: BECAUSE THE INSTRUCTION IS
11 CONFUSING, YOUR HONOR, AND THAT'S TO CLARIFY THE
12 PARAGRAPH AS TO THE USE OF THE INSTRUCTION.

13 THE COURT: IT MAKES IT MORE CONFUSING.

14 MS. ABRAMSON: YOU KNOW, YOUR HONOR, WE NEED
15 ANOTHER CO-CONSPIRATOR STATEMENT INSTRUCTION.

16 THE COURT: WELL, LET'S DEAL WITH THIS ONE FIRST.

17 I DON'T SEE THE NEED FOR THIS LAST
18 PARAGRAPH. IT MAKES IT MORE CONFUSING THAN HELPFUL.

19 SO I AM GOING TO GIVE THE STANDARD 6.24.

20 OKAY, WHAT WAS IT THAT YOU'RE SAYING?

21 MS. ABRAMSON: YOUR HONOR, REMEMBER WHEN WE WERE
22 HAVING THE 402 ON THE BRIAN ESLAMINIA LETTER, THE ISSUE
23 WAS WHETHER THERE WAS CORROBORATION --

24 THE COURT: RIGHT.

25 MS. ABRAMSON: -- OF THE EXISTENCE OF THE
26 CONSPIRACY OTHER THAN BY --

27 THE COURT: OVERT ACT, OR WHETHER THERE WAS A --
28 WELL, ONE OF THE THINGS WAS WHETHER THE OVERT ACT

1 OCCURRED BEFORE OR AFTER THE CONSPIRACY. THERE WAS
2 SOMETHING ELSE.

3 MS. ABRAMSON: YES, THERE WAS.

4 IT WAS OUR POSITION THAT THE ONLY
5 CORROBORATION FOR THE PARTICIPATION OF MY CLIENT IN THE
6 CONSPIRACY WAS BEING GIVEN BY MR. ESLAMINIA; ALBEIT
7 GREEN, AND THAT THERE WAS A NEED UNDER THE LAW BECAUSE
8 HE WAS A CO-CONSPIRATOR FOR CORROBORATION INDEPENDENT OF
9 HIM, INDEPENDENT OF THE STATEMENT OF ANY CO-CONSPIRATOR.

10 THE COURT: LET'S DO THIS THEN. SINCE YOU'RE
11 THINKING IT THROUGH, PREPARE SOMETHING AND BRING IT IN
12 ON TUESDAY, BECAUSE WE WANT TO GET THROUGH THESE THAT WE
13 HAVE THAT HAVE ALREADY BEEN PRINTED.

14 6.25 IS A STANDARD INSTRUCTION, AND IT WILL
15 BE GIVEN.

16 MR. GESSLER: YOUR HONOR, ON 6.25 --

17 THE COURT: YES.

18 MR. GESSLER: THE CONSPIRACY TO COMMIT THE CRIME
19 OF MURDER, I AM NOT SURE THAT TAKES INTO ACCOUNT THE NEW
20 CASE ON THE ACTUAL INTENT TO KILL, AS OPPOSED TO THE
21 IMPLIED MALICE, WHICH THE PEOPLE ARE GOING TO BE ARGUING
22 IN CONNECTION WITH OTHER COUNTS.

23 THE COURT: YES. 6.25 WILL BE GIVEN, BUT
24 EITHER -- I GUESS THIS AS GOOD A PLACE AS ANY. IT HAS
25 TO BE MODIFIED TO INCLUDE A FINDING, OR PART OF THE
26 FINDING OF THE JURY THAT -- IT'S NOT A FINDING, BUT IT

27 HAS TO BE AN ELEMENT OF THE CRIME, THE EXPRESS MALICE.

28 MR. CONN: RIGHT.

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1 THE COURT: SO YOU WILL HAVE TO MODIFY 6.25 TO
2 SHOW AN EXPRESS MALICE.

3 MS. ABRAMSON: ISN'T IT SPECIFICALLY INTENT TO
4 KILL? ISN'T THAT THE WAY THE CASE AUTHORITY READS?
5 ISN'T THAT WHAT IT READS? I THINK THAT'S WHAT SWAIN
6 SAID. IT'S INTENT TO KILL, SPECIFIC INTENT TO KILL.

7 THE COURT: IF THAT'S WHAT IT IS --

8 MS. ABRAMSON: YES, WHICH IS EXPRESS MALICE. BUT
9 IT TALKS ABOUT IT IN TERMS OF SPECIFIC INTENT TO KILL.

10 THE COURT: YES. YES.

11 MS. ABRAMSON: IT SHOULD ALSO BE MODIFIED TO NOT
12 BE PLURAL. IT'S ONLY ONE CRIME.

13 THE COURT: WELL, I CAN'T FIND THE EXACT
14 LANGUAGE. IT TALKS MORE ABOUT EXPRESS MALICE AND INTENT
15 TO KILL.

16 SO WHILE WE'RE GOING AHEAD HERE, IF
17 SOMEBODY WANTS TO FIND IT.

18 ALL RIGHT. LET'S -- I HAVE ALREADY SAID
19 THAT IN MY VIEW I AM ADOPTING THE ANALYSIS OF JUSTICE
20 MOSK THAT THERE IS JUST CONSPIRACY TO COMMIT MURDER, AND
21 THE JURY DOESN'T HAVE TO FIND A DEGREE, AND THEREFORE
22 6.26.

23 MS. ABRAMSON: BUT DO YOU AGREE THERE MUST BE
24 ONLY EXPRESS MALICE OR SPECIFIC INTENT TO KILL?
25 THE COURT: RIGHT. THERE HAS TO BE SOMETHING IN
26 THE INSTRUCTION ON 6.25. IT HAS TO BE MODIFIED
27 REGARDING EXPRESS MALICE.
28 AND THEN 6.26 WILL BE GIVEN.

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1 8.00 WILL BE GIVEN.
2 8.10 WILL BE GIVEN.
3 8.11 WILL BE GIVEN.
4 8.20 WILL BE GIVEN.
5 8.25 WILL BE GIVEN.
6 8.30 AND 8.31 WILL BE GIVEN.
7 8.58.
8 8.25 --
9 MS. ABRAMSON: YOU ARE GIVING IT?
10 THE COURT: YES.
11 MS. ABRAMSON: I DON'T THINK IT'S ALLEGED.
12 THE COURT: NO, IT'S A THEORY OF FIRST DEGREE.
13 MR. GESSLER: HOWEVER, WE WOULD ASK THAT THE
14 LANGUAGE BE ADDED TO 8.25 WHICH THE COURT ADDED TO THE
15 SPECIAL CIRCUMSTANCE, LYING IN WAIT IN THE LAST TRIAL.
16 THE COURT: I DON'T RECALL THAT IT WAS.
17 MR. GESSLER: IT IS IN OUR SPECIALS. WE DID OUR
18 SPECIALS BEFORE THEY DID 8.25. BUT IT'S THE LANGUAGE WE

19 PUT AT THE END OF 8.81.

20 THE COURT: IN THE FIRST TRIAL THE PEOPLE DIDN'T

21 PURSUE THE THEORY OF LYING IN WAIT.

22 MR. GESSLER: NO, BUT THEY DID HAVE THE LYING IN

23 WAIT SPECIAL CIRCUMSTANCE, AND BASED ON EDWARDS, FOR THE

24 SPECIAL CIRCUMSTANCE THE COURT ADDED THE LANGUAGE: "IF

25 THE MURDER IS DONE SUDDENLY, WITHOUT A PERIOD OF

26 WAITING, WATCHING AND CONCEALMENT, THE SPECIAL

27 CIRCUMSTANCE OF LYING IN WAIT IS NOT PRESENT."

28 WE WOULD HE ASK IN THIS CASE THAT IF THE

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1 KILLING IS DONE SUDDENLY, BECAUSE IT HAS TO BECOME

2 MURDER ON ITS OWN WEIGHT BEFORE THIS COMES INTO PLAY.

3 MR. CONN: WE WOULD OPPOSE THAT PARTICULAR

4 LANGUAGE, BECAUSE THAT IS NOT A PART OF CALJIC 8.81.15,

5 THE LYING IN WAIT SPECIAL CIRCUMSTANCE. I THINK THAT

6 THE PHRASE, "WITHOUT A PERIOD OF WAITING, WATCHING AND

7 CONCEALMENT" IS ARGUMENTATIVE AND REDUNDANT.

8 I THINK THAT THE INSTRUCTION ITSELF, BY

9 SUGGESTING THAT THOSE -- BY SPECIFICALLY INSTRUCTING THE

10 JURY THAT THOSE ARE REQUIREMENTS, MAKES THAT PHRASE

11 "WITHOUT A PERIOD OF WAITING, WATCHING AND CONCEALMENT"

12 BOTH ARGUMENTATIVE AND REDUNDANT, AND THE PHRASE

13 "SUDDENLY" IS VAGUE AND ARGUABLY AT ODDS WITH THE

14 REMAINDER OF THE INSTRUCTION.

15 THE COURT: I AGREE, SUDDENLY DOESN'T ADD MUCH.
16 IF THE MURDER IS DONE WITHOUT A PERIOD OF WAITING,
17 WATCHING AND CONCEALMENT, THE SPECIAL CIRCUMSTANCE IS
18 NOT PRESENT, BECAUSE CERTAINLY YOU CAN HAVE WAITING,
19 WATCHING AND CONCEALMENT, AND THEN SUDDENLY ACT.
20 SO THAT DOESN'T REALLY ACCOMPLISH THE
21 PURPOSE OF THE ADDED LANGUAGE.
22 MR. GESSLER, IF IT SAID "IF THE KILLING" --
23 MR. GESSLER: YOU'RE OMITTING THE WORD
24 "SUDDENLY."
25 THE COURT: "IF THE KILLING IS DONE WITHOUT A
26 PERIOD OF WAITING, WATCHING AND CONCEALMENT."
27 MR. GESSLER: THAT'S FOR 8.81.15?
28 THE COURT: YES.

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1 MR. GESSLER: I WOULD AGREE, YOUR HONOR. THAT'S
2 FINE.
3 THE COURT: AND GOING BACK TO THE OTHER ONE, YOU
4 WANT TO ADD THAT LANGUAGE TO 8.25 THAT IF THE KILLING IS
5 DONE WITHOUT A PERIOD OF WAITING, WATCHING AND
6 CONCEALMENT, IT DOES NOT CONSTITUTE LYING IN WAIT?
7 MR. GESSLER: THAT'S CORRECT, YOUR HONOR.
8 THE COURT: WELL, IT CERTAINLY SEEMS TO CONFORM
9 WITH THE LAW.
10 WHAT IS THE PEOPLE'S POSITION ON THAT?

11 MR. CONN: I HAVE NO OBJECTION THEN.
12 THE COURT: IF YOU WOULD PROVIDE THAT TO ME,
13 MR. GESSLER, BOTH 8.25 AS MODIFIED, WE'RE DELETING
14 "SUDDENLY" FROM THAT, AND OTHERWISE I AM CHANGING IT
15 FROM THE SPECIAL CIRCUMSTANCE LANGUAGE TO "A KILLING."
16 OKAY. THEN 8.58 WAS WHERE WE'RE AT.
17 IS THERE ANY OBJECTION TO 8.58? APPARENTLY
18 NOT. SO IT WILL BE GIVEN.
19 8.70 WILL BE GIVEN.
20 8.71. 8.73.
21 MS. ABRAMSON: NOW, 8.73, THE PEOPLE HAVE
22 MODIFIED IT IMPROPERLY.
23 THE COURT: WELL, IT -- THEY WERE ANTICIPATING
24 VOLUNTARY MANSLAUGHTER. SO IT WOULD HAVE TO BE MODIFIED
25 TO INCLUDE THAT LANGUAGE.
26 MS. ABRAMSON: WELL, NO. I MEAN THE WAY IT
27 READS: "BUT THE PROVOCATION WAS NOT SUFFICIENT TO
28 REDUCE THE HOMICIDE." THAT'S STILL APPROPRIATE.

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1 THE COURT: YES. I SAID IT HAS TO BE MODIFIED TO
2 INCLUDE THAT LANGUAGE, TO PUT IT BACK.
3 MS. ABRAMSON: IN OTHER WORDS, YOU NEED A CLEAN
4 COPY.
5 THE COURT: IT HAS TO BE PUT BACK IN 8.73.
6 MS. ABRAMSON: IN THE ORIGINAL VERSION?

7 THE COURT: YES.

8 MS. TOWERY: I'M SORRY, YOUR HONOR. I HAD TO

9 TAKE A PHONE CALL.

10 THE COURT: YES.

11 MS. TOWERY: DID THE COURT DEAL WITH THE

12 MANSLAUGHTER INSTRUCTION THAT WE REQUESTED, SINCE WE DO

13 HAVE ONE.

14 MS. ABRAMSON: LET'S FINISH THESE FIRST.

15 THE COURT: AS I SAID, I AM NOT CROSS-REFERENCING

16 TO YOUR LIST, I AM JUST GOING THROUGH, AND IF SOMEBODY

17 YELLS ABOUT SOMETHING I WILL GO BACK.

18 8.73 WILL BE GIVEN AS UNMODIFIED.

19 MS. ABRAMSON: THANK YOU, YOUR HONOR.

20 THE COURT: 8.74 WILL BE GIVEN.

21 MS. ABRAMSON: ALSO IT HAS TO BE UNMODIFIED.

22 THE COURT: PARTIALLY.

23 MS. ABRAMSON: YES, TAKE OUT THE VOLUNTARY -- THE

24 INVOLUNTARY, BUT NOT THE VOLUNTARY.

25 THE COURT: AND 8.80, THE DEFENSE HAS SUBMITTED

26 ONE.

27 WHAT WAS YOUR CHANGE?

28 MS. TOWERY: THIS I THINK IS THE MODIFICATION

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1 THAT THE COURT GAVE TO THE JURY THE LAST TIME.

2 THE COURT: OKAY. AND WHAT WAS THE MODIFICATION?

3 MS. TOWERY: I DON'T REMEMBER. MR. GESSLER, HELP
4 ME ON THAT.

5 THE COURT: THE PEOPLE TOOK OUT THE LANGUAGE: "A
6 CO-CONSPIRATOR OR AN AIDER AND ABETTOR," AND JUST PUT
7 "THE ACTUAL KILLER."

8 MS. ABRAMSON: THEY PUT IT BACK IN.

9 THE COURT: IT'S JUST DUPLICATIVE, I GUESS.

10 MS. ABRAMSON: I GUESS IT DEPENDS ON WHAT THEIR
11 PRIMARY THEORY IS.

12 THE COURT: THIS IS ONE OF THE MORE CONFUSING
13 INSTRUCTIONS IN CALJIC, THIS PARAGRAPH.

14 MR. CONN: I BELIEVE WHAT I DID THERE WAS I JUST
15 COPIED THAT FROM THE INSTRUCTION THAT WAS GIVEN IN THE
16 FIRST TRIAL.

17 THE COURT: WELL, YOU BOTH BELIEVE THAT YOU GAVE
18 ME WHAT WE DID IN THE FIRST TRIAL THEN.

19 MS. ABRAMSON: I HAVE THE INSTRUCTIONS THAT WERE
20 GIVEN IN THE FIRST TRIAL, AND IT SURE LOOKS LIKE THE
21 DEFENSE VERSION.

22 MR. CONN: PERHAPS I'M WRONG THEN.

23 MR. GESSLER: WELL, THEY HAVE LINED OUT
24 CONSPIRATOR AND AIDER AND ABETTOR.

25 MS. TOWERY: WELL, CHARLIE, THIS IS WHAT WAS
26 GIVEN.

27 MS. ABRAMSON: IT LOOKS LIKE IT'S THE SAME
28 ACTUALLY, JUST ONE IS TYPED NEATER.

1 THE COURT: THE PEOPLE KEEP THE LANGUAGE, "ON THE
2 OTHER HAND, IF YOU FIND BEYOND A REASONABLE DOUBT THAT
3 THE DEFENDANT WAS THE ACTUAL KILLER, YOU NEED NOT FIND
4 THE INTENT TO KILL."

5 SO THE PEOPLE ARE -- YOU WANT TO KEEP THAT
6 LANGUAGE THERE?

7 MR. CONN: YES.

8 MS. ABRAMSON: WELL, I JUST THINK THAT'S REALLY
9 DIFFICULT LANGUAGE IN THIS CASE, BECAUSE IT'S GOING TO
10 BE VERY HARD TO MAKE THAT DETERMINATION.

11 THE COURT: WELL THEN, THE JURY HAS THE OPTION OF
12 GOING TO THE PREVIOUS PORTION.

13 THIS IS VERY DIFFICULT TO APPLY, AND IT'S
14 DIFFICULT TO MODIFY THIS INSTRUCTION ONCE YOU GET INTO
15 THAT PARTICULAR PARAGRAPH.

16 MS. ABRAMSON: I JUST THINK THAT LANGUAGE IS SO
17 REDUNDANT WHEN YOU HAVE A MULTIPLE DEFENDANT CASE, AND
18 IS SO CONFUSING, THAT IT REALLY MAKES MORE SENSE TO TAKE
19 IT OUT, AS I BELIEVE WE DID IN THE FIRST TRIAL, WHERE
20 THE EVIDENCE WAS IDENTICAL.

21 THE COURT: WELL, THERE IS SOME DISTINCTION
22 BETWEEN THE DEFENDANTS, AND PERHAPS THAT -- WHAT IS YOUR
23 RATIONALE FOR THIS, MR. CONN, AS TO WHY YOU WANT THAT
24 PARTICULAR BRACKET IN?

25 MR. CONN: FOR THAT PARTICULAR SENTENCE?

26 THE COURT: YES, "ON THE OTHER HAND."

27 MR. CONN: I THINK IT -- IT'S A CORRECT STATEMENT

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1 ACTUAL KILLER, THE INTENT TO KILL NEED NOT BE SHOWN IN
2 ORDER TO FIND THE SPECIAL CIRCUMSTANCE TO BE TRUE.

3 THE COURT: WELL, THAT'S TRUE. YOU ARE
4 REQUESTING IT. YOU ARE ENTITLED TO IT. THAT'S THE LAW.

5 ALL RIGHT. I WILL GIVE IT, 8.80.

6 8.81.3 WILL BE GIVEN.

7 8.81.5 WITH A MODIFICATION ADDED --
8 REQUESTED BY THE DEFENSE WILL BE GIVEN, REMOVING
9 "SUDDENLY."

10 MS. TOWERY: AND CHANGING THE MURDER TO KILLING.

11 THE COURT: YES.

12 THE COURT: THIS ONE WILL HAVE MURDER.

13 MS. ABRAMSON: THIS DOES HAVE MURDER. THIS IS
14 THE SPECIAL. I'M SORRY. I MADE NOTES ON THE OTHER ONE.

15 THE COURT: 8.83, STANDARD INSTRUCTION, WILL BE
16 GIVEN.

17 THE SAME WITH .1 AND .2.

18 17.00, 17.02, 17.10, WITH THE ADDITIONAL
19 MODIFICATION OF MANSLAUGHTER, VOLUNTARY MANSLAUGHTER.

20 17.30, .31, .40, .45, .47, .48, .49, .50.

21 I'VE SKIPPED OVER SOME DEFENSE
22 INSTRUCTIONS, SO LET ME GO BACK NOW AND TELL ME WHICH
23 ONES THAT I'VE MISSED HERE THAT YOU WANT TO ADD.

24 MR. GESSLER: .52.
25 THE COURT: 8.52?
26 MR. GESSLER: 17.52.
27 THE COURT: WEREN'T THERE SOME BEFORE THEN?
28 MS. TOWERY: 17.01 YOU SKIPPED OVER, AND THEN

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1 THERE IS A WHOLE SERIES OF MANSLAUGHTER INSTRUCTIONS.
2 THE COURT: OKAY. SO YOU WANT 17.01?
3 OKAY. WHAT IS THE POSITION OF THE
4 PROSECUTION ON 17.01, MULTIPLE ACTS AND AIDING AND
5 ABETTING? I DON'T UNDERSTAND HOW THIS ONE WORKS.
6 MR. CONN: THIS DOESN'T APPLY TO THIS FACT
7 SITUATION.
8 MR. GESSLER: WELL, I THINK IT DOES AS TO THE
9 CONSPIRACY, YOUR HONOR. IT SAYS THAT THERE IS STILL A
10 DIFFERENCE OF OPINION AS TO WHETHER THERE MUST BE
11 AGREEMENT OF AN OVERT ACT. I THINK THAT THERE SHOULD
12 BE, AND THAT'S WHY WE'RE ASKING FOR IT.
13 THE COURT: THIS RELATES TO CONSPIRACY?
14 MR. GESSLER: YES.
15 THE COURT: OKAY.
16 MR. CONN: AND AGAIN, I THINK THAT THIS HAS NO
17 APPLICATION TO THIS TRIAL WHATSOEVER. THIS IS INTENDED
18 FOR A SITUATION WHERE THERE ARE MULTIPLE ACTS.
19 THE COURT: WELL, THERE IS A SPLIT IN AUTHORITY

20 IN THE APPELLATE COURTS ON WHETHER IT SHOULD BE GIVEN,
21 CONSPIRACY, IN THIS SITUATION.

22 MR. GESSLER: WE SIDE WITH THE DISTRICT COURTS OF
23 APPEAL WHO SAY THAT THERE SHOULD BE UNANIMITY WITH THE
24 OVERT ACT, AND IT MAKES SENSE THAT THE OVERT ACT WHICH
25 IS AN ESSENTIAL PART OF CONSPIRACY, THEY SHOULD HAVE TO
26 AGREE ON WHAT OVERT ACT THERE IS.

27 THE COURT: WELL, THEY DON'T, DO THEY?

28 IN THE INSTRUCTIONS ON CONSPIRACY, AREN'T

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1 THEY TOLD ABOUT THAT, ABOUT FINDNG AN OVERT ACT? ISN'T
2 THAT INCLUDED IN THE CONSPIRACY INSTRUCTIONS?

3 MS. ABRAMSON: BUT THEY SAY, I THINK -- LET ME
4 LOOK AT THE CONSPIRACY INSTRUCTIONS THERE, BUT --

5 THE COURT: WELL, THAT'S WHERE IT SHOULD BE, IF
6 IT'S ANYWHERE. IF THERE SHOULD BE UNANIMITY OF
7 AGREEMENT, IT SHOULD BE AT 6.10 RATHER THAN AT 17.01.

8 MR. GESSLER: ALL IT SAYS IN 6.10 IS:

9 "IN ORDER TO FIND A DEFENDANT
10 GUILTY OF CONSPIRACY, IN ADDITION TO PROOF
11 OF THE UNLAWFUL AGREEMENT AND SPECIFIC
12 INTENT, THERE MUST BE PROOF OF THE
13 COMMISSION OF AT LEAST ONE OF THE OVERT
14 ACTS ALLEGED IN THE INDICTMENT."

15 IT DOESN'T SAY THEY HAVE TO AGREE ON THE

16 OVERT ACT, AND I THINK THAT THAT'S REQUIRED.

17 THE COURT: OKAY. THE USE NOTE ON 6.10 JUST

18 DUPLICATES TO SOME EXTENT 17.01, SAYING THERE IS A SPLIT

19 IN AUTHORITY. DIVISION TWO SAYS THAT IT'S NOT

20 REQUIRED -- SECOND DISTRICT, DIVISION ONE.

21 SO WE'RE CLOSE ENOUGH TO DOWNTOWN TO SAY

22 THAT THE SECOND DISTRICT RULE APPLIES, AND THAT THEY

23 DON'T NEED UNANIMITY. PEOPLE VERSUS JONES.

24 SO, I WON'T GIVE IT.

25 MR. GESSLER: ALL RIGHT. I WILL ASK, HOWEVER,

26 YOUR HONOR, THAT IT BE GIVEN, AND THAT, WITH ALL DUE

27 RESPECT TO THE DISTRICT WE'RE IN, THEY'RE DEAD WRONG.

28 THE OTHER DIVISIONS ARE SMARTER, AND WHEN THE SUPREME

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1 COURT GETS THIS, THEY WILL UPHOLD THE OTHER DIVISIONS.

2 SO WE WANT TO BE ON RECORD THAT THIS SHOULD

3 REQUIRE UNANIMITY, BECAUSE THE OVERT ACT IS AN ESSENTIAL

4 PART OF THE CONSPIRACY. IT IS NOT JUST SOMETHING OF A

5 THEORY.

6 THE COURT: OKAY. ALL RIGHT.

7 THE POSITION OF THE DEFENSE IS THAT YOU

8 WANT THAT, AND IT'S REFUSED. SO YOU HAD ONE MORE, 17

9 WHAT?

10 MS. TOWERY: 17.52.

11 THE COURT: WELL, THAT'S THE SEPARATION

12 INSTRUCTION.

13 MS. TOWERY: YES.

14 THE COURT: OKAY. I NORMALLY DO THAT IN MY OWN
15 WORDS, BUT I WILL COVER THAT ONE WAY OR ANOTHER.

16 WHETHER IN THE LANGUAGE OF 17.52 OR NOT, I WILL
17 DEFINITELY COVER IT.

18 OKAY. THEN WE GO BACK TO THE DEFENSE
19 SPECIALS, AND HAVE WE COVERED EVERYTHING?

20 MS. ABRAMSON: NO. NO. WE HAVEN'T DONE
21 MANSLAUGHTER, JUDGE.

22 THE COURT: WHERE ARE THEY?

23 MS. TOWERY: THEY'RE IN OUR LIST STARTING AT
24 8.37.

25 THE COURT: OKAY. I'M SORRY. LET ME GO BACK TO
26 YOUR LIST THEN.

27 MR. LEVIN: YOUR HONOR, DO YOU HAVE AN IDEA HOW
28 LATE WE'RE GOING TO GO?

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1 THE COURT: WELL, WE'RE GETTING THERE. IT
2 SHOULDN'T TAKE TOO MUCH LONGER, I DON'T THINK.

3 MR. LEVIN: BECAUSE I HAVE A CHILD HOME ALONE.

4 THE COURT: IF YOU WANT TO GO --

5 MR. LEVIN: NO. I HAVE TO STAY.

6 THE COURT: OKAY. 8.37 WILL BE GIVEN. IN THE
7 FIRST -- THE FIRST SENTENCE. I DON'T THINK THERE IS A

8 NEED FOR THE SECOND SENTENCE.

9 AND 8.40 WILL BE GIVEN WITH MODIFICATIONS
10 RELATING TO DELETION OF IMPERFECT SELF-DEFENSE.

11 8.42 WILL BE GIVEN.

12 I ASSUME THE PEOPLE ARE ASKING FOR 8.43?

13 MR. CONN: YES, YOUR HONOR.

14 THE COURT: OKAY. IT'LL BE GIVEN.

15 8.44 WILL BE GIVEN.

16 8.45 WILL NOT BE GIVEN.

17 MS. ABRAMSON: WHICH ONE IS 8.45?

18 THE COURT: INVOLUNTARY MANSLAUGHTER.

19 MS. ABRAMSON: OKAY.

20 THE COURT: 8.50 IS A STANDARD INSTRUCTION
21 DISTINGUISHING MURDER AND MANSLAUGHTER.

22 MS. ABRAMSON: MURDER AND MANSLAUGHTER, RIGHT.

23 THE COURT: IT'LL BE GIVEN.

24 OKAY. 8.71, WE'VE ALREADY COVERED THAT.

25 OKAY. HAVE WE COVERED NOW EVERYTHING BUT
26 YOUR SPECIALS, THE DEFENSE SPECIALS?

27 MR. GESSLER: 8.72, DID WE GET THAT?

28 MS. ABRAMSON: YES.

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1 THE COURT: 8.72 IS TO BE GIVEN.

2 MS. ABRAMSON: 8.73.

3 THE COURT: 8.73 IS TO BE GIVEN.

4 8.74 IS TO BE GIVEN.

5 SOME OF THESE WERE ALREADY INCLUDED IN THE
6 PEOPLE'S INSTRUCTIONS.

7 MS. TOWERY: YOUR HONOR, DID THE COURT RULE ON
8 8.58 AND 8.70? I THINK THAT'S WHEN I WAS TALKING ON THE
9 PHONE.

10 THE COURT: YES. NO ONE HAD ANY OBJECTION TO IT,
11 AND I SAID IT WOULD BE GIVEN. 8.70 AND 8.71, YES.

12 MS. TOWERY: I JUST DIDN'T KNOW.

13 THE COURT: NOW WE ARE TO THE DEFENSE SPECIALS.

14 MS. ABRAMSON: WE HAVE TWO, I THINK, THAT HAVE TO
15 BE REMODIFIED THAT DEAL WITH HEAT OF PASSION. JUST A
16 SECOND.

17 THE COURT: OKAY. THERE IS SOME THAT YOU'VE
18 OFFERED HERE THAT WILL BE REFUSED.

19 5.50, THAT RELATED TO IMPERFECT
20 SELF-DEFENSE.

21 MS. ABRAMSON: OKAY. WITH RESPECT TO OUR SPECIAL
22 INSTRUCTION NO. 2, AS IT STANDS RIGHT NOW, STRIKING OUT
23 THE IMPERFECT SELF-DEFENSE LANGUAGE, WE WOULD STILL BE
24 OFFERING THAT WITH RESPECT TO WHETHER THE DEFENDANT
25 ACTED IN A HEAT OF PASSION OR UPON SUFFICIENT
26 PROVOCATION.

27 MR. CONN: AND WE WILL OPPOSE THAT. I THINK THIS
28 IS THE TYPE OF ARGUMENTATIVE INSTRUCTION THAT THE

1 SUPREME COURT IN PEOPLE VERSUS WRIGHT SAID SHOULD NOT BE
2 GIVEN, AT 45 CAL.3D 1126.

3 IT SAID THAT INSTRUCTIONS THAT ATTEMPT TO
4 RELATE PARTICULAR FACTS TO A LEGAL ISSUE ARE GENERALLY
5 OBJECTIONABLE AS ARGUMENTATIVE, AND THE EFFECT OF
6 CERTAIN FACTS, UNIDENTIFIED THEORIES, IS BEST LEFT TO
7 ARGUMENT BY COUNSEL, CROSS-EXAMINATION OF THE WITNESSES,
8 AND EXPERT TESTIMONY, WHERE APPROPRIATE.

9 SO ALL THIS DOES IS IT TAKES A PARTICULAR
10 FACT AND SEEKS TO TIE IT INTO A THEORY ARGUED BY THE
11 DEFENSE, AND IT SHOULD BE EXCLUDED UNDER PEOPLE VERSUS
12 WRIGHT.

13 THE COURT: OKAY.

14 MS. TOWERY: THIS IS AN INSTRUCTION THAT THE
15 COURT GAVE TO THE ERIK MENENDEZ JURY AT THE LAST TRIAL
16 WITHOUT THE PART B. OTHERWISE IT'S VERBATIM.

17 THE COURT: I DON'T RECALL THAT ONE. I DON'T
18 THINK I GAVE THAT. I DON'T RECALL IT.

19 MS. TOWERY: ACCORDING TO THE PACKET THAT I
20 RECEIVED FROM THE CLERK, THIS INSTRUCTION WAS GIVEN TO
21 ERIK MENENDEZ' JURY.

22 THE COURT: OKAY. SPECIAL INSTRUCTION NO. 2.

23 MS. ABRAMSON: OH. IT WAS GIVEN FOR IMPERFECT
24 SELF-DEFENSE.

25 MS. TOWERY: IT WAS GIVEN, BUT NOT WITH THE HEAT
26 OF PASSION LANGUAGE, ONLY THE IMPERFECT SELF-DEFENSE
27 LANGUAGE.

28 MS. ABRAMSON: RIGHT. IT WAS GIVEN FOR IMPERFECT

1 SELF-DEFENSE, YOUR HONOR.

2 THE COURT: OKAY. MY VIEW IS -- AND I DID REFER
3 TO PEOPLE VERSUS WRIGHT IN THESE EARLIER DISCUSSIONS
4 DURING THE TIME WE WERE GOING THROUGH JURY INSTRUCTIONS
5 IN THE FIRST TRIAL.

6 IN REVIEWING THESE INSTRUCTIONS, THIS TYPE
7 OF INSTRUCTION, I DO THINK IT'S ARGUMENTATIVE, AND IT
8 REALLY RELATES TO THE ARGUMENT OF COUNSEL. IT IS NOT
9 THE PROVINCE OF THE COURT TO FOCUS ON THIS TYPE OF
10 EVIDENCE AND ACCENTUATE IT. IT'S FOR THE LAWYERS TO
11 ARGUE THE CASE.

12 SO I WILL REFUSE THAT.

13 SPECIAL NO. 1, THAT RELATES TO IMPERFECT
14 SELF-DEFENSE. IT WON'T BE GIVEN.

15 MS. ABRAMSON: SPECIAL NO. 3 YOU GAVE LAST TIME,
16 YOUR HONOR, AND I THINK IT'S STILL APPROPRIATE. YOU
17 GAVE EXACTLY THIS LANGUAGE LAST TIME, AND I THINK IT'S A
18 PROPER STATEMENT OF LAW. IT'S NOT TIED TO ANY SPECIFIC
19 FACTS. IT'S NOT ARGUMENTATIVE.

20 MS. TOWERY: THAT'S ALSO TRUE WITH SPECIAL NO. 4,
21 YOUR HONOR.

22 THE COURT: NO, IT'S WRONG. IT'S NOT CORRECT TO
23 THE EXTENT THAT IT SAYS: "BUT MAY BE ANY EMOTION."

24 I FOUND THIS AFTERWARDS, THAT IT SHOULD NOT
25 SAY, "BUT MAY BE ANY EMOTION EXCEPT FOR REVENGE,"

26 BECAUSE REVENGE IS NOT A PROPER MOTIVE.

27 MS. ABRAMSON: REVENGE ISN'T AN EMOTION, IT'S A
28 MOTIVE.

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1 THE COURT: I DON'T KNOW. IT'S ALSO AN EMOTION.

2 MS. ABRAMSON: BUT THE CASES SAY THE REASON CAN'T
3 BE REVENGE, BUT IT CAN BE ANY HIGHLY WROUGHT, EXCITED
4 EMOTION; RAGE, ANGER, FEAR. ALL THOSE ARE MENTIONED.

5 THE COURT: I DON'T KNOW. I'M NOT SO SURE. I
6 THINK THE LANGUAGE --

7 MS. ABRAMSON: BUT IF YOU PUT IN REVENGE AND THE
8 REAL EMOTION IS RAGE, IT CAN BE RAGE, AND RAGE CAN COME
9 FROM A SENSE OF REVENGE.

10 IT CAN'T BE -- REVENGE ITSELF IS NOT HEAT
11 OF PASSION. REVENGE ITSELF IS NOT AN EMOTION, IT'S A
12 PURPOSE.

13 THE COURT: I AM NOT SO SURE ABOUT THAT. THAT
14 WAS WHAT CONCERNS ME MORE THAN ANYTHING ELSE ABOUT THAT
15 INSTRUCTION. IT DELETES SOMETHING THAT THE APPEAL
16 COURTS TALK ABOUT. THEY ACTUALLY TALK ABOUT ANY EMOTION
17 BUT REVENGE IN THEIR LANGUAGE.

18 WHAT IS THE PEOPLE'S POSITION?

19 MR. CONN: WE ASK THAT IT NOT BE GIVEN. I THINK
20 IT'S JUST UNNECESSARY. I THINK IT'S CLEAR FROM THE
21 OTHER INSTRUCTIONS THAT COUNSEL CAN RELY UPON THE FEAR,

22 AND IT'S UNNECESSARY TO PINPOINT THIS SPECIFIC ISSUE;
23 SPECIFICALLY WHEN, AS THE COURT INDICATED, IT LEAVES OUT
24 MATTERS WHICH PERHAPS SHOULD BE CONTAINED IN IT.

25 SO IT WORKS IN UNFAIRNESS TO THE PEOPLE.

26 THE COURT: WELL, OTHER THAN DELETING OR NOT
27 INCLUDING REVENGE, WHAT IS THERE IN THIS THAT'S
28 INCORRECT?

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1 MR. CONN: I THINK THAT'S THE ONLY PROBLEM THAT
2 COMES TO MIND.

3 THE COURT: BECAUSE I DON'T RECALL FEAR BEING
4 MENTIONED IN THESE OTHER INSTRUCTIONS.

5 MS. ABRAMSON: IT ISN'T.

6 THE COURT: IN DEFINING HEAT OF PASSION.

7 MS. ABRAMSON: THEY DON'T.

8 MR. CONN: PERHAPS WE COULD -- I WOULD ASK THEN
9 THAT IF WE GIVE THE INSTRUCTION, WE ADD A SENTENCE
10 INDICATING THAT THE HEAT OF PASSION DEFENSE MAY NOT BE
11 PREMISED UPON REVENGE.

12 THE COURT: WELL, WHY DON'T YOU COME UP WITH THE
13 LANGUAGE. IT'S MENTIONED IN MANY CASES, JUST THE
14 SUBJECT, USING THE WORD REVENGE NOT BEING THE TYPE OF
15 EMOTION THAT -- I THINK IT SAYS "NEVER REVENGE" OR
16 SOMETHING LIKE THAT.

17 ON OTHER OCCASIONS I'D BE INCLINED TO GIVE

18 THIS, BUT I WANT IT MODIFIED.

19 MS. ABRAMSON: I THINK WE COULD MAYBE DO IT IF WE
20 SAY, "ANY EMOTION, INCLUDING", LISTING EMOTIONS, "BUT
21 MAY NOT BE BASED ON A DESIRE FOR REVENGE." I THINK THAT
22 SEGREGATES EMOTIONS FROM MOTIVES.

23 THE COURT: WHY DON'T YOU PRESENT THAT TO ME, AND
24 I WILL CONSIDER IT. BUT IT HAS TO BE SOMETHING MORE
25 THAN -- OR SOMETHING DIFFERENT THAN WHAT IT SAYS.

26 OKAY. AND NO. 4.

27 MR. CONN: NO. 4 WE OBJECT TO, BECAUSE I THINK
28 THIS GETS BACK TO THE ARGUMENT THAT I MADE CONCERNING

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1 THE WAY THAT COUNSEL HAS INCORRECTLY ARGUED THE HEAT OF
2 PASSION ISSUE; THAT IS, THAT THE PROVOCATION IS VIEWED
3 AS AN AGGREGATE OF INCIDENTS OVER A PERIOD OF TIME. BUT
4 I THINK THAT THAT MISSTATES THE LAW.

5 THE LAW IS THAT YOU VIEW THE PROVOCATION AT
6 THE PARTICULAR MOMENT, BUT IT IS INTERPRETED IN LIGHT OF
7 PAST EVENTS.

8 MS. ABRAMSON: WELL, THE WAY THE COURT GAVE THIS
9 LAST TIME, WHICH I DIDN'T THINK WAS QUITE AS ACCURATE AS
10 WHAT THE CASES REALLY SAY, WAS ON PAGE 50 OF THE
11 INSTRUCTIONS GIVEN IN THE LAST TRIAL. "A DEFENDANT MAY
12 ACT IN THE HEAT OF PASSION AT THE TIME OF THE KILLING AS
13 A RESULT OF A SERIES OF EVENTS WHICH OCCUR OVER A

14 CONSIDERABLE PERIOD OF TIME."

15 NOW, THAT SEEMS TO ME TO BE EVEN WILDER
16 THAN WHAT WE ARE PROPOSING NOW, WHICH IS, "IN WEIGHING
17 THE SUFFICIENCY OF THE PROVOCATION," WHICH IS PRECISELY
18 WHAT IT GOES TO, "NECESSARY FOR HEAT OF PASSION, YOU MAY
19 CONSIDER A SERIES OF EVENTS WHICH OCCURRED OVER A
20 CONSIDERABLE PERIOD OF TIME."

21 EITHER WAY, IT STATES THE LAW, AND IT IS
22 THE PROVOCATION ASPECT, THE SUFFICIENCY OF PROVOCATION
23 THAT THE NUMBER OF EVENTS OVER A LONG PERIOD OF TIME
24 GOES TO, ACCORDING TO THE CASES.

25 THE COURT: WELL, THE ONLY RESPONSE AT THIS POINT
26 IS THAT 8.42 HAS A BRACKET THAT INCLUDES THE PHRASE
27 "LEGALLY ADEQUATE PROVOCATION MAY OCCUR IN A SHORT OR
28 OVER A CONSIDERABLE PERIOD OF TIME."

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1 MS. ABRAMSON: BUT NO, THAT'S NOT THE SAME AS
2 SAYING "REFERRING TO EVENTS THAT OCCUR OVER A
3 CONSIDERABLE PERIOD OF TIME," AND WE THINK IT IS
4 IMPORTANT WHEN YOU HAVE A LONG-TERM RELATIONSHIP WITH
5 THE DECEDENTS, WHERE THERE ARE NUMEROUS PROVOCATORY ACTS
6 GOING BACK OVER TIME, THAT YOU INDICATE THAT IT IS NOT
7 JUST THE FORMATION OF THE HEAT OF PASSION, BUT THE
8 SERIES OF PROVOCATORY EVENTS WHICH CAN TAKE PLACE OVER A
9 CONSIDERABLE PERIOD OF TIME.

10 THE COURT: THAT'S WHAT IT SAYS. IT SAYS:

11 "LEGALLY ADEQUATE PROVOCATION MAY OCCUR IN A SHORT OR
12 OVER A CONSIDERABLE PERIOD OF TIME."

13 MS. ABRAMSON: IT DOESN'T SAY, THOUGH, YOUR
14 HONOR, THAT IT'S A SERIES OF EVENTS.

15 MR. CONN: I DON'T THINK THE CASE LAW SUPPORTS
16 THAT THEORY. I AM LOOKING AT PEOPLE VERSUS WHARTON
17 RIGHT NOW AT PAGE 570 AS CITED BY THE DEFENSE, AND THE
18 PROBLEM THAT WHARTON FOUND WITH THE JURY INSTRUCTION WAS
19 THAT THE JURY WAS NOT INFORMED THAT PROVOCATION COULD
20 OCCUR OVER A CONSIDERABLE PERIOD OF TIME.

21 SO WHARTON DOES NOT SUPPORT THIS THEORY
22 THAT A SERIES OF EVENTS MUST BE CONSIDERED.

23 MS. ABRAMSON: I DON'T KNOW WHAT THOMPCKINS SAYS.
24 DO YOU KNOW WHAT THOMPCKINS SAYS?

25 THE COURT: OKAY. AT THIS POINT I AM INCLINED
26 JUST TO GIVE 8.42, THE BRACKET, ENCOMPASSING THE TIME
27 PERIOD, BECAUSE THAT'S WHAT IT'S DESIGNED FOR, AND IT
28 WAS CREATED IN RESPONSE TO WHARTON.

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1 SO I AM GOING TO REFUSE AT THIS POINT
2 NO. 4.

3 NO. 5.

4 MR. CONN: WE OBJECT TO NO. 5.

5 THE COURT: YES. I TOLD MR. GESSLER THAT I DID

6 NOT THINK THAT WAS THE LAW, AND THAT IT WAS A MISTAKE TO
7 GIVE IT IN THE FIRST TRIAL, AND I AM NOT GOING TO GIVE
8 IT IN THIS TRIAL.

9 NO. 5 WON'T BE GIVEN. IT DOESN'T -- JUST
10 ANALYZING IT, IT DOESN'T MAKE SENSE.

11 MR. GESSLER: WE LIKED IT.

12 MS. ABRAMSON: I THINK IT DOES MAKE SENSE WHEN
13 YOU'VE GOT TWO PEOPLE WHO ARE OPERATING UNDER THE LONG
14 STANDING STATE OF FEAR.

15 THE COURT: WELL, BUT THAT MEANS BASICALLY --

16 MS. ABRAMSON: WHO ARE DECIDING TO DEFEND
17 THEMSELVES. THE WHOLE THEORY NOW HAS BEEN BLOWN OUT.

18 THE COURT: HEAT OF PASSION GOES ON FOR A LONG
19 PERIOD OF TIME. THAT DOESN'T MAKE SENSE. THAT'S NOT
20 EVEN THE DEFENSE, THAT THERE WAS A SUDDEN BOIL-UP IN THE
21 LAST MINUTE.

22 MS. ABRAMSON: WELL, IT'S NOT A DEFENSE ANYMORE.
23 IT WAS A DEFENSE AT THE LAST TRIAL.

24 THE COURT: NO. YOU STILL HAVE THIS BOIL-UP,
25 HEAT OF PASSION AT THE LAST MINUTE.

26 MS. ABRAMSON: SO I'M THINKING OF THE NOTION THAT
27 ALL THEY EVER CONSPIRED TO DO WAS TO DEFEND THEMSELVES,
28 AND PERHAPS THEY WERE.

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1 THE COURT: THAT'S NOT A CRIME. SO IF THAT'S

2 WHAT THEY DID, THEN IT'S A DIFFERENT CRIME, AND THEY
3 HAVEN'T BEEN CHARGED WITH THAT.

4 THEN NO. 6.

5 MS. ABRAMSON: WE THINK THIS IS EXTREMELY
6 IMPORTANT, YOUR HONOR. WE ARE ENTITLED TO A -- TO
7 PATTERN 2.90 TO THE SPECIFIC ISSUE IN OUR CASE, AND WE
8 THINK THE SPECIFIC ISSUE IS WHETHER MALICE WAS NEGATED
9 BY HEAT OF PASSION FOR ONE COUNT.

10 I ALSO INTEND TO OFFER ANOTHER INSTRUCTION
11 NOW ABOUT MALICE BEING NEGATED BY MENTAL DISORDER.

12 MR. CONN: WE WOULD OPPOSE THIS INSTRUCTION,
13 BECAUSE THE DEFENDANT IS ALREADY RECEIVING AN
14 INSTRUCTION CONCERNING IF THERE IS A REASONABLE DOUBT
15 CONCERNING FIRST-DEGREE MURDER OR SECOND. IF THERE IS A
16 REASONABLE DOUBT CONCERNING SECOND-DEGREE MURDER, IT'S
17 MANSLAUGHTER.

18 NOW WHAT THEY ARE DOING HERE IS ISOLATING
19 ONE OF THE ELEMENTS OF THE OFFENSE; THAT IS, MALICE, AND
20 DEVISING A REASONABLE DOUBT INSTRUCTION BASED UPON A
21 PARTICULAR ELEMENT OF THE OFFENSE.

22 MS. ABRAMSON: BECAUSE THAT'S WHAT THE HEAT OF
23 PASSION GOES TO, JUST THAT ONE ELEMENT.

24 MR. CONN: BUT TEWKSBURY DOES NOT STAND FOR THE
25 PROPOSITION THAT YOU CAN ISOLATE AN ELEMENT OF THE
26 OFFENSE, AND YOU ARE ENTITLED TO DEVISE A JURY
27 INSTRUCTION BASED ON THE ABSENCE OF THAT ELEMENT OF THE
28 OFFENSE.

1 TEWKSBURY WAS NOT A CASE DEALING WITH JURY
2 INSTRUCTIONS. IT SIMPLY MENTIONS IN ITS DISCUSSION THE
3 FACT THAT IF A DOUBT IS RAISED AS TO THAT ELEMENT, THEN
4 THE CRIME IS NOT PROVED. THAT STANDS TO REASON. IT
5 DOESN'T MEAN THEY ARE ENTITLED AN INSTRUCTION ISOLATING
6 THAT ELEMENT.

7 THE COURT: I AGREE WITH THE PROSECUTION. I
8 DON'T THINK THAT'S AN APPROPRIATE INSTRUCTION.

9 ANY OTHER SPECIALS? I THINK THAT'S IT.

10 MS. ABRAMSON: JUDGE, JUST TO REFRESH MY
11 RECOLLECTION.

12 THE COURT: YES.

13 MS. ABRAMSON: IN THE FIRST TRIAL, DID THE
14 PROSECUTION OBJECT TO -- I THOUGHT THEY OBJECTED TO YOUR
15 GIVING HEAT OF PASSION.

16 THE COURT: NO, I DON'T THINK SO.

17 MS. ABRAMSON: I KNOW THEY DIDN'T OBJECT TO
18 IMPERFECT SELF-DEFENSE.

19 THE COURT: THEY FELT THAT IMPERFECT SELF-DEFENSE
20 SHOULD BE GIVEN, AND I THINK THEY FELT THAT HEAT OF
21 PASSION SHOULD BE GIVEN.

22 MS. ABRAMSON: I THINK THERE WAS A FIGHT OVER
23 HEAT OF PASSION. I AM GOING TO HAVE TO GO BACK TO THE
24 RECORD.

25 THE COURT: ALL RIGHT.

26 WE WILL BE IN RECESS UNTIL TUESDAY AT 8:30.

27

28 (AT 4:50 P.M. PROCEEDINGS WERE

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1 ADJOURNED UNTIL TUESDAY,
2 FEBRUARY 20, 1996 AT 8:30 A.M.)

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 DEPARTMENT NW "N" HON. STANLEY M. WEISBERG JUDGE

4 THE PEOPLE OF THE STATE OF)
5 CALIFORNIA,)
6)
6 PLAINTIFFS,)
7)
7 VS.) NO. BA 068880
8)
8 ERIK GALEN MENENDEZ, AND)
9 JOSEPH LYLE MENENDEZ,)
10)
10 DEFENDANTS.)
11)

12 REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

13 FRIDAY, FEBRUARY 16, 1996

14 VOLUME 298

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APPEARANCES:

(SEE APPEARANCE PAGE)

1 APPEARANCES:

2

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FOR THE DEFENDANT

9 JOSEPH LYLE MENENDEZ: MICHAEL P. JUDGE,

PUBLIC DEFENDER

10

BY: CHARLES GESSLER, DEPUTY

AND

11

TERRI TOWERY, DEPUTY

210 WEST TEMPLE

12

LOS ANGELES, CA 90012

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