

1 VAN NUYS, CALIFORNIA; TUESDAY, FEBRUARY 20, 1996

2 10:20 A.M.

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

4 (APPEARANCES AS HERETOFORE NOTED.)

5 (MARILYN A. FADALE, OFFICIAL REPORTER)

6 (MARY LU MURPHY, OFFICIAL REPORTER)

7

8 (THE FOLLOWING PROCEEDINGS WERE

9 HELD IN OPEN COURT, OUT OF THE

10 PRESENCE OF THE JURY:)

11

12 THE COURT: IN THE TRIAL, WE HAVE THE

13 DEFENDANTS HERE IN COURT, THEIR LAWYERS, THE

14 PROSECUTION, AND WE HAVE SOME LOOSE ENDS TO DEAL

15 WITH IN REGARD TO MATTERS DISCUSSED LAST FRIDAY.

16 THESE ISSUES PRIMARILY RELATE TO JURY INSTRUCTIONS.

17 THE COURT DID RECEIVE A SUPPLEMENTAL

18 MEMORANDUM FILED BY THE DEFENSE THIS MORNING, AND I

19 HAVE REVIEWED IT, AS WELL AS AUTHORITIES CITED

20 WITHIN; AND ALSO, I'VE REREAD THE PREVIOUS BRIEFS

21 AND AUTHORITIES CITED BY THE PARTIES.

22 DO THE PEOPLE WISH TO RESPOND TO THE

23 MEMORANDUM FILED BY THE DEFENSE?

24 MR. CONN: I WOULD ONLY SAY THAT I THINK THAT

25 THE COURT'S RULING LAST WEEK WAS THE CORRECT RULING;

26 THAT THERE WAS SIMPLY INSUFFICIENT PROVOCATION THAT

27 WOULD HAVE CAUSED AN ORDINARY REASONABLE MAN TO

28 RESPOND IN A PASSIONATE STATE IN RESPONSE TO THE

1 BEHAVIOR OF KITTY MENENDEZ. AND THE COURT WAS  
2 CORRECT THAT THE HEAT OF PASSION INSTRUCTION HAS NO  
3 BEARING TO THAT PARTICULAR COUNT.

4 THE CASES CITED BY COUNSEL ARE  
5 CONSISTENT WITH THE ARGUMENT THEY MADE LAST WEEK,  
6 AND OFFER NO NEW INSIGHTS.

7 I WOULD ASK THE COURT DENY THE MOTION OF  
8 THE DEFENSE.

9 THE COURT: OKAY. JUST IN RESPONSE TO THE  
10 PEOPLE'S POSITION JUST STATED, NOT TO DUPLICATE WHAT  
11 HAS BEEN PREVIOUSLY SAID OR WRITTEN IN YOUR  
12 MATERIALS, DID THE DEFENSE HAVE ANY RESPONSE?

13 MS. TOWERY: WELL, YOUR HONOR, MOST OF WHAT I  
14 WOULD SAY IS ALREADY WRITTEN IN OUR MATERIALS. I  
15 WOULD POINT OUT THAT OUR PREVIOUS BRIEF FOCUSED ON  
16 ISSUES IN ADDITION TO THE ADEQUACY OF THE  
17 PROVOCATION, AND WE HAVE SOUGHT HERE TO FOCUS THE  
18 COURT'S ATTENTION SPECIFICALLY ON THAT ISSUE, AND  
19 TRIED TO PRESENT CALIFORNIA CASE LAW TO THE COURT IN  
20 WHICH -- WHAT WE CONSIDER TO BE LESSER PROVOCATION  
21 IN WHICH THAT WAS HELD SUFFICIENT, NOT ONLY TO  
22 PERMIT THE ISSUE TO GO TO THE JURY, BUT IN SEVERAL  
23 OF THE CASES, TO PERMIT A VERDICT, A MANSLAUGHTER

24 VERDICT.

25           AND I THINK THE MOST IMPORTANT CASES  
26 THAT WE'VE CITED TO THE COURT ARE THE BORCHERS AND  
27 BERRY CASES. IN BORCHERS THERE WAS VERBAL  
28 PROVOCATION ONLY BY THE DEFENDANT'S GIRLFRIEND WITH

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1 WHOM HE WAS LIVING SPORADICALLY. AND AS THE COURT  
2 DESCRIBED THAT PROVOCATION, IN WHICH IT SOUNDS  
3 SUFFICIENT FOR THE TRIAL COURT TO FIND A HEAT OF  
4 PASSION MANSLAUGHTER, THE COURT DESCRIBED THAT  
5 PROVOCATION AS "DOTTY," THE VICTIM, ADMITTED  
6 INFIDELITY; HER STATEMENTS THAT SHE WISHED SHE WERE  
7 DEAD; HER ATTEMPT TO JUMP FROM THE CAR ON THE TRIP  
8 TO SAN DIEGO; HER REPEATED URGING THAT DEFENDANT  
9 SHOOT HER, TONY, AND HIMSELF ON THE NIGHT OF  
10 HOMICIDE; AND HER TAUNT: "ARE YOU CHICKEN?"

11           THAT WAS THE ENTIRETY OF THE PROVOCATION  
12 IN THAT CASE, WHICH WAS HELD SUFFICIENT TO SUPPORT A  
13 MANSLAUGHTER VERDICT.

14           IN PEOPLE VERSUS BERRY, THE CALIFORNIA  
15 SUPREME COURT REVERSED A FIRST-DEGREE MURDER  
16 CONVICTION AFTER THE TRIAL COURT HAD REFUSED TO GIVE  
17 VOLUNTARY MANSLAUGHTER INSTRUCTIONS; AND AGAIN, THAT  
18 WAS ENTIRELY VERBAL PROVOCATION IN WHICH THE

19 DEFENDANT'S WIFE TAUNTED HIM ABOUT HER INFIDELITY,  
20 SEXUALLY AROUSED THE DEFENDANT, AND THEN REFUSED TO  
21 HAVE INTERCOURSE WITH HIM, AND SCREAMED AT HIM.

22 IN RESPONSE TO THAT, HE CHOKED HER INTO  
23 UNCONSCIOUSNESS AND SHE WENT TO THE HOSPITAL; AND  
24 WHEN SHE RETURNED THE FOLLOWING DAY, SHE AGAIN BEGAN  
25 SCREAMING AT HIM, WHEREUPON, HE KILLED HER.

26 AND THE CALIFORNIA SUPREME COURT STATED  
27 THAT:

28 "THERE IS NO SPECIFIC TYPE OF

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1 PROVOCATION REQUIRED BY PENAL CODE  
2 SECTION 192, AND HELD THAT THAT WAS  
3 SUFFICIENT PROVOCATORY CONDUCT WHICH  
4 COULD AROUSE A PASSION OF JEALOUSY,  
5 PAIN, AND SEXUAL RAGE IN AN ORDINARY  
6 MAN OF AVERAGE DISPOSITION, SUCH AS TO  
7 CAUSE HIM TO ACT RASHLY FROM THIS  
8 PASSION."

9 IN PEOPLE VERSUS WHARTON, YOUR HONOR, AS  
10 BEST I COULD DETERMINE FROM READING THE CASE, THE  
11 ENTIRETY OF THE PROVOCATORY CONDUCT BY THE VICTIM  
12 WAS GETTING INTO A DRUNKEN ARGUMENT WITH THE  
13 DEFENDANT AND THEN THROWING A BOOK AT HIM.

14           AND WE ALSO HAVE RECITED THE CASE -- THE  
15 RECENT CASE OF PEOPLE VERSUS BARTON, WHICH, AS THE  
16 COURT'S AWARE, CAME DOWN IN DECEMBER OF 1995.  
17           AND I POINT OUT TO THE COURT THAT THE  
18 PROVOCATORY CONDUCT BY THE VICTIM IN THAT CASE WAS  
19 GETTING INTO A CASE OF TRAFFIC TAG WITH THE  
20 DEFENDANT'S DAUGHTER AND THEN SPITTING ON HER  
21 AUTOMOBILE. THE SUBSEQUENT ENCOUNTER BETWEEN THE  
22 DEFENDANT AND THE VICTIM IN WHICH THEY ARGUED, AND  
23 THE DEFENDANT SHOT THE VICTIM, WAS INITIATED BY THE  
24 DEFENDANT. HE WENT AND FOUND THE VICTIM, SOUGHT HIM  
25 OUT, AND INITIATED AN ARGUMENT.  
26           SO I'D ASK THE COURT TO TAKE THAT INTO  
27 CONSIDERATION AS WELL.  
28           THE PROSECUTION ARGUES PEOPLE VERSUS

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1 SPURLIN AS ITS ONLY CASE SUPPORTING ITS POSITION,  
2 AND ARGUES THAT KITTY MENENDEZ WAS AN INNOCENT  
3 BYSTANDER. SPURLIN INVOLVED A SITUATION WHERE THE  
4 DEFENDANT KILLED HIS WIFE DUE TO LEGALLY ADEQUATE  
5 PROVOCATION, AND WENT IN AND KILLED HIS YOUNG SON AS  
6 WELL. IN THAT CASE THE YOUNG SON WAS, IN FACT, AN  
7 INNOCENT BYSTANDER.  
8           BUT AS WAS ARGUED ON FRIDAY TO THE

9 COURT, THAT'S NOT THE SITUATION THAT WE HAVE HERE.  
10 KITTY MENENDEZ' CONDUCT WAS NOT THAT OF AN INNOCENT  
11 BYSTANDER. I THINK MR. GESSLER CHARACTERIZED HER AS  
12 A CHEERLEADER IN CONNECTION WITH THE MOLESTATION OF  
13 ERIK MENENDEZ, BUT I'D CALL IT WORSE, YOUR HONOR.  
14 I'D SAY THAT HER ACTS AND HER CONDUCT ESTABLISHED  
15 HER AS A COCONSPIRATOR WITH JOSE MENENDEZ TO  
16 CONTINUE THE MOLESTATION. NOT ONLY DID SHE  
17 ACKNOWLEDGE THAT SHE WAS AWARE OF THE PRIOR ACTS OF  
18 MOLESTATION, BUT HER CONDUCT DURING THE LAST WEEK  
19 ESTABLISHED HER AS -- IN COMPLICITY WITH JOSE  
20 MENENDEZ TO PERMIT THE MOLESTATION TO CONTINUE.  
21 I THINK THAT HER CONDUCT DURING THE LAST  
22 WEEK ALONE IS SUFFICIENT TO PERMIT THE JURY TO  
23 CONSIDER THIS QUESTION, AND FOR THE JURY TO  
24 DETERMINE THE LEGAL ADEQUACY OF THE PROVOCATION, OR  
25 THE FACTUAL ADEQUACY.  
26 THE COURT: WHAT PASSION IS IT THAT YOU  
27 ASCRIBE TO YOUR CLIENT?  
28 MS. TOWERY: I'M SORRY?

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1 THE COURT: WHAT PASSION DO YOU ASCRIBE TO  
2 YOUR CLIENT?  
3 MS. TOWERY: WHAT SPECIFIC EMOTION?

4 THE COURT: YES.

5 MS. TOWERY: I THINK IT COULD BE A NUMBER OF  
6 DIFFERENT EMOTIONS, OR A MIXTURE OF A --

7 THE COURT: AS TO KITTY MENENDEZ,  
8 MRS. MENENDEZ.

9 MS. TOWERY: I THINK THAT --

10 THE COURT: PROVOKED FROM HER AND HER ACTIONS  
11 ONLY.

12 MS. TOWERY: I THINK THE RECORD REFLECTS  
13 FEAR, CERTAINLY. I THINK THE RECORD REFLECTS ANGER  
14 AS TESTIFIED -- AS ERIK MENENDEZ TESTIFIED TO THE  
15 REACTIONS OF LYLE MENENDEZ DURING THE COURSE OF THE  
16 LAST WEEK, CULMINATING IN SUNDAY NIGHT. I THINK  
17 FEAR AND ANGER WERE BOTH DESCRIBED, SPECIFICALLY BY  
18 ERIK MENENDEZ, AS TO LYLE MENENDEZ' REACTIONS.

19 THE COURT: THE TYPE OF FEAR THAT ONE WOULD  
20 EXPECT TO BE AROUSED IN A REASONABLE PERSON OF  
21 AVERAGE DISPOSITION REGARDING THE CONDUCT AND  
22 PROVOCATION OF MRS. MENENDEZ?

23 MS. TOWERY: I THINK, GIVEN THE FACTUAL  
24 CONTEXT OF THIS CASE, YES, YOUR HONOR. GIVEN THE  
25 FACT THAT THE BROTHERS HAD THREATENED TO DISCLOSE  
26 THE SEXUAL MOLESTATION AND EXPOSE THE FAMILY SECRET;  
27 THAT I THINK A REASONABLE PERSON WOULD REACT, NOT  
28 ONLY WITH ANGER TO THE TYPE OF PROVOCATION THAT WAS

1 PROPOUNDED BY KITTY MENENDEZ, BUT ALSO WITH FEAR IN  
2 THIS CONTEXT AND IN THIS FACTUAL SITUATION.

3 WE HAVE A THREAT ON THE PART OF LYLE  
4 MENENDEZ TOWARDS HIS FATHER TO EXPOSE THE FAMILY  
5 SECRET. WE HAVE IMPLIED KNOWLEDGE ON THE PART OF  
6 KITTY MENENDEZ WHEN SHE SAYS TO THE BROTHERS ON  
7 SATURDAY: "IF YOU HAD KEPT YOUR MOUTH SHUT," SHE  
8 SAYS TO ERIK MENENDEZ IN LYLE MENENDEZ' PRESENCE --  
9 "IF YOU HAD KEPT YOUR MOUTH SHUT, THINGS MIGHT HAVE  
10 WORKED OUT IN THIS FAMILY."

11 SHE SAYS DIRECTLY TO LYLE MENENDEZ, ON  
12 SUNDAY, JUST BEFORE THE HOMICIDES, AFTER THE  
13 CONFRONTATION BETWEEN LYLE MENENDEZ AND HIS FATHER,  
14 WHEN LYLE MENENDEZ SAYS TO HER: "ARE YOU GOING TO  
15 LET THIS HAPPEN?"

16 SHE SAID: "YOU RUINED THIS FAMILY," AND  
17 WALKED INTO THE DEN WITH HER HUSBAND.

18 CERTAINLY, YOUR HONOR, THAT CONDUCT IN  
19 AND OF ITSELF IS SUFFICIENT TO PERMIT THE ISSUE TO  
20 GO TO THE JURY. THE ISSUE HERE IS NOT WHETHER OR  
21 NOT THAT CONDUCT PROVED BEYOND A REASONABLE DOUBT  
22 THAT THE PROVOCATION WAS ADEQUATE. THE ONLY ISSUE  
23 IS WHETHER OR NOT A REASONABLE JUROR COULD FIND IT  
24 PERSUASIVE.

25 AND I WOULD SUBMIT TO THE COURT THAT THE  
26 COURT SHOULD NOT -- AND THE CASES OF BROOKS AND  
27 SAHARA TELL US THIS -- THAT GENERALLY THE JURY SHOULD



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1 WERE SUFFICIENT TO AROUSE THE PASSION OF THE  
2 ORDINARY REASONABLE MAN.

3       THIS COURT'S RULING TAKES THAT AWAY FROM  
4 THE JURY AND PRECLUDES THE JURY FROM MAKING THE  
5 ANALYSIS. PERHAPS THEY WILL MAKE THE ANALYSIS THAT  
6 THE COURT HAS MADE. PERHAPS THEY WILL SAY THIS  
7 PROVOCATION ISN'T GOOD ENOUGH. THIS PROVOCATION  
8 WOULD NOT CAUSE THE AVERAGE ORDINARY REASONABLE  
9 PERSON TO BE PROVOKED SO THEY ACT OUT OF PASSION  
10 RATHER THAN JUDGMENT. IT'S POSSIBLE. IT'S  
11 CERTAINLY POSSIBLE.

12       BUT THAT'S A MATTER FOR ARGUMENT TO THE  
13 JURY. AND THIS COURT'S RULING HAS, IN EFFECT, GIVEN  
14 THIS JURY A DIRECTED VERDICT FOR MURDER ON KITTY  
15 MENENDEZ.

16       AND OUR POSITION IS, YOUR HONOR, THAT  
17 THAT IS JUST NOT FAIR. IT'S NOT SUPPORTED BY THE  
18 EVIDENCE. THE CASE LAW REQUIRES THIS COURT TO  
19 SUBMIT THAT INSTRUCTION TO THE JURY, AND WE ASK THAT  
20 THE COURT DO SO.

21       MS. ABRAMSON: YOUR HONOR, I'D LIKE TO BE  
22 HEARD BRIEFLY CONCERNING MY CLIENT.

23 THE COURT: YES.

24 MS. ABRAMSON: AS DISTURBING AS LAST FRIDAY'S

25 RULING WAS -- AND I DON'T PRETEND TO BE --

26 THE COURT: LET'S JUST STICK TO THE ISSUE

27 HERE AND NOT THE EMOTIONS OF COUNSEL.

28 MS. ABRAMSON: I'M GOING TO TALK ABOUT HAVING

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1 TO READ THE RECORD OVER THE WEEKEND, BECAUSE I'M

2 GOING TO BE ARGUING THIS CASE. AND I'VE READ IT

3 CORRECTLY, WITH EXACTLY THE QUESTION IN MIND -- AND

4 I NOTED IN MY CLIENT'S TESTIMONY THAT HE TESTIFIED

5 THAT ON THAT THURSDAY NIGHT WHEN HE LEARNED FROM HIS

6 MOTHER THAT SHE KNEW ALL ALONG WHAT HAD HAPPENED TO

7 HIM, AND CLEARLY DEMONSTRATED THAT SHE DID NOT CARE,

8 HIS FEELINGS WERE ANGER, RAGE, AND A SENSE OF

9 BETRAYAL. AND IN FACT, HE TESTIFIED THAT HE SAID AT

10 THAT TIME "I HATE YOU."

11 AND WHAT ENSUED WAS HER YELLING AT HIM

12 THAT HE COULDN'T TALK TO HER THAT WAY; HER CHASING

13 HIM TO THE GUESTHOUSE; HER HAVING A CONFRONTATION

14 THERE IN FRONT OF LYLE AND ERIK MENENDEZ, WHERE LYLE

15 MENENDEZ ASKED HER: "HOW COULD YOU LET THIS HAPPEN?"

16 NOW, THAT'S A STATEMENT, APPARENTLY, OF

17 ANGER ON THE PART OF LYLE MENENDEZ.

18 BUT WHAT IS IMPORTANT IN FOCUSING ON  
19 ERIK MENENDEZ' MENTAL STATE IS SHE THEN BLAMED THEM,  
20 AND CLAIMED NO ONE EVER HELPED HER WITH HER LIFE;  
21 THEREFORE, WHY SHOULD SHE HELP ANYONE ELSE.  
22 I THINK IT IS ALSO INSTRUCTIVE OF MY  
23 CLIENT'S STATE OF MIND -- FIRST OF ALL, I DON'T THINK  
24 IT CAN BE REASONABLY ARGUED THAT THE COMMUNITY  
25 STANDARD OF WHAT WOULD UPSET -- BECAUSE THAT'S REALLY  
26 ALL HEAT OF PASSION IS, AND DOESN'T REQUIRE SPECIFIC  
27 EMOTIONAL UPSET -- WHAT WOULD UPSET PEOPLE IN THIS  
28 COMMUNITY, THE NOTION THAT ONE'S MOTHER HAS TOLD

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1 THEM THAT SHE IS AWARE OF THE FACT THAT THEY HAVE  
2 BEEN SUBJECTED TO VIOLENT SEXUAL ABUSE AND DOESN'T  
3 CARE, AND BLAMES THEM, AND PORTRAYS HERSELF AS A  
4 GREATER VICTIM; THAT THE NOTION THAT WOULD BE  
5 UPSETTING I DON'T THINK IS REALLY SUBJECT TO SERIOUS  
6 DEBATE.

7 AND SINCE WE DO KNOW THAT PROVOCATION  
8 CAN BE, AS THE INSTRUCTION INDICATES, OF  
9 CONSIDERABLE DURATION, OR AS THE INSTRUCTION WE  
10 SUBMITTED, COULD BE A SERIES OF EVENTS OCCURRING  
11 OVER A CONSIDERABLE PERIOD OF TIME, I THINK IN THE  
12 CONTEXT OF THIS FAMILY WE HAVE A LONG HISTORY OF

13 MRS. MENENDEZ NOT ONLY GOING ALONG WITH HER  
14 HUSBAND'S BRUTAL METHODS OF CHILD REARING, OR HIS  
15 DISCIPLINE METHODS, BUT SETTING HER CHILDREN UP SO  
16 THAT SHE DOESN'T GET PUNISHED.

17 AND THIS -- WHAT GOES THROUGH THE WHOLE  
18 HISTORY OF THIS FAMILY IS HER BLAMING HER CHILDREN,  
19 HER ALLOWING HER CHILDREN TO GET PUNISHED FOR HER  
20 OWN MISDEEDS; AND HERE SHE IS DOING IT AGAIN. WE  
21 HAVE THIS WHOLE HISTORY OF HER BEHAVIOR.

22 THE ONE AREA IN WHICH ERIK MENENDEZ  
23 TESTIFIED AND TOLD DR. WILSON HE DID NOT THINK HIS  
24 MOTHER WAS HIS ENEMY WAS IN THIS AREA OF THE  
25 MOLESTATION. HE BELIEVED, AND WANTED TO BELIEVE HIS  
26 WHOLE LIFE, THAT SHE DID NOT KNOW. HE COULDN'T  
27 CONCEIVE THAT SHE WOULD KNOW AND NOT DO SOMETHING TO  
28 ASSIST HIM. AND NOW HE IS DISCOVERING THIS HORRIBLE

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1 TRUTH, AND HE USES THE WORD VAMPIRE WHEN HE  
2 DESCRIBES THIS SENSE THAT HE GOT OF HER THAT NIGHT  
3 TO DR. WILSON TO INDICATE THAT SHE COMPLETELY  
4 CHANGED IN HIS VIEW. HE WAS ANGRY. HE WAS  
5 ENRAGED. BUT HE WAS ALSO FEARFUL, WHICH IS ALSO A  
6 NATURAL COMPONENT, WHEN SOMEONE YOU HAVE TRUSTED IN  
7 THIS WAY TURNS OUT TO BE BETRAYING YOU. AND HE

8 DISCUSSES THIS FEELING OF BETRAYAL, BOTH ON THE

9 WITNESS STAND AND TO DR. WILSON.

10 NOW, WHAT ENSUES, SHE IS REINFORCES HER

11 BELLIGERENCE ABOUT NOT HAVING HELPED HER SON

12 THURSDAY NIGHT. SO ONE COULD SAY THE REAL ISSUE

13 HERE IS, IS THERE A COOLING PERIOD FROM THIS

14 PROVOCATION, WHICH IS AN ISSUE FOR THE JURY TO

15 DECIDE.

16 WE COULD ARGUE, AND I WOULD ARGUE, THAT

17 EVEN IF -- THIS IS SUCH A SHOCKING FACT, IT WOULD

18 TAKE A WHILE TO PROCESS -- BUT EVEN IF NOTHING ELSE

19 HAD HAPPENED, HE MIGHT NOT HAVE BEEN ABLE TO COOL

20 DOWN FROM THE VIOLENT EMOTION THAT THIS CAUSED.

21 THE FACT IS, OTHER THINGS DO CONTINUE TO

22 HAPPEN. ONE OF THE THINGS THAT HAPPENS IS SHE SHOWS

23 CONTINUING ANGER TOWARDS HIM, THE CHILD THAT SHE HAS

24 JUST TOLD SHE DOESN'T CARE ABOUT HIS VICTIMIZATION

25 TO ON FRIDAY NIGHT. SHE SHOWS NOT ONLY ANGER, BUT

26 BLAME ON SATURDAY NIGHT, LESS THAN 24 HOURS BEFORE

27 THE HOMICIDES; AND FINALLY, IT IS SHE WHO STARTS THE

28 ARGUMENT ON SUNDAY NIGHT BY TELLING LYLE MENENDEZ

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1 THAT THEY CANNOT GO OUT. SHE IS STANDING THERE

2 THROUGHOUT THIS ENTIRE CONFRONTATION, HEARING JOSE

3 MENENDEZ CLAIM THAT HE CAN DO WHATEVER HE WANTS WITH  
4 HIS SON.

5 I WOULD SUBMIT, YOUR HONOR, IF SHE NEVER  
6 SAID ANOTHER WORD, THE NOTION THAT SOMEONE'S MOTHER  
7 IS STANDING THERE WHILE SOMEONE'S FATHER IS  
8 THREATENING TO HURT OR MOLEST THEM, AND SAYS  
9 NOTHING, GIVEN THE HISTORY OF THIS FAMILY, IS  
10 PROVOCATORY.

11 BUT SHE DOESN'T SAY NOTHING. WHEN LYLE  
12 MENENDEZ, EITHER ANGRILY OR FEARFULLY, OR BOTH, SAYS  
13 TO HER: "ARE YOU GOING TO LET THIS HAPPEN?" HER  
14 RESPONSE IS: "YOU RUINED THIS FAMILY."

15 AGAIN, TO SHIFT BLAME.

16 NOW, I CANNOT SEE HOW, WITH THAT SET OF  
17 FACTS, IT IS NOT AN ISSUE FOR THE JURY TO DETERMINE  
18 WHETHER OR NOT, GIVEN THIS FAMILY, THAT IS  
19 SUFFICIENT PROVOCATION TO AN EMOTIONAL STATE. I'M  
20 NOT AWARE OF ANY CASE AUTHORITY THAT SAYS IT HAS TO  
21 DICTATE PARTICULAR EMOTIONAL STATE, OR IT HAS TO BE --  
22 THAT THE JURY HAS TO DECIDE WHAT EMOTIONAL STATE OF  
23 PASSION WOULD THE AVERAGE PERSON BE ENRAGED TO,  
24 BECAUSE IT DOESN'T MATTER, IF THE AVERAGE PERSON  
25 WOULD BE ENRAGED, BUT THAT THESE PEOPLE ARE IN FEAR.  
26 THE POINT IS THE SAME. THEY ARE UPSET BY THIS  
27 INFORMATION. IT IS THE KIND OF UPSET THAT CAN  
28 OBSCURE REASON AND INTERFERE WITH THE EXERCISE OF

1 GOOD JUDGMENT AND SHOULD BE SUFFICIENT.

2 I ALSO WANT TO INDICATE TO THE COURT --

3 I'LL WAIT FOR THE RULING -- BUT THEN WE HAVE SOME

4 REQUESTS TO MAKE OF THE COURT AGAIN AFTER THE

5 RULING.

6 MS. TOWERY: I HAVE A BRIEF ADDITIONAL

7 COMMENT TO MAKE, YOUR HONOR.

8 MY ARGUMENT WAS DIRECTED PRIMARILY TO

9 THE VERBAL PROVOCATION OF KITTY MENENDEZ, AND I JUST

10 WANT TO POINT OUT TO THE COURT THAT'S NOT ALL THAT

11 THERE IS IN THIS RECORD WHICH THE COURT MUST LOOK AT

12 IN MAKING ITS RULING. AND MR. GESSLER POINTED THIS

13 OUT ON FRIDAY, AND I'LL REMIND THE COURT AGAIN, THAT

14 THERE IS EVIDENCE IN THIS RECORD THAT -- WHICH CAME

15 IN AS SUBSTANTIVE EVIDENCE OFFERED BY THE

16 PROSECUTION THAT KITTY MENENDEZ SEXUALLY MOLESTED

17 LYLE MENENDEZ.

18 THE COURT: THE EVIDENCE WAS THAT LYLE

19 MENENDEZ REPORTED THAT TO MS. PISARCIK.

20 MS. TOWERY: THAT IS CORRECT, YOUR HONOR.

21 THE COURT: THAT'S THE EVIDENCE YOU'RE

22 REFERRING TO?

23 MS. TOWERY: THAT IS THE EVIDENCE THAT I'M

24 REFERRING TO. AND THAT WAS NOT LIMITED IN ANY WAY,

25 AND THE JURY IS FREE TO BELIEVE THAT STATEMENT BY

26 LYLE MENENDEZ TO MISS PISARCIK AS IT WAS PRESENTED

27 BY THE PROSECUTION.

28 SO THAT, IN AND OF ITSELF, WHICH I THINK

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1 THE COURT -- THE COURT'S NOT DETERMINING

2 CREDIBILITY.

3 THE COURT: THAT'S TRUE, I'M NOT.

4 MS. TOWERY: THE COURT'S ONLY DETERMINING

5 WHETHER OR NOT THERE'S SUFFICIENT EVIDENCE OF

6 PROVOCATION IN THE RECORD TO PERMIT THE JURY TO MAKE

7 THAT DECISION.

8 AGAIN, THE JURY MAY DECIDE THEY DON'T

9 BELIEVE THAT. THEY MAY THROW THAT AWAY. THAT'S FOR

10 THE JURY TO DECIDE. AND FROM THIS COURT'S ANALYSIS

11 -- WHEN THE COURT LOOKS AT THE FACTS, THE COURT HAS

12 TO LOOK AT THE FACT THAT THERE IS EVIDENCE IN THE

13 RECORD OF SEXUAL MOLESTATION BY THIS VICTIM --

14 THE COURT: RIGHT.

15 MS. TOWERY: -- OF LYLE MENENDEZ.

16 THE COURT: WELL, I LOOK AT THE RECORD THAT

17 THE DEFENDANT MADE THAT STATEMENT. THAT'S WHAT I

18 LOOK AT AS TO --

19 MS. TOWERY: I WOULD SUBMIT THAT THE COURT

20 MUST ACCEPT THAT AS TRUE, OTHERWISE THE COURT IS



21 MAKING A CREDIBILITY --

22 THE COURT: NO. ALL I WOULD DO IS EVALUATE

23 THAT AS A STATEMENT MADE BY THE DEFENDANT.

24 MS. TOWERY: I THINK THE COURT MUST EVALUATE

25 THAT AS EVIDENCE IN THIS CASE.

26 THE COURT: RIGHT.

27 MS. TOWERY: THE OTHER THING THAT I WANT TO

28 POINT OUT -- WHICH INVOLVES CONDUCT AS OPPOSED TO

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1 WORDS BY KITTY MENENDEZ -- AND I THINK THAT WE ALL

2 NEGLECTED TO MENTION THIS ON FRIDAY; AND THAT IS THE

3 FACT THAT SHE PULLED HIS HAIRPIECE OFF ON TUESDAY

4 AND HUMILIATED HIM SO THAT HE CRIED.

5 NOW, I THINK THE COURT HAS TO TAKE THAT

6 INTO ACCOUNT IN THE CONTEXT OF ALL OF THE OTHER

7 THINGS THAT HAPPENED DURING THE LAST WEEK; AND MOST

8 PARTICULARLY, IN FOCUSING UPON THE CONDUCT OF KITTY

9 MENENDEZ, THAT THAT WAS A DIRECT PHYSICAL

10 PROVOCATORY ACT BY KITTY MENENDEZ TOWARDS LYLE

11 MENENDEZ. AND CERTAINLY, I WOULD SUBMIT TO THE

12 COURT, THAT THAT IS A MORE PROVOCATIVE ACT THAN

13 THROWING A BOOK AT SOMEONE WHEN YOU'RE DRUNK, AS

14 HAPPENED IN WHARTON; AND CERTAINLY A MORE

15 PROVOCATIVE ACT THAN THE WORDS SPOKEN IN BORCHERS

16 AND BERRY.

17 THE COURT: BUT THERE WAS A LONG PASSAGE OF  
18 TIME BETWEEN THAT INCIDENT AND THE SHOOTING IN THIS  
19 CASE.

20 MS. TOWERY: THERE WAS A PASSAGE OF TIME, BUT  
21 THERE WERE CONTINUED INCIDENTS OF PROVOCATION BY  
22 KITTY MENENDEZ TOWARDS LYLE MENENDEZ AND ERIK  
23 MENENDEZ, VERBAL PROVOCATION. AND IN BORCHERS --

24 THE COURT: BEAR IN MIND, AS FAR AS YOUR  
25 CLIENT IS CONCERNED, WE'RE OPERATING WITH A RECORD  
26 THAT IS VIRTUALLY SILENT AS TO HIS MENTAL STATE,  
27 OTHER THAN THE BRIEF DESCRIPTION PROVIDED BY THE  
28 CODEFENDANT IN HIS TESTIMONY.

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1 MS. TOWERY: I'M AWARE OF THAT. AND LYLE  
2 MENENDEZ DID NOT TESTIFY.

3 HOWEVER, THE EVIDENCE THAT WAS PRESENTED  
4 THROUGHOUT THE TESTIMONY OF ERIK MENENDEZ IS  
5 SUFFICIENT UNDER THE LAW TO PERMIT THE JURY TO MAKE  
6 THE DETERMINATION AS TO WHETHER OR NOT LYLE MENENDEZ  
7 WAS ACTING IN A HEAT OF PASSION; AND WE'VE LITIGATED  
8 THE ISSUE OF WHETHER OR NOT CIRCUMSTANTIAL EVIDENCE  
9 OF A STATE OF MIND OF THE DEFENDANT IS SUCH TO  
10 PERMIT JURY INSTRUCTIONS ON BOTH VOLUNTARY -- EXCUSE

11 ME -- HEAT OF PASSION IMPERFECT SELF-DEFENSE.  
12 AND I BELIEVE THAT THE COURT UNDERSTANDS  
13 THAT THAT IS THE LAW, AND WE HAVE QUITE A BIT OF  
14 CIRCUMSTANTIAL EVIDENCE AS TO THE STATE OF MIND OF  
15 LYLE MENENDEZ; CERTAINLY, SUFFICIENT TO PERMIT THE  
16 MATTER TO GO TO THE JURY. THE PEOPLE'S CASE IS  
17 BUILT ENTIRELY UPON CIRCUMSTANTIAL EVIDENCE AS TO  
18 THE STATE OF MIND OF BOTH DEFENDANTS, AND WE SHOULD  
19 BE ALLOWED THE SAME OPPORTUNITY TO PRESENT OUR  
20 EVIDENCE TO THE JURY AS THE PEOPLE HAVE.  
21 THE COURT: OKAY. DID THE PEOPLE WISH TO  
22 RESPOND?  
23 MR. CONN: YES. I THINK THAT THE WAY IN  
24 WHICH COUNSEL SEEKS TO INVOKE THE EVENTS OF THAT  
25 WEEK, RATHER THAN RELYING UPON THE EVENTS OF THAT  
26 PARTICULAR DAY, IS AN IMPLICIT RECOGNITION BY  
27 COUNSEL FOR BOTH SIDES, FOR BOTH ERIK MENENDEZ AND  
28 LYLE MENENDEZ, OF THE INADEQUACY OF THE PROVOCATION

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1 ON THAT DAY. THEY FIND IT NECESSARY TO GO BACK TO  
2 TUESDAY, GO BACK TO THURSDAY AND FRIDAY AND  
3 SATURDAY, TO LOOK UPON ADDITIONAL PROVOCATION IN  
4 ORDER TO CLAIM THAT THE PROVOCATION ON SUNDAY WAS  
5 SUFFICIENT TO CAUSE AN ORDINARY REASONABLE MAN OF

6 AVERAGE DISPOSITION TO RESPOND IN A PASSIONATE

7 STATE.

8 THEY, OF COURSE, OVERLOOK THE FACT THAT

9 THERE WAS A COOLING-OFF PERIOD FOR EACH OF THOSE

10 PRIOR EVENTS.

11 IF WE WERE -- IF THEY WERE ABLE TO

12 SIMPLY INVOKE THOSE PRIOR INSTANCES WITHOUT

13 REFERENCE TO THE COOLING-OFF PERIOD, THEN THAT WOULD

14 MEAN THERE'S NO SUCH THING AS A COOLING-OFF PERIOD.

15 THAT WOULD MEAN, ONCE THERE HAS BEEN SUFFICIENT

16 PROVOCATION, A PERSON CAN JUST STORE THAT UP AND

17 RESPOND UPON THE SLIGHTEST INFRACTION AGAINST HIM.

18 BUT THAT IS NOT THE LAW.

19 WE MUST LOOK AT THE PROVOCATION OF THAT

20 PARTICULAR DAY TO DETERMINE IF THAT PROVOCATION IS

21 SUFFICIENT. IT CAN ALWAYS BE VIEWED IN LIGHT OF

22 PRIOR TRANSGRESSIONS, BUT IT IS THE PROVOCATION OF

23 THAT DAY THAT IS CONTROLLING.

24 SO HERE WE HAVE A SITUATION IN WHICH --

25 WHILE KITTY MENENDEZ MAY HAVE ALLEGEDLY TORE OFF THE

26 HAIRPIECE OF LYLE MENENDEZ ON TUESDAY -- THERE WAS A

27 COOLING-OFF PERIOD FOR THAT ACT. THE DEFENDANT DID

28 NOT ACT, AND HE CANNOT NOW INVOKE THAT ACT UPON THE

1 SLIGHTEST TRANSGRESSION MANY DAYS LATER.

2 THE SAME IS TRUE FOR ALL OF THE EVENTS

3 OF THURSDAY AND FOR FRIDAY AND SATURDAY; AND IF IT'S

4 TRUE FOR THOSE EVENTS, IT'S CERTAINLY TRUE FOR THE

5 MOLESTATION WHICH OCCURRED MANY YEARS EARLIER.

6 AS THE COURT, I THINK, CORRECTLY NOTED,

7 WHAT WE HAVE IS A CLAIM OF THE DEFENDANT, LYLE

8 MENENDEZ, THAT HE WAS ALLEGEDLY MOLESTED BY HIS

9 MOTHER. THERE'S NO PROOF THAT HE WAS ACTUALLY

10 MOLESTED BY HIS MOTHER. WE DON'T HAVE EVIDENCE OF

11 THE MOLESTATION, BUT JUST A CLAIM. WE HAVE YEARS

12 WHICH PASSED FROM THAT INCIDENT, UP UNTIL THE

13 SUNDAY, AUGUST THE 20TH OF 1989.

14 SO, AGAIN, THE DEFENDANT CANNOT RELY

15 UPON THAT PRIOR EVENT TO JUSTIFY OR TO MITIGATE OR

16 EXCUSE IN ANY WAY HIS ACTIONS ON AUGUST THE 20TH OF

17 1989.

18 SO I WOULD SUBMIT THAT THE PROVOCATION

19 OF THAT PARTICULAR DAY, AS THE COURT CORRECTLY NOTED

20 LAST WEEK, WAS INSUFFICIENT TO AROUSE THE PASSIONS

21 OF THE ORDINARY REASONABLE MAN OF AVERAGE

22 DISPOSITION. ALL CASES CITED BY THE DEFENDANTS ARE

23 CASES IN WHICH THERE WAS AN EXCITED QUARREL WITH

24 THAT PARTICULAR VICTIM, AND IT WAS IN THE HEAT OF

25 THAT PARTICULAR PASSION, THAT PARTICULAR QUARREL

26 AGAINST THAT PARTICULAR VICTIM, THAT THE DEFENDANT

27 KILLED.

28 THAT IS NOT THE SITUATION HERE, WHERE

1 KITTY MENENDEZ DID NOTHING BUT TWO THINGS: NUMBER  
2 ONE, SHE TOLD THE DEFENDANTS THEY COULD NOT GO TO  
3 THE MOVIES. THIS IS THE FIRST ACT THAT THEY ARE  
4 RELYING UPON.

5       AND SECONDLY, SHE WALKED INTO THE DEN.  
6 AND NO MATTER WHAT ALLEGATIONS THEY WANT TO MAKE  
7 AGAINST JOSE MENENDEZ, THOSE ARE THE ONLY TWO THINGS  
8 THAT KITTY MENENDEZ DID THAT DAY; AND THAT IS SIMPLY  
9 INSUFFICIENT TO CAUSE THIS COURT TO CONCLUDE THAT  
10 THE OBJECTIVE EVIDENCE IS SUCH THAT IT WOULD CAUSE  
11 AN ORDINARY REASONABLE MAN OF AVERAGE DISPOSITION TO  
12 RESPOND IN A PASSIONATE STATE IN RESPONSE TO THAT  
13 INSTIGATION.

14       THE COURT: OKAY.

15       MS. TOWERY: IF I MAY RESPOND.

16       THE COURT: JUST VERY, VERY BRIEFLY.

17       MS. TOWERY: VERY BRIEFLY.

18       NUMBER ONE, THIS SITUATION, IN THIS  
19 CASE, IN THIS TRIAL, ALSO INVOLVED AN EXCITED  
20 QUARREL JUST BEFORE THE HOMICIDES. AND THAT EXCITED  
21 QUARREL WAS PRECEDED BY ALL OF THE OTHER INCIDENTS  
22 WHICH OCCURRED IN THE WEEK BEFORE THE HOMICIDES IN  
23 WHICH THE PROVOCATORY CONDUCT THAT WE'VE SPECIFIED  
24 BY KITTY MENENDEZ OCCURRED.

25 I WOULD POINT OUT TO THE COURT THAT IN  
26 PEOPLE VERSUS BERRY THAT PROVOCATION, WHICH AGAIN,  
27 WAS TAUNTS ABOUT THE WIFE'S INFIDELITY, SEXUAL  
28 AROUSAL OF THE DEFENDANT AND REFUSING TO HAVE

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1 INTERCOURSE, AND SCREAMING AT HIM. AND THAT  
2 PROVOCATION OCCURRED OVER A 13-DAY PERIOD. SHE WENT  
3 TO THE HOSPITAL, CAME BACK THE NEXT DAY, STARTED  
4 SCREAMING AGAIN, AND THE DEFENDANT KILLED HER.

5 SO I THINK THAT THAT CASE DISPOSES OF  
6 THE PROSECUTION'S ARGUMENT WITH RESPECT TO A  
7 COOLING-OFF PERIOD.

8 ALSO, THE COOLING OFF IS A QUESTION FOR  
9 THE JURY TO DETERMINE. THE JURY CAN TAKE INTO  
10 ACCOUNT TIME PERIODS WHICH ELAPSED IN BETWEEN THE  
11 SPECIFIC INCIDENTS OF PROVOCATION BY KITTY MENENDEZ  
12 AND DECIDE WHETHER OR NOT A SUFFICIENT COOLING OFF  
13 OCCURRED, OR SHOULD HAVE OCCURRED, IN THEIR  
14 EVALUATION OF THE EVIDENCE. THAT'S A JURY QUESTION  
15 AND NOT SOMETHING FOR THE COURT TO DECIDE. THE  
16 COURT IS ONLY TO LOOK TO SEE WHETHER OR NOT THERE'S  
17 SUFFICIENT EVIDENCE OF PROVOCATION TO PERMIT THE  
18 JURY TO MAKE THE DETERMINATION.

19 ALSO, WITH RESPECT TO KITTY MENENDEZ'

20 SEXUAL MOLESTATION OF LYLE MENENDEZ. THERE WAS NO  
21 TIME FRAME ESTABLISHED FOR THAT. FOR ALL WE KNOW,  
22 IT COULD HAVE BEEN THE DAY BEFORE THE HOMICIDES.

23 SO I DON'T KNOW WHY MR. CONN SAYS YEARS  
24 BEFORE. WE WEREN'T PERMITTED TO PROVE PRIOR CONDUCT  
25 ON THE PART OF KITTY MENENDEZ TOWARDS LYLE.

26 THE COURT: THAT'S NOT TRUE. THAT'S NOT  
27 TRUE.

28 MS. TOWERY: THE COURT PRECLUDED --

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1 THE COURT: YOU OFFERED CERTAIN EVIDENCE THAT  
2 WAS NOT ADMISSIBLE.

3 MS. TOWERY: YES. CIRCUMSTANTIAL EVIDENCE.

4 THE COURT: OTHER EVIDENCE CERTAINLY WAS  
5 AVAILABLE TO THE DEFENSE THAT THE DEFENSE CHOSE NOT  
6 TO INTRODUCE, AND THE COURT WAS NEVER CALLED UPON  
7 AND DID NOT RULE THAT EVIDENCE WOULD BE INADMISSIBLE.

8 MS. TOWERY: THAT IS CORRECT, YOUR HONOR.  
9 HOWEVER, WE DID OFFER, AND THE COURT DID PRECLUDE  
10 EVIDENCE WHICH WE OFFERED AS CIRCUMSTANTIAL EVIDENCE  
11 OF INAPPROPRIATE SEXUAL CONDUCT BY KITTY MENENDEZ  
12 TOWARDS LYLE MENENDEZ; AND THE FACT IS, THAT THE  
13 RECORD AS IT STANDS NOW HAS SUBSTANTIVE EVIDENCE  
14 THAT KITTY MENENDEZ SEXUALLY MOLESTED HIM, AND WE



15 DON'T KNOW WHEN. AND THE JURY IS FREE TO MAKE THAT  
16 DETERMINATION AS WELL.

17 SO, AGAIN, I WOULD ASK THE COURT TO  
18 RECONSIDER ITS PREVIOUS RULING, AND I WOULD ASK THE  
19 COURT TO LET THIS JURY MAKE THE DECISION IN THIS  
20 CASE.

21 THE COURT: OKAY. THAT'S WHAT I'VE BEEN  
22 DOING HERE, IS RECONSIDERING AND PERMITTING COUNSEL  
23 TO PRESENT ADDITIONAL ARGUMENT AND AUTHORITY ON THE  
24 SUBJECT.

25 LET ME GO BACK AND SUMMARIZE WHAT  
26 OCCURRED ON FRIDAY. IT HAS NOT BEEN DISCUSSED,  
27 BECAUSE THE COURT INDICATED IT WAS NOT  
28 RECONSIDERING, AND HAS NOT RECONSIDERED THE SUBJECT

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1 OF SO-CALLED IMPERFECT SELF-DEFENSE. BUT JUST SO  
2 THE RECORD IS CLEAR AS TO THE COURT'S ANALYSIS OF  
3 THAT SUBJECT, AS WELL AS THIS, I WANT TO BRIEFLY  
4 DISCUSS THIS ISSUE.

5 AS DISCUSSED HERE, AND AS THE PARTIES  
6 ARE AWARE, THE BASIC DEFINITION OF MURDER IS THE  
7 UNLAWFUL KILLING OF A HUMAN BEING WITH MALICE  
8 AFORETHOUGHT. A DEFENDANT WHO COMMITS AN  
9 INTENTIONAL AND UNLAWFUL KILLING, BUT WHO LACKS

10 MALICE, IS GUILTY OF A LESSER-INCLUDED OFFENSE OF  
11 INVOLUNTARY MANSLAUGHTER.

12 BUT A DEFENDANT WHO INTENTIONALLY AND  
13 UNLAWFULLY KILLS, LACKS MALICE ONLY IN LIMITED  
14 EXPLICITLY DEFINED CIRCUMSTANCES. ONE OF THOSE  
15 CIRCUMSTANCES HAS BEEN ARGUED HERE; THAT IS, THE  
16 SO-CALLED SUDDEN QUARREL OR HEAT OF PASSION. THAT  
17 IS A STATUTORY DEFINITION OF MANSLAUGHTER.

18 THERE IS ALSO A NON-STATUTORY DEFINITION  
19 OF MANSLAUGHTER, REDUCING WHAT OTHERWISE WOULD BE AN  
20 UNLAWFUL INTENTIONAL KILLING WITH MALICE AFORETHOUGHT  
21 TO MANSLAUGHTER; AND THAT IS A JUDICIALLY CREATED  
22 MANSLAUGHTER, REFERRED TO AS UNREASONABLE  
23 SELF-DEFENSE OR IMPERFECT SELF-DEFENSE.

24 THE DUTY OF THE COURT TO INSTRUCT ON THE  
25 LESSER OFFENSE OF SO-CALLED IMPERFECT OR  
26 UNREASONABLE MANSLAUGHTER ARISES WHEN THE DEFENDANT  
27 PRESENTS EVIDENCE FROM WHICH A JURY COULD REASONABLY  
28 CONCLUDE THAT THE DEFENDANT KILLED IN THE

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1 UNREASONABLE BUT GOOD-FAITH BELIEF IN THE NECESSITY  
2 TO ACT IN SELF-DEFENSE.

3 AS STATED IN THE CASE OF PEOPLE VERSUS  
4 FLANNEL, 25 CAL.3D AT PAGE 684, THE EVIDENCE MUST BE

5 SUFFICIENT TO DESERVE CONSIDERATION BY THE JURY AND  
6 NOT BE MINIMAL AND INSUBSTANTIAL.

7 AS STATED IN IN RE CHRISTIAN S., WHICH  
8 WAS A CASE DECIDED BY THE CALIFORNIA SUPREME COURT  
9 IN 1994, THE CONCEPT OF IMPERFECT SELF-DEFENSE HAS  
10 NARROW APPLICATION, AND THE COURT STATED, AND I'M  
11 QUOTING FROM THE SUPREME COURT:

12 "IT REQUIRES, WITHOUT EXCEPTION,  
13 THAT THE DEFENDANT MUST HAVE HAD AN  
14 ACTUAL BELIEF IN THE NEED FOR  
15 SELF-DEFENSE.

16 "WE ALSO EMPHASIZE WHAT SHOULD BE  
17 OBVIOUS. FEAR OF FUTURE HARM, NO  
18 MATTER HOW GREAT THE FEAR, AND NO  
19 MATTER HOW GREAT THE LIKELIHOOD OF THE  
20 HARM, WILL NOT SUFFICE. THE  
21 DEFENDANT'S FEAR MUST BE OF IMMINENT  
22 DANGER.

23 "PUT SIMPLY, THE TRIER OF FACT  
24 MUST FIND AN ACTUAL FEAR OF AN  
25 IMMINENT HARM. WITHOUT THIS FINDING,  
26 IMPERFECT SELF-DEFENSE IS NO DEFENSE,  
27 END QUOTE.

28 THAT'S THE LANGUAGE OF THE SUPREME COURT

1 AT PAGE 783.

2 IN THE CASE BEFORE THE COURT, THIS CASE,  
3 THE DEFENDANT, ERIK MENENDEZ, HAS PRESENTED  
4 EVIDENCE, IF BELIEVED, OF AN ACTUAL UNREASONABLE  
5 BELIEF OF DANGER. BUT THE DANGER HE DESCRIBED WAS  
6 NOT IMMINENT. IT WAS IN THE FUTURE.

7 THERE IS NO MITIGATION OF MURDER TO  
8 MANSLAUGHTER BASED UPON AN ACTUAL UNREASONABLE  
9 BELIEF OF NON-IMMINENT DANGER.

10 FROM THIS THE COURT HAS CONCLUDED, AND  
11 DID CONCLUDE ON FRIDAY, THAT THERE WAS INSUFFICIENT  
12 EVIDENCE IN THIS RECORD TO INSTRUCT THE JURY ON  
13 IMPERFECT SELF-DEFENSE, SINCE THERE WAS NO EVIDENCE  
14 FROM WHICH A JURY COULD REASONABLY FIND THAT THE  
15 DEFENDANT HAD AN ACTUAL BELIEF OF THE IMMINENT, AS  
16 OPPOSED TO FUTURE DANGER.

17 AND EVIDENCE UPON WHICH THE DEFENDANT,  
18 LYLE MENENDEZ, RELIES AND RELIED IN SUPPORT OF AN  
19 INSTRUCTION ON IMPERFECT SELF-DEFENSE, AGAIN, IS  
20 EVEN LESS SUBSTANTIAL. THE RECORD IS VIRTUALLY  
21 SILENT REGARDING HIS STATE OF MIND. AND THERE IS NO  
22 EVIDENCE RELATING TO WHAT HE DID OR WHERE HE WENT IN  
23 ORDER TO OBTAIN THE SHOTGUN THE NIGHT OF THE  
24 SHOOTINGS. THE RECORD IS COMPLETELY SILENT, AS I  
25 RECALL, ON THAT SUBJECT.

26 SO FOR THOSE REASONS, THE COURT ON  
27 FRIDAY REFUSED TO INSTRUCT ON IMPERFECT SELF-DEFENSE.

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1 SUBJECT OF HEAT OF PASSION. THE DEFENDANT, ERIK  
2 MENENDEZ, PRESENTED EVIDENCE THAT HE WAS AROUSED TO  
3 A STATE OF PANIC AND FEAR, AND HE DESCRIBED THESE AS  
4 THE EMOTIONS THAT HE EXPERIENCED AT THE TIME HE SHOT  
5 HIS PARENTS. THERE'S BEEN ARGUMENT HERE THAT HE  
6 ARTICULATED SOME OTHER EMOTIONS EARLIER, FELT  
7 EARLIER THAT WEEK. BUT AT THE TIME HE SHOT HIS  
8 PARENTS HE ARTICULATED THE EMOTIONS OF PANIC AND  
9 FEAR.

10 THE COURT CONCLUDED LAST FRIDAY THAT  
11 THERE WAS SUFFICIENT EVIDENCE TO INSTRUCT ON THE  
12 THEORY OF HEAT OF PASSION PROVOKED BY ADEQUATE  
13 PROVOCATION AS TO THE VICTIM JOSE MENENDEZ; THAT  
14 THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO  
15 RESOLVE AS TO WHETHER OR NOT THERE WAS ADEQUATE  
16 PROVOCATION TO AROUSE AN INDIVIDUAL OF ORDINARY  
17 REASONABLE DISPOSITION TO A STATE OF PANIC OR FEAR  
18 OR PASSION, AS ARTICULATED BY THE DEFENDANT.

19 AND THE COURT CONCLUDED THAT THE  
20 QUESTION WAS ONE OF FACT FOR THE JURY TO DETERMINE,  
21 WHETHER OR NOT THIS OCCURRED, AND WHETHER A  
22 REASONABLE PERSON WOULD HAVE BEEN AROUSED TO SUCH A

23 STATE IN REGARD TO THE PROVOCATION ALLEGED BY THE  
24 ACTIONS OF JOSE MENENDEZ.

25 THE COURT MADE THAT FINDING AS TO ERIK  
26 MENENDEZ. AND ALSO, ALTHOUGH THE EVIDENCE IS LESS  
27 SUBSTANTIAL THAN IT IS TO ERIK MENENDEZ, THE COURT  
28 ALSO MADE THAT FINDING AS TO JOSE MENENDEZ -- AS TO

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1 LYLE MENENDEZ, SO THAT THE ISSUE AS TO THE DEGREE OF  
2 HOMICIDE, WHETHER FIRST, SECOND, OR VOLUNTARY  
3 MANSLAUGHTER, AS TO JOSE MENENDEZ, WAS A SUBJECT FOR  
4 THE JURY TO RESOLVE.

5 THE ISSUE HERE IS ONE DEALING WITH THE  
6 PROVOCATION ASPECT OF HEAT OF PASSION INVOLVING THE  
7 VICTIM, MARY LOUISE MENENDEZ.

8 THE COURT INDICATED FRIDAY THAT THE  
9 ISSUE HAD TO BE ADDRESSED SEPARATELY AS TO EACH  
10 DEFENDANT, AS TO HOW EACH DEFENDANT STOOD IN THE  
11 FACTUAL PRESENTATION IN THIS CASE, AS WELL AS TO  
12 EACH VICTIM. THE ANALYSIS HAD TO BE SEPARATELY MADE  
13 AS TO EACH DEFENDANT, VIS-A-VIS EACH VICTIM. AND  
14 THE COURT MADE THAT ANALYSIS AS TO JOSE MENENDEZ AND  
15 AS TO THE TWO DEFENDANTS, AND FOUND THAT THERE WAS  
16 SUFFICIENT EVIDENCE FOR THE JURY TO RESOLVE AS TO  
17 THE ADEQUACY OF PROVOCATION.

18 THE PROSECUTION CITES THE CASE OF PEOPLE  
19 VERSUS SPURLIN, AND THAT'S BEEN ALSO ARGUED BY THE  
20 DEFENSE, AND THAT'S CITED AND FOUND AT 156  
21 CAL.APP.3D 119. AND THAT CASE STANDS FOR THE  
22 PROPOSITION THAT THE PROVOCATION MUST COME FROM THE  
23 VICTIM KILLED; THAT THERE IS NO THEORY OF  
24 ACCUMULATED OR CUMULATIVE PROVOCATION; THAT IT HAS  
25 TO DERIVE FROM THE ACTIONS OF THE VICTIM KILLED.

26 AND THE DEBATE WE'VE HAD HERE, THE  
27 DISCUSSION WE'VE HAD HERE IS WHETHER OR NOT THERE  
28 HAS BEEN SUFFICIENT EVIDENCE PRESENTED AS TO THE

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1 CONDUCT, THE ACTIONS OF MRS. MENENDEZ, FROM WHICH A  
2 REASONABLE JURY COULD FIND THAT THERE WAS SUFFICIENT  
3 EVIDENCE TO PERSUADE THEM THAT A PERSON OF  
4 REASONABLE DISPOSITION WOULD HAVE BEEN AROUSED TO A  
5 STATE OF PASSION SUFFICIENT TO MITIGATE FROM MURDER  
6 TO MANSLAUGHTER. AND WE'VE HAD DESCRIPTIONS OF THE  
7 TYPE OF CONDUCT OR ACTIVITIES OF MRS. MENENDEZ.  
8 BOTH SIDES CHARACTERIZED IT IN THE WAY THEY FIND  
9 MOST HELPFUL TO THEIR ARGUMENT.

10 SOME PROBLEMS EXIST IN THIS ANALYSIS,  
11 BOTH AS TO THE PROVOCATION OF THE DECEDENT,  
12 MRS. MENENDEZ, AND AS TO THE MENTAL STATE OF EACH

13 DEFENDANT. I'LL REFER TO SOME OF THESE PROBLEMS

14 NOW.

15 FIRST OF ALL, THERE IS DISCUSSION THAT --

16 AND ARGUMENT THAT WHATEVER HAPPENED THROUGHOUT THE

17 LIFE OF EACH DEFENDANT MAY BE CONSIDERED AS A BASIS

18 FOR A DETERMINATION OF PROVOCATION, AND ONE COULD

19 LOOK AT WHATEVER INTERACTION THERE WAS BETWEEN THE

20 VICTIM AND DEFENDANT THROUGHOUT THE DEFENDANTS' LIFE

21 TO DETERMINE WHETHER OR NOT THERE WAS PROVOCATION.

22 THEN, AS TO ERIK MENENDEZ, THERE IS

23 THROWN INTO THE ARGUMENT TESTIMONY FROM A MENTAL

24 HEALTH EXPERT REGARDING HOW CERTAIN CONDUCT DID

25 AFFECT THE DEFENDANT AT THE TIME OF THE SHOOTING OF

26 HIS MOTHER.

27 THE PROBLEM WITH THAT ANALYSIS IS THAT

28 IT MIXES UP THE ORDINARY REASONABLE MAN WITH A

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1 DEFENDANT OR A PERSON WHO HAS A MENTAL DISORDER.

2 AND THE LAW IS CLEAR THAT AN INDIVIDUAL SUFFERING

3 FROM A MENTAL DISORDER, WHATEVER IT MIGHT BE, AND

4 WHAT CAUSED THE DISORDER AND HOW VARIOUS ACTS AND

5 CONDUCT AFFECT THAT INDIVIDUAL, IS NOT AND CANNOT BE

6 THE ORDINARY MAN OF AVERAGE DISPOSITION. IT JUST

7 DOESN'T WORK THAT WAY.



8 AS THE COURT OF APPEALS SAID IN IN RE  
9 THOMAS S. 183 C.A.3D 798: "THE MINOR'S CLINICAL  
10 DEPRESSION IS NOT THE ORDINARY MAN'S AVERAGE  
11 DISPOSITION, END QUOTE.

12 AND THIS HOLDING WAS ECHOED BY JUSTICE  
13 MOSK IN A CONCURRING OPINION IN IN RE CORDERO, 46  
14 CAL.3D 161, AT PAGE 190, IN WHICH JUSTICE MOSK  
15 STATED:

16 "EXCEPTIONAL SUBJECTIVE  
17 CONDITIONS SUCH AS INTOXICATION OR  
18 MENTAL DEPRESSION BY DEFINITION WILL  
19 NOT BE EXPERIENCED BY THE ORDINARILY  
20 REASONABLE MAN, AND ARE THEREFORE  
21 PLAINLY INCOMPATIBLE WITH A STATUTORY  
22 DEFENSE."

23 SO, ONE OF THE THINGS THAT I HAVE TO  
24 ADDRESS HERE IS THE MIXTURE OF EVIDENCE THAT IS  
25 PRESENTED BY THE DEFENDANTS -- MORE SO ERIK MENENDEZ  
26 THAN LYLE MENENDEZ -- SINCE HE DID NOT TESTIFY, AND  
27 SINCE HE DID NOT PRODUCE ANY EXPERT TESTIMONY.  
28 THERE WAS CERTAINLY TESTIMONY FROM ERIK MENENDEZ,

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1 EXPERT TESTIMONY SUPPLEMENTING AND OFFERED TO  
2 CORROBORATE HIS TESTIMONY.

3           THERE IS A NEED TO SEPARATE THE NATURE  
4 OF PROVOCATION THAT WOULD BE EXPERIENCED BY THE  
5 REASONABLE PERSON FROM THAT WHICH WAS EXPERIENCED BY  
6 THE DEFENDANT, BECAUSE THERE IS AN OBJECTIVE AND A  
7 SUBJECTIVE TEST.

8           CERTAINLY, THE MENTAL DISORDER CAN BE  
9 CONSIDERED BY THE JURY IN EVALUATING, ALONG WITH ALL  
10 THE OTHER EVIDENCE OF PROVOCATION, WHETHER THE  
11 DEFENDANT ACTUALLY WAS PROVOKED TO A MENTAL STATE OF  
12 PASSION. THAT'S THE SUBJECT OR ELEMENT OF HEAT OF  
13 PASSION.

14          BUT THEN THERE IS THE OBJECTIVE ELEMENT,  
15 WHETHER OR NOT A REASONABLE PERSON OF AVERAGE  
16 DISPOSITION WOULD BE PROVOKED TO THE STATE OF  
17 PASSION BY THE PROVOCATION OF THE VICTIM. THAT IS  
18 AN OBJECTIVE TEST.

19          THE PARTIES ARE CORRECT. THE DEFENSE IS  
20 CORRECT, THAT NORMALLY THIS IS AN ISSUE FOR THE JURY  
21 TO DECIDE AS TO WHETHER OR NOT THERE WAS ADEQUATE  
22 PROVOCATION; THAT BOTH OF THESE ISSUES ARE FOR THE  
23 JURY TO DECIDE: ONE, WHETHER THE DEFENDANT HIMSELF  
24 SUBJECTIVELY WAS PROVOKED; AND TWO, WHETHER OR NOT A  
25 MAN OF REASONABLE, OR WOMAN, OR PERSON OF REASONABLE  
26 DISPOSITION, ORDINARY AND REASONABLE DISPOSITION,  
27 WOULD HAVE BEEN PROVOKED TO THE LEVEL OF PASSION  
28 REFLECTED IN THE CONDUCT OF THE DEFENDANT.

1           AND THE ARGUMENT HERE AND THE DISCUSSION  
2 HERE INVOLVES WHETHER OR NOT THERE HAS BEEN  
3 SUFFICIENT EVIDENCE, SUBSTANTIAL EVIDENCE SUFFICIENT  
4 ENOUGH TO CONVINCE A JURY, OR AT LEAST PERMIT A JURY  
5 TO CONSIDER WHETHER OR NOT THIS WOULD HAVE PROVOKED  
6 A PERSON OF REASONABLE AND ORDINARY DISPOSITION.

7           COMBINED WITH THIS DISCUSSION IS ANOTHER  
8 THING THAT RUNS THROUGH THE DEFENSE BRIEF. IT'S AN  
9 INTERESTING ARGUMENT, AND IT'S DIFFICULT, ACTUALLY,  
10 TO DEAL WITH AND TO CONCEPTUALIZE, BECAUSE TO SOME  
11 EXTENT, TO A GREAT EXTENT, ESPECIALLY THE DEFENDANT,  
12 ERIK MENENDEZ, PUT FORTH A MENTAL STATE, A STATE OF  
13 PASSION OF FEAR AND NOT ANGER; AND WHEN PUSHED AND  
14 ASKED ABOUT THE MATTER AT THE TIME OF THE SHOOTING --  
15 NOT AT SOME EARLIER TIME, BUT AT THE TIME HE SHOT  
16 HIS PARENTS --"WHAT WAS IT THAT YOU FELT? WHAT DID  
17 YOU THINK? WHAT WAS YOUR EMOTION AT THAT TIME?"

18           AND CONSISTENTLY HE INDICATED THAT HIS  
19 STATE OF MIND AND HIS PASSION WAS THAT OF FEAR.

20           THE DEFENSE ARGUES THAT THERE NEED BE NO  
21 IDENTITY OF EMOTION OR PASSION BETWEEN WHAT WOULD BE  
22 PROVOKED IN A REASONABLE MAN AND WHAT WAS PROVOKED  
23 IN THE DEFENDANT; THAT THEORETICALLY A DEFENDANT  
24 COULD PUT FORTH ANY EMOTION, IF BELIEVED BY THE  
25 JURY, AS HIS SUBJECTIVE EMOTION; AND THEN  
26 OBJECTIVELY THE JURY WOULD BE CALLED UPON TO REVIEW

27 THE SAME EVIDENCE OF PROVOCATION AND COME UP WITH  
28 PERHAPS A TOTALLY DIFFERENT PASSION OR EMOTION THAT

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1 WOULD HAVE BEEN PROVOKED IN A REASONABLE ORDINARY  
2 MAN.

3        THAT IS AN ARGUMENT MADE BY THE DEFENSE  
4 IN ITS BRIEF. AND THE DEFENSE CITES THE CASE OF  
5 PEOPLE VERSUS BARTON FOR THAT PROPOSITION. BARTON  
6 REALLY DOESN'T SAY THAT. WHAT BARTON SAYS IS THAT  
7 THE JURY IN THAT CASE, PRESENTED WITH THE EVIDENCE  
8 AS IT WAS PRESENTED -- AND I THINK THE DEFENSE IN  
9 ITS BRIEF DOESN'T -- THE SUPREME COURT ACTUALLY  
10 DIDN'T SUMMARIZE ALL OF THE EVIDENCE AT THE  
11 CONCLUSION AS IT DID EARLIER IN THE OPINION -- BUT  
12 IN THAT CASE, ONE OF THE ISSUES WAS WHETHER OR NOT  
13 THE DEFENDANT ACTUALLY INTENDED TO PULL THE  
14 TRIGGER. THE DEFENDANT ARGUED TO THE JURY THAT IT  
15 WAS ALL AN ACCIDENT. HE DIDN'T INTEND TO PULL THE  
16 TRIGGER. IT WAS JUST AN ACCIDENT; AND CIRCUMSTANCES  
17 WERE SUCH WHERE HE WAS HOLDING THE GUN AND HOLDING  
18 HIS HAND ON THE GUN AND -- HIS HAND ON THE TRIGGER,  
19 AND THEN THE GUN WENT OFF ACCIDENTALLY.

20        THERE WAS A LOT OF TESTIMONY AND  
21 EVIDENCE ON THAT SUBJECT AS TO THE TRIGGER PULL, AND

22 HOW MUCH IT WEIGHED AND WHAT IT WOULD REQUIRE TO  
23 PULL THE TRIGGER.  
24 BUT IN THAT SAME CASE THE DEFENSE HAD  
25 OFFERED EVIDENCE THROUGH -- APPEARS TO BE MENTAL  
26 HEALTH EXPERTS -- THAT THE DEFENDANT WAS OPERATING  
27 WITH A REFLEXIVE -- ACTION OF REFLEX, THAT WHAT HE  
28 DID WAS RESPONDING TO THE FEAR OF THE MOMENT AND

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1 PULLING THE TRIGGER.  
2 THAT WAS BASICALLY THE EVIDENCE THAT THE  
3 DEFENSE OFFERED THROUGH WAY OF EXPERTS. THEN THE  
4 DEFENDANT TOOK THE WITNESS STAND AND CONTRADICTED  
5 HIS EXPERTS AND SAID: "NO, IT WASN'T A REFLEXIVE  
6 ACTION. IT WAS AN ACCIDENT."

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1 THE SUPREME COURT, IN ANALYZING ALL OF THE  
2 FACTS, INCLUDING WHAT IT IS YOU HAVE SUMMARIZED HERE,  
3 BASICALLY SAID THE JURY COULD DISREGARD THE DEFENDANT'S  
4 TESTIMONY IN THAT PARTICULAR CASE BECAUSE THERE WAS  
5 OTHER EVIDENCE IN THE CASE OF WHAT IT WAS THAT REALLY  
6 OCCURRED, AND THAT IT WASN'T AN ACCIDENT, AS THE  
7 DEFENDANT TESTIFIED, BUT IT WAS SOMETHING ELSE. IT WAS  
8 INTENT TO KILL, EITHER PROVOKED BY UNREASONABLE FEAR,

9 BASED UPON THE PECULIAR CIRCUMSTANCES IN THAT CASE, OR  
10 BY HEAT OF PASSION.

11 AND THEREFORE THE COURT WAS REQUIRED IN  
12 THAT SITUATION, OVER THE OBJECTION OF THE DEFENDANTS, TO  
13 GIVE INSTRUCTIONS ON BOTH IMPERFECT SELF-DEFENSE AND  
14 HEAT OF PASSION.

15 THAT WAS NOT A CASE IN WHICH THE SUPREME  
16 COURT SAID ONE COULD LOOK AT THE MENTAL STATE OF THE  
17 REASONABLE MAN AND CONCLUDE THAT THAT MENTAL STATE WOULD  
18 HAVE BEEN PROVOKED IN A REASONABLE MAN, AND THEN LOOK AT  
19 THE MENTAL STATE OR THE PASSION OF THE DEFENDANT, AND  
20 ALTHOUGH THEY WERE TOTALLY DIFFERENT, THAT THE JURY  
21 WOULD THEN BE IN A POSITION TO CONCLUDE THAT SINCE A  
22 REASONABLE MAN MIGHT HAVE BEEN PROVOKED TO A CERTAIN  
23 PASSION, AND THE DEFENDANT WAS PROVOKED TO A DIFFERENT  
24 PASSION, THAT THAT SOMEHOW WORKS AS CLOSE ENOUGH, AND  
25 SAYS THAT IT'S CLOSE ENOUGH.

26 MS. ABRAMSON: YOUR HONOR, COULD I JUST --

27 THE COURT: EVEN THOUGH THERE IS NO REQUIREMENT  
28 THAT THE PASSION BE IDENTICAL, CERTAINLY THE PASSION

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1 DESCRIBED IN THE LAW CANNOT BE PRECISELY DEFINED, AND  
2 THERE IS A BROAD RANGE OF EMOTION THAT IS CONTEMPLATED  
3 BY HEAT OF PASSION. IT'S A VERY AMORPHOUS CONCEPT, AND  
4 CERTAINLY THERE IS NO REQUIREMENT OF PERFECT SYMMETRY

5 BETWEEN THAT TYPE OF PASSION WHICH WOULD BE PROVOKED IN  
6 A REASONABLE, ORDINARY MAN, AND THAT WHICH WOULD BE  
7 PROVOKED BY OR WAS PROVOKED IN THE DEFENDANT IN A  
8 PARTICULAR CIRCUMSTANCE BECAUSE OF HIS PECULIAR  
9 SITUATION.

10 MS. ABRAMSON: YOUR HONOR, JUST TO COMMENT ON  
11 THAT FOR A MOMENT, I DON'T THINK THAT THE COURT COULD  
12 SAY THAT THERE IS -- THAT A REASONABLE MAN WOULD NEVER  
13 BE PROVOKED TO FEAR BASED ON THE REVELATION OF A  
14 PARENT'S COMPLICITY IN THE TRAUMA-INDUCING SERIES OF  
15 EVENTS.

16 THE COURT: SUFFICIENT FEAR TO PROVOKE A  
17 REASONABLE MAN TO A STATE OF HEAT OF PASSION, SUFFICIENT  
18 TO MITIGATE MURDER TO MANSLAUGHTER, IS WHAT WE'RE  
19 TALKING ABOUT.

20 MS. ABRAMSON: WELL, THAT'S RIGHT. WE ARE  
21 TALKING ABOUT HOW PEOPLE WHO ARE TAUNTED, HOW "CHICKEN"  
22 HAS PROVOKED THEM TO A PASSIONATE STATE -- I'M NOT SURE  
23 WHAT THAT STATE COULD HAVE BEEN CALLED -- TO REDUCE  
24 MURDER TO MANSLAUGHTER.

25 THE COURT: I HAVEN'T BEEN CITED TO ANY SUCH  
26 CASE.

27 MS. ABRAMSON: YES. IT WAS ONE OF THE CASES WE  
28 CITED, "YOU'RE TOO CHICKEN."

1 THE COURT: THERE WAS MORE TO IT THAN THAT.

2 MS. ABRAMSON: WELL, THERE WAS HISTORY AND MORE  
3 TO IT HERE AS WELL, YOUR HONOR.

4 BUT I THINK THE COURT CANNOT SAY -- I DON'T  
5 THINK ANYONE COULD SAY THAT A REASONABLE REACTION -- WE  
6 ARE NOT TALKING ABOUT STRANGERS HERE, WE ARE TALKING  
7 ABOUT ONE'S MOTHER -- THAT IT IS NOT REASONABLE TO BE  
8 PROVOKED TO FEAR BY THIS KIND OF REVELATION, EVEN IF THE  
9 INITIAL REACTION WAS ANGER OR SENSE OF BETRAYAL.

10 MOREOVER, I DON'T THINK THE DEFENDANT HAS  
11 TO ARTICULATE EVERY POSSIBLE LEVEL, CONSCIOUS, SUB OR  
12 UN, OF THEIR EMOTIONAL STATE FOR IT TO CONSTITUTE HEAT  
13 OF PASSION.

14 I THINK IT'S SORT OF COMMONLY KNOWN THAT  
15 PEOPLE SUPPRESS ANGER. EVEN THOUGH IT MAY MOTIVATE  
16 THEM, THEY MAY NOT BE CONSCIOUS OF IT AT THE TIME THAT  
17 THEY ARE ACTING IN A HEAT OF PASSION.

18 I THINK THE KEY HERE THAT THE LAW IS TRYING  
19 TO RECOGNIZE, FRANKLY, IS NOT THIS INTELLECTUAL LINE  
20 DRAWN, AND COMPARTMENTALIZING. BUT THE BASIC CONCEPT  
21 THAT WHEN PEOPLE ACT FROM AN EXCESS OF EMOTION THAT IS  
22 NOT SIMPLY IDIOSYNCRATIC TO THEM, THEY ARE NOT JUST A  
23 HYPER-EMOTIONAL JERK WHEN THEY ACT FROM AN EXCESS OF  
24 EMOTION, EITHER BECAUSE THEY FEAR THEY'RE GOING TO DIE,  
25 OR BECAUSE SOMEONE ELSE HAS PROVOKED THEM. THEY ARE NOT  
26 AS REPREHENSIBLE, AS MORALLY RESPONSIBLE, AS THOSE WHO  
27 SIMPLY HAVE A SHORT FUSE AND GO OFF.

28 THE ONES WITH THE SHORT FUSE MAY BE GUILTY



1 OF SECOND-DEGREE MURDER. THE ONES WHO ARE TRULY ACTING  
2 OUT OF EMOTION THAT IS NOT SIMPLY SELF-GENERATING ARE  
3 ONLY GUILTY OF MANSLAUGHTER. I THINK THAT IS THE MORAL  
4 CONSTRUCT BEHIND FLANNEL ORIGINALLY, AND BEHIND THE  
5 PROVOCATION THEORY.

6 THE COURT: OKAY. ALL RIGHT.

7 JUST TO FOLLOW THROUGH ON MY DISCUSSIONS  
8 HERE, THE ISSUE AGAIN TURNS TO WHAT IT WAS THAT IS  
9 DESCRIBED IN THE EVIDENCE THAT MRS. MENENDEZ DID THAT  
10 WAS THE PROVOCATION, AND AS TO WHETHER OR NOT IN  
11 REVIEWING THAT EVIDENCE -- AND AGAIN, AS I SAID LAST  
12 WEEK, THE COURT IS NOT MAKING FINDINGS ON CREDIBILITY,  
13 AND NOT WEIGHING THE EVIDENCE AS FAR AS CREDIBILITY,  
14 GIVING FULL WEIGHT TO WHAT IT IS THE DEFENSE HAS  
15 PRESENTED. THE COURT IS EVALUATING WHETHER OR NOT THERE  
16 IS LEGALLY SUFFICIENT EVIDENCE TO JUSTIFY AN INSTRUCTION  
17 ON PROVOCATION, HEAT OF PASSION, MURDER AS TO  
18 MRS. MENENDEZ, VIS-A-VIS BOTH DEFENDANTS; WHETHER OR NOT  
19 THERE IS SUFFICIENT EVIDENCE FROM WHICH A JURY COULD  
20 REASONABLY CONCLUDE THAT THERE WAS ADEQUATE PROVOCATION  
21 AS DESCRIBED IN HER ACTIVITIES.

22 THE COURT HAS CONSIDERED THIS ISSUE AND  
23 RECONSIDERED IT. IT'S AN INTERESTING ISSUE, AND ONE  
24 THAT IS VERY SIGNIFICANT TO THE PARTIES INVOLVED,  
25 OBVIOUSLY.

26 THE COURT HAS CONSIDERED WHETHER OR NOT THE  
27 JURY INSTRUCTION ON HEAT OF PASSION SHOULD BE MODIFIED,  
28 OR 8.42, THE DEFINITION OF MURDER BY MANSLAUGHTER,

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1 SHOULD BE MODIFIED TO INCLUDE A FINDING BY THE JURY, OR  
2 A REQUIREMENT THAT THE JURY MUST CONCLUDE THAT THE  
3 PROVOCATION CAME FROM THE PERSON WHO ACTUALLY WAS  
4 KILLED.

5 BUT IT SEEMS TO ME THAT THIS IS A QUESTION  
6 OF LAW AS TO WHETHER OR NOT THERE IS SUFFICIENT EVIDENCE  
7 TO JUSTIFY THE INSTRUCTION BEING GIVEN TO THE JURY, NOT  
8 ONE FOR THE JURY TO RESOLVE, AS TO WHETHER THE  
9 PROVOCATION CAME FROM THE VICTIM WHO WAS KILLED. THE  
10 THRESHOLD ISSUE IS ONE FOR THE COURT TO RESOLVE.

11 AND AFTER RECONSIDERING THE EVIDENCE  
12 PRESENTED, THE ARGUMENT OF ALL SIDES, MY VIEW IS AS IT  
13 WAS ON FRIDAY, THAT I DON'T FIND THAT FROM THE  
14 PRESENTATION HERE AND THE EVIDENCE PRESENTED, THE  
15 TOTALITY OF THE EVIDENCE PRESENTED HERE, THAT A JURY  
16 COULD REASONABLY CONCLUDE THAT THERE WAS ADEQUATE  
17 PROVOCATION FROM MRS. MENENDEZ. I FIND THAT THE  
18 EVIDENCE IN REGARD TO MRS. MENENDEZ IS INSUBSTANTIAL AND  
19 MINIMAL REGARDING PROVOCATION.

20 THEREFORE, THERE IS NO LEGAL BASIS FOR AN  
21 INSTRUCTION ON HEAT OF PASSION MANSLAUGHTER REGARDING

22 THE DEATH OF MRS. MENENDEZ.

23 SO THAT IS THE COURT'S RULING.

24 MR. GESSLER: GIVEN THE COURT'S ANALYSIS TODAY,  
25 AND FURTHER RECONSIDERATION, AND ON BEHALF OF LYLE  
26 MENENDEZ, WE ARE ASKING 8.65 BE GIVEN, WHICH IS  
27 TRANSFERRED INTENT; THAT IS, AS TO MARY MENENDEZ.

28 THIS IS BASED PARTLY ON THE TESTIMONY OF

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1 ROGER MC CARTHY, THE SHARED-SHOT ANALYSIS THAT HE GAVE,  
2 REGARDING THE SHOT GOING THROUGH JOSE MENENDEZ AND  
3 STRIKING MRS. MENENDEZ ON THE BREAST.

4 THIS IS EVIDENCE PRESENTED BY THE PEOPLE,  
5 AND I THINK IT WOULD SUPPORT A TRANSFERRED INTENT FROM  
6 THE SHOOTING OF JOSE MENENDEZ, WHICH MOST OF THE  
7 EVIDENCE SHOWS WAS DONE PRIMARILY BY LYLE MENENDEZ.

8 THE COURT: THAT HE DIDN'T INTEND TO KILL HIS  
9 MOTHER, JUST HIS FATHER, THAT'S WHAT YOU'RE ARGUING?

10 MR. GESSLER: THAT'S CORRECT, YOUR HONOR. THAT  
11 THERE IS NO EVIDENCE TO SHOW -- OR NOT ENOUGH CONCLUSIVE  
12 EVIDENCE TO SHOW THAT HE INTENDED TO KILL HIS MOTHER.  
13 HE HAS NEVER SO TESTIFIED.

14 WE HAVE, AS I SAY, THE TESTIMONY OF ROGER  
15 MC CARTHY ON SHARED SHOTS, AS WELL AS THE OTHER EXPERTS;  
16 WHO, ALTHOUGH THEY DISAGREED AS TO ANGLES OR ANGULATION,  
17 IF YOU WOULD, AND SO FORTH, NONETHELESS SAY THAT THERE

18 WERE SHARED SHOTS, WHICH WOULD SUPPORT THE TRANSFERRED  
19 INTENT THEORY.

20 THE COURT: IF ONE GOES INTO A FAIRLY SMALL,  
21 ENCLOSED SPACE WITH A SHOTGUN, AND YOU HAVE TWO PEOPLE  
22 STANDING BEFORE YOU, AND YOU DISCHARGE MANY SHOTS,  
23 DOESN'T THAT CONSTITUTE INTENT TO KILL BOTH INDIVIDUALS?

24 MR. GESSLER: NO. I THINK IT SUPPORTS  
25 TRANSFERRED INTENT, EXACTLY AS TO HOW AN UNINTENDED  
26 VICTIM COULD BE SHOT AND KILLED.

27 THE COURT: HOW COULD THAT PERSON BE AN  
28 UNINTENDED VICTIM IF THE PERSON IS THERE AND YOU SEE

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1 THEM THERE, AND KNOW THAT PERSON IS THERE? HOW COULD  
2 THERE BE A UNINTENDED VICTIM IN THAT SITUATION?

3 MR. GESSLER: THERE ISN'T ANY UNINTENDED VICTIM,  
4 YOUR HONOR, OF TRANSFERRED INTENT. THERE IS ALWAYS  
5 SOMEBODY TOO CLOSE TO THE INTENDED VICTIM WHO ENDS UP  
6 GETTING KILLED, OTHERWISE THEY WOULDN'T BE KILLED IF  
7 THEY WEREN'T IN THE LINE OF FIRE, AND TRANSFERRED INTENT  
8 WOULD NEVER WORK.

9 IN FACT, IF THIS WERE A LARGER, UNENCLOSED  
10 SPACE, IT WOULD BE A MUCH BETTER ARGUMENT THAT THERE WAS  
11 INTENT TO KILL EACH OF THE DECEASEDS, BECAUSE YOU WOULD  
12 HAVE TO RE-AIM YOUR WEAPON AWAY FROM THE FIRST TARGET IN  
13 ORDER TO HIT THE SECOND TARGET.

14 WHERE THERE IS A CLOSE, CONFINED SPACE SUCH  
15 AS THIS ROOM;  
16 WHERE THE TWO PEOPLE ARE RIGHT NEXT TO EACH  
17 OTHER, ACCORDING TO THE PEOPLE'S THEORY, OR STANDING  
18 NEXT TO THE COUCH;

19 WHERE THE SHARED-SHOT THEORY IS GIVEN BY  
20 DR. LAWRENCE, FOR THE PEOPLE; BY ROGER MC CARTHY, FOR  
21 THE PEOPLE;

22 WHERE IN FACT THIS EVIDENCE SHOWS THAT JOSE  
23 MENENDEZ WAS OBVIOUSLY THE INTENDED VICTIM OF THE FIRST  
24 SHOT, WHICH HE HAS GOING THROUGH THE ELBOW, THROUGH AN  
25 ARM AND INTO THE BREAST OF MARY MENENDEZ; AND CAUSING,  
26 ACCORDING TO THE CORONER'S REPORT, WHICH IS IN EVIDENCE,  
27 WHAT TURNED OUT TO BE A FATAL WOUND, EVEN THOUGH NOT  
28 IMMEDIATELY FATAL, WHERE THE TESTIMONY OF ERIK MENENDEZ

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1 IS THAT HE CAN'T DELINEATE EACH SHOT. ALL HE CAN SAY IS  
2 THERE WAS LOT OF SHOOTING GOING ON.

3 ALL OF THIS EVIDENCE SUPPORTS A THEORY OF  
4 TRANSFERRED INTENT, YOUR HONOR, AT LEAST A REASONABLE  
5 DOUBT AS TO WHETHER THERE WAS TRANSFERRED INTENT RATHER  
6 THAN A SPECIFIC INTENT TO KILL MARY MENENDEZ BY LYLE  
7 MENENDEZ.

8 THE COURT: OKAY. WHAT IS THE PEOPLE'S POSITION?

9 MR. CONN: I THINK THAT THERE'S SIMPLY NO BASIS

10 IN THE EVIDENCE TO WARRANT THE INSTRUCTION THAT COUNSEL  
11 IS SUGGESTING. ALL OF THE EVIDENCE IN THIS CASE  
12 SUPPORTS JUST THE CONTRARY.

13 LYLE MENENDEZ RELIES UPON THE TESTIMONY OF  
14 ERIK MENENDEZ CONCERNING THE EVENTS LEADING UP TO THAT  
15 PARTICULAR SHOOTING. HE RELIES UPON HIS TESTIMONY  
16 CONCERNING HIS APPEARANCE AND HIS BEHAVIOR AT THE TIME  
17 OF THE SHOOTING.

18 ALL OF THAT EVIDENCE SUGGESTS NOTHING BUT  
19 AN INTENT TO KILL BOTH PARENTS, NOT TO MENTION THE  
20 DECEMBER 11 TAPE, WHICH CLEARLY OUTLINES, IN THE WORDS  
21 OF THE DEFENDANT HIMSELF, PRE-EXISTING PLAN AND INTENT  
22 TO KILL BOTH PARENTS.

23 I WOULD SUBMIT THAT THAT THEORY HAS NO  
24 APPLICATION TO THIS.

25 MR. GESSLER: NO PLACE, YOUR HONOR, IS THERE  
26 DIRECT EVIDENCE THAT THERE WAS A PLAN TO KILL BOTH  
27 PARENTS. THERE WAS A PLAN TO GO INTO THAT ROOM, AND THE  
28 SHOOTING OCCURRED.

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1 THE PEOPLE ARE RELYING ON CIRCUMSTANCIAL  
2 EVIDENCE AS TO THE INTENT AND THE STATE OF MIND OF LYLE  
3 MENENDEZ FOR PREMEDITATION, DELIBERATION AND FOR MALICE  
4 AND FOR INTENT TO KILL, AND WE ARE ENTITLED, SINCE WE  
5 HAVE CIRCUMSTANCIAL EVIDENCE, AND IT CAN BE INTERPRETED

6 BOTH WAYS, TO THE TRANSFERRED INTENT INSTRUCTION, GIVEN  
7 THE PHYSICAL SURROUNDINGS HERE AND THE TESTIMONY OF THE  
8 PEOPLE'S OWN WITNESSES.

9 I THINK THERE IS ENOUGH EVIDENCE TO JUSTIFY  
10 THAT GIVING OF THE INSTRUCTION TO THE JURY ON  
11 CIRCUMSTANCIAL EVIDENCE, LET THEM DETERMINE WHETHER IT'S  
12 PROVEN BEYOND A REASONABLE DOUBT THAT LYLE MENENDEZ  
13 SPECIFICALLY INTENDED TO KILL HIS MOTHER.

14 THE COURT: AND WHAT IS IT THAT YOU'RE ASKING FOR  
15 THE COURT TO DO?

16 MR. GESSLER: I AM ASKING THE COURT TO GIVE 8.65,  
17 TRANSFERRED INTENT INSTRUCTION, YOUR HONOR.

18 THE COURT: AND THAT INSTRUCTION SAYS:

19 "WHEN ONE ATTEMPTS TO KILL A  
20 CERTAIN PERSON, BUT BY MISTAKE OR  
21 INADVERTENCE KILLS A DIFFERENT PERSON, THE  
22 CRIME, IF ANY, SO COMMITTED, IS THE SAME  
23 AS THOUGH THE PERSON ORIGINALLY INTENDED  
24 TO BE KILLED HAD BEEN KILLED."

25 MR. GESSLER: THAT'S CORRECT, YOUR HONOR. BUT IT  
26 DOESN'T SIMPLY DISAPPEAR BECAUSE THE FIRST PERSON DID IN  
27 FACT GET KILLED. INTENT, THE MENS REA, IF YOU WOULD,  
28 THE STATE OF MIND FOR THE TIME THE TRIGGER WAS PULLED

2 THE COURT: OKAY. ANYTHING FURTHER?

3 MR. CONN: NOT TO MENTION THE COUP DE GRACE. WE  
4 MUST NOT OVERLOOK THE TESTIMONY OF ERIK MENENDEZ THAT IT  
5 WAS HIS BROTHER WHO RAN INTO THE ROOM AND PUT THE GUN TO  
6 HIS MOTHER'S FACE AND FIRED THAT LAST SHOT INTO HER  
7 FACE -- INTO HER CHEEK, AND EVEN THE EXPERT IN THIS CASE  
8 ESTABLISHES THAT THAT WAS THE LAST SHOT FIRED IN THIS  
9 CASE.

10 SO I WOULD SUBMIT THAT LYLE MENENDEZ IS  
11 CLEARLY RESPONSIBLE, BASED UPON THAT, FOR THE  
12 INTENTIONAL KILLING OF HIS MOTHER AND FIRST-DEGREE  
13 MURDER.

14 MR. GESSLER: FOR A COUP DE GRACE, YOUR HONOR,  
15 THE VICTIM MUST STILL BE ALIVE. ALL OF THE EVIDENCE  
16 HERE WAS THAT IT WAS PERIMORTEM OR POSTMORTEM. AT LEAST  
17 THERE IS SUBSTANTIAL EVIDENCE AND REASONABLE DOUBT AS TO  
18 THE TIME THAT SHOT WAS FIRED AS TO WHETHER SHE WAS  
19 ALREADY DEAD, OR TAKING HER LAST BREATH, WHICH DID NOT  
20 HASTEN DEATH.

21 SO I DON'T THINK THAT THEY CAN BASE THEIR  
22 THEORY ON WHAT THEY CALL THE COUP DE GRACE, WHEN ALL OF  
23 THE EXPERT EVIDENCE; DR. WECHT, DR. GOLDEN'S REPORT, IS  
24 TO THE CONTRARY, AND DR. LAWRENCE SAID HE CAN'T TELL  
25 ABOUT THAT WOUND, AND TALKED ABOUT -- JUST AS HE DID  
26 WITH JOSE MENENDEZ' PARESTHETIC PRESSURE AND OTHER  
27 REASONS YOU CAN'T TELL.

28 NOBODY HAS DISAGREED WITH THE PERIMORTEM OR



1 POSTMORTEM NATURE OF THAT PARTICULAR WOUND.

2 THE COURT: OKAY. I DON'T FIND THAT THERE IS  
3 SUBSTANTIAL EVIDENCE JUSTIFYING AN INSTRUCTION OF  
4 TRANSFERRED INTENT. I DON'T FIND THERE IS SUBSTANTIAL  
5 EVIDENCE TO CONCLUDE THAT THE KILLING OF MRS. MENENDEZ  
6 WAS BY MISTAKE OR INADVERTENCE.

7 MS. ABRAMSON: YOUR HONOR, I JUST WANT TO MAKE A  
8 RECORD ABOUT ONE THING.

9 BECAUSE OF THE WAY THE COURT HAS FORMULATED  
10 ITS RULING TODAY ON THE IMPERFECT SELF-DEFENSE, I JUST  
11 WANT TO INDICATE FOR THE RECORD THAT WHAT THE COURT  
12 SEEMS TO DO IN ITS ANALYSIS IS DETERMINE THAT THERE IS  
13 AN OBJECTIVE STANDARD OF IMMINENCE FOR IMPERFECT  
14 SELF-DEFENSE, JUST AS THERE IS FOR COMPLETE  
15 SELF-DEFENSE.

16 AND I WOULD POINT OUT THE CALIFORNIA  
17 SUPREME COURT HAD THE OPPORTUNITY IN 1994 IN IN RE  
18 CHRISTIAN S. TO MAKE THAT DETERMINATION, AND IT DID NOT  
19 DO SO.

20 I BELIEVE, AND I HAVE FELT ALL ALONG, FROM  
21 THE TIME THAT WE STARTED HAVING THESE INTELLECTUAL  
22 DISCUSSIONS ABOUT THE MEANING OF CHRISTIAN S. BACK IN  
23 AUGUST, THAT THE COURT IS READING IN A MEANING TO A  
24 FOOTNOTE IN CHRISTIAN S. THAT IT SIMPLY DOESN'T DESERVE.

25 THE COURT: THE FOOTNOTE IS THE WHOLE LAST PAGE  
26 OF THE OPINION.

27 MS. ABRAMSON: I UNDERSTAND. BUT WHAT THEY ARE  
28 SAYING IS WHAT THE PERSON MUST THINK -- THE PERSON MUST

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1 ACTUALLY BELIEVE THAT THEY ARE FACED WITH AN IMMINENT  
2 THREAT.

3 THERE IS NOTHING IN THAT OPINION THAT SAYS  
4 THAT WE ARE TO MEASURE THAT THREAT OBJECTIVELY TO SEE IF  
5 THEY'RE RIGHT. MY CLIENT DID NOT BELIEVE HE WAS GOING  
6 TO BE HARMED IN THE FUTURE. HE BELIEVED HE WAS GOING TO  
7 BE HARMED INSTANTANEOUSLY. HE COULDN'T PUT THE  
8 MOMENT -- AND HE SAID THIS 50 TIMES IN HIS TESTIMONY --  
9 HE COULDN'T PUT THE MOMENT ON IT, BECAUSE HE WAS IN  
10 MOTION, IN A PANIC SENSE OF MOTION, THAT LASTED I ASSUME  
11 LESS THAN TWO MINUTES FROM THE TIME HE FIRST WAS PLACED  
12 INTO THAT STATE UNTIL HE WALKED INTO THE DOORS OF THE  
13 DEN.

14 THERE IS -- I CAN EASILY SEE THE DIFFERENCE  
15 BETWEEN SOMEONE SAYING: "I FEARED THAT I WAS GOING TO  
16 BE KILLED IN 20 MINUTES," OR "I FEARED WHEN HE CAME BACK  
17 FROM THE GROCERY STORE HE WAS GOING TO KILL ME," OR "I  
18 FEARED WHEN HE WOKE UP HE WAS GOING TO KILL ME."

19 THAT IS NOT THE FEAR OF IMMINENT HARM. ALL  
20 ARIS EVER SAID IS THAT SLEEP IS NOT IMMINENT, WITH WHICH  
21 ONE CAN OBVIOUSLY AGREE. IT WENT NO FARTHER THAN THAT.

22 I THINK THIS COURT IS GOING WAY BEYOND WHAT

23 THE CALIFORNIA SUPREME COURT HAS SAID, BECAUSE I THINK  
24 THE RESULT OF IT IS THERE IS NO LONGER ANY IMPERFECT  
25 SELF-DEFENSE.

26 AND THERE CERTAINLY ISN'T ANY IMPERFECT  
27 SELF-DEFENSE, IF THE COURT IS CORRECT, FOR VICTIMS OF  
28 DOMESTIC VIOLENCE. THIS WHOLE AREA OF LAW, AS THIS

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1 COURT KNOWS, HAS BEEN UTILIZED TO INDICATE, IN THE ARIS  
2 CASE AND CASES LIKE IT, AS SORT OF AN EXTENSION OF THE  
3 PREMISE THAT IF THERE HAVE BEEN PRIOR THREATS, WHERE  
4 THERE HAS BEEN PRIOR HARM, PENA SAYS, IS ENTITLED TO ACT  
5 QUICKER. QUICKER MEANS ABSOLUTELY BEFORE IT IS  
6 ABSOLUTELY IMMINENT.

7 I MEAN, IT'S NEVER BEEN DEFINED. QUICKER  
8 MEANS QUICKER IN THESE DOMESTIC VIOLENCE SITUATIONS. IT  
9 IS ABSOLUTELY CHARACTERISTIC THAT THE VICTIM OF THE  
10 DOMESTIC VIOLENCE DOES NOT WAIT UNTIL THE LAST POSSIBLE  
11 SECOND TO REACT. IF THEY DID, THERE WOULD BE NO NEED  
12 FOR IMPERFECT SELF-DEFENSE, BECAUSE EVEN PERFECT  
13 SELF-DEFENSE DOESN'T REQUIRE THAT YOU BE RIGHT ABOUT THE  
14 ACTUAL THREAT. THERE IS NO NEED TO PROVE, FOR  
15 SELF-DEFENSE, TRUE DANGER. ONLY THE APPEARANCE OF TRUE  
16 DANGER.

17 SO IF YOU READ IN AN OBJECTIVE IMMINENCE  
18 STANDARD FOR IMPERFECT SELF-DEFENSE, WHAT YOU ARE SAYING

19 IS THE PERSON, TO AVAIL THEMSELF OF THIS, MUST WAIT  
20 UNTIL THINGS ARE CLOSE ENOUGH THAT THEY CAN MAKE THEIR  
21 ASSESSMENT. AND IF THAT IS TRUE, THEY ARE NO LONGER  
22 ACTING UNREASONABLY. THEY ARE NO LONGER IN A POSITION  
23 WHERE THEY COULD MISUNDERSTAND WHAT'S HAPPENING.

24 THE WHOLE POINT OF IMPERFECT SELF-DEFENSE  
25 WAS THAT WHERE PEOPLE ARE UNREASONABLE, THEY ARE  
26 UNREASONABLE ABOUT IMMINENCE.

27 NOW, WHAT THE COURT IS SAYING IN  
28 CHRISTIAN S. IS, OBVIOUSLY, IF THEY KNOW IT ISN'T

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1 IMMINENT, THEN THEY CANNOT AVAIL THEMSELF OF THIS RULE.  
2 BUT IF THEY HONESTLY OR ACTUALLY BELIEVE IT IS, THEN  
3 THEY CAN. THAT IS ALL THE CASE SAID.

4 THE COURT HAS NOW READ IN WHAT WAS MEANT IN  
5 ARIS BY SELF-DEFENSE OBJECTIVE IMMINENCE, AND ELIMINATED  
6 THE POSS -- I CAN'T CONCEIVE, I HAVE TRIED -- AND MAYBE  
7 THERE IS SOME TINY LITTLE CIRCUMSTANCES WHERE YOU COULD  
8 CONCEIVE THAT YOU COULD BE ABSOLUTELY RIGHT ABOUT  
9 IMMINENCE, REASONABLE ABOUT IMMINENCE AND UNREASONABLE  
10 ABOUT THE NATURE OF THE HARM, BUT STILL BELIEVE THAT YOU  
11 HAVE AN ACTUAL BELIEF THAT SUCH HARM EXISTS.

12 I CAN'T SEE THAT AS A TRIPARTITE EXAMPLE.  
13 I HAVE TRIED TO THINK OF HYPOTHETICALS ALONG THAT LINE,  
14 BUT IF -- EVEN IF THERE WERE ONE OR TWO FREQUENT KEY

15 SITUATIONS WHERE THAT WOULD BE TRUE, I THINK THAT IS  
16 UNDULY RESTRICTING WHAT THE COURT IN CHRISTIAN S. CALLED  
17 A NARROW EXCEPTION.

18 I AGREE IT'S A NARROW EXCEPTION. WE DON'T  
19 WANT PEOPLE AROUND SAYING: "I WAS AFRAID HE WAS TAKING  
20 A PLANE FROM LA GUARDIA. HE WAS GOING TO KILL ME  
21 TOMORROW, SO I FLEW THERE AND KILLED HIM FIRST."

22 I UNDERSTAND THAT AS A MATTER OF PUBLIC  
23 POLICY.

24 BUT WHERE YOU HAVE SOMEONE, WHERE IT ISN'T  
25 REALLY DISPUTABLE THAT THE PERSON HAS AN OVERWHELMING  
26 SENSE OF IMMINENT HARM, AND IF THEY ARE UNREASONABLE,  
27 THE REASON THEY ARE UNREASONABLE IS NOT A QUIRK OF  
28 THEIRS, IS NOT CREATED BY THEM, BUT A PRODUCT OF THE

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1 TREATMENT AT THE HANDS OF THE VICTIM.

2 AS A MATTER OF PUBLIC POLICY THERE IS  
3 NOTHING OFFENSIVE OF THE LAW OF ALLOWING THAT PERSON TO  
4 AVAIL THEMSELF OF IMPERFECT SELF-DEFENSE, AND YOU CAN  
5 ENGAGE IN INTELLECTUAL EXERCISE AND REDEFINE THE TERMS,  
6 BUT I DON'T BELIEVE THAT THE SUPREME COURT IN  
7 CHRISTIAN S. COMPELS THE COURT TO MAKE THE RULING THAT  
8 IT DID.

9 THE OTHER ASPECT I WANT TO BE HEARD ON IS  
10 HOW MISLED WE HAVE BEEN BY THE WAY IN WHICH THE COURT

11 HAS ALLOWED EVIDENCE IN THIS TRIAL, AND THEN RESULTING  
12 IN FRIDAY'S RULING.

13 I AM WELL AWARE OF WHAT THE COURT SAID ON  
14 AUGUST 1ST WHEN IT MADE THE DECISION THAT IT WOULD ALLOW  
15 EVIDENCE IN ON IMPERFECT SELF-DEFENSE, BECAUSE IT WAS  
16 RELEVANT. I AM WELL AWARE THAT THE COURT SAID IT WAS  
17 NOT MAKING A FINAL DECISION ON INSTRUCTIONS.

18 BUT, JUST FROM A DUE PROCESS, FAIR TRIAL  
19 STANDPOINT, IT HAS BEEN PERFECTLY OBVIOUS TO THE COURT,  
20 I AM SURE, THAT THE CORE OF OUR DEFENSE FOR ERIK  
21 MENENDEZ WAS IMPERFECT SELF-DEFENSE;

22 THAT WE PUT ON EXPERTS WHO WOULD ADDRESS THAT  
23 ISSUE. IN FACT, AS RECENTLY AS WHEN DR. WILSON WAS ON  
24 THE STAND, WE HAD LENGTHY COLLOQUIES ABOUT WHAT THE ARIS  
25 COURT SAID, ABOUT WHAT WAS RELEVANT ABOUT EXPERT  
26 TESTIMONY, AND THE ISSUE OF IMMINENCE, AND THE COURT  
27 MADE A RULING, AND HE WAS PERMITTED TO TESTIFY ABOUT  
28 CERTAIN THINGS.

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1 THE EVIDENCE IN THIS TRIAL IS REALLY NO  
2 DIFFERENT THAN IN THE FIRST TRIAL ON THIS ISSUE.  
3 NOTHING CHANGED. THE ROOM DIDN'T MOVE. MY CLIENT  
4 DIDN'T GO ANYWHERE ELSE. NOTHING ELSE HAPPENED, EXCEPT  
5 THAT HE MADE EXPLICIT IN THIS TRIAL THAT BEFORE HE  
6 FIRED, HE SAW HIS PARENTS STANDING, AND HE BELIEVED HIS

7 FATHER WAS COMING TOWARDS HIM. THAT'S THE ONLY  
8 DIFFERENCE.

9 AND THAT COULDN'T POSSIBLY HAVE HURT US.  
10 THAT DIDN'T TAKE ANYTHING AWAY FROM THE ANALYSIS.

11 MOREOVER, THERE IS NOTHING DIFFERENT IN THE  
12 FRAMEWORK OF IMPERFECT SELF-DEFENSE FROM WHAT ARIS --  
13 THE CHRISTIAN S. HOLDING ADOPTS ARIS, ACCORDING TO  
14 CHRISTIAN S.

15 AND CERTAINLY SINCE AUGUST 1ST, WHEN THE  
16 COURT MADE THAT RULING, NOTHING HAS CHANGED BUT THE  
17 COURT'S MIND. AND ALTHOUGH THE COURT IS FREE TO CHANGE  
18 ITS MIND, I AM NOT SURE THAT IT'S APPROPRIATE THAT IT  
19 CHANGE ITS MIND AFTER WE HAVE PUT IN ALL THE EVIDENCE  
20 AND RESTED, AND NOW WE FIND OUT THAT IT IS WANTING,  
21 BASED ON AN INTELLECTUAL ANALYSIS OF CHRISTIAN S., WHICH  
22 I THINK HAS GONE TOO FAR. I DO NOT BELIEVE THIS COURT  
23 IS COMPELLED TO READ IN THIS OBJECTIVE IMMINENCE  
24 STANDARD. I DO BELIEVE IT EVISCERATES IMPERFECT  
25 SELF-DEFENSE.

26 THIS ISN'T THE END -- THIS CASE ISN'T THE  
27 BE-ALL AND END-ALL OF JURISPRUDENCE IN THIS STATE. IF  
28 THIS COURT IS RIGHT, THEN THE SUPREME COURT HAS

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1 EVISCERATED IMPERFECT SELF-DEFENSE FOR THE VICTIMS OF  
2 DOMESTIC VIOLENCE.

3 NOT ONLY DO I NOT BELIEVE THEY DID THAT,  
4 THEY TALK ABOUT THAT VERY CONCERN IN CHRISTIAN S., THAT  
5 THAT IS THE CLASS OF PEOPLE MOST CONCERNED WITH  
6 PRESERVING IMPERFECT SELF-DEFENSE, AND THAT IS THE CLASS  
7 OF PEOPLE, AS THE ARIS COURT EVEN POINTS OUT, WHERE  
8 PEOPLE REACT BEFORE ABSOLUTE, CLEAR, OBJECTIVE  
9 INTELLECTUAL IMMINENCE OCCURS.

10 BECAUSE OF THE POWER IMBALANCE WITHIN THESE  
11 FAMILIES, BECAUSE OF THE CONCERN OF DOMESTIC VIOLENCE  
12 VICTIMS, THAT THEY CANNOT ACT WHEN THEY ARE CONFRONTED  
13 BY THE PEOPLE WHO HAVE DOMINATED THEM, THEY TEND TO  
14 FREEZE, WHICH I WOULD POINT OUT IS PRECISELY WHAT MY  
15 CLIENT SAID IS THE REASON HE HAD TO GET TO THAT ROOM  
16 BEFORE THEY CAME OUT, BECAUSE HE WAS CONCERNED HE WOULD  
17 FREEZE.

18 I SAY THIS TO THE COURT BECAUSE I DO NOT  
19 THINK IT IS INAPPROPRIATE FOR A TRIAL COURT TO CONSIDER  
20 WHAT THE SUPREME COURT IS UNWILLING TO CONSIDER, WHICH  
21 IS WHAT ARE THE RAMIFICATIONS OF TAKING AN INTELLECTUAL  
22 APPROACH, OF READING IN MORE TO THE CASE THAN WHAT THE  
23 SUPREME COURT SAID.

24 AND THE COURT ALSO INDICATED THAT IT WAS  
25 NOT GOING TO ACCEPT WHAT THE CALJIC COMMITTEE FORMULATED  
26 IN 5.17 AS THEIR UNDERSTANDING OF WHAT THE SUPREME COURT  
27 MEANT.

28 NOW, AGAIN, THIS COURT HAS REAFFIRMED,



1 QUITE APPROPRIATELY, THAT IT IS NOT MAKING CREDIBILITY  
2 CALLS. BUT I ALSO THINK IT HAS TO REALIZE THAT IT'S NOT  
3 HERE TO REWRITE THE LAW ON THIS ISSUE. BELIEVE ME, THE  
4 CALIFORNIA SUPREME COURT WAS INVITED. WE SAW ALL THE  
5 BRIEFING IN CHRISTIAN S. WE HAD GREAT CONCERNS ABOUT  
6 CHRISTIAN S. DURING THE FIRST TRIAL.

7 THAT COURT WAS INVITED BY THE ATTORNEY  
8 GENERAL'S OFFICE TO ESTABLISH NOT ONLY AN OBJECTIVE  
9 IMMINENCE STANDARD FOR IMPERFECT SELF-DEFENSE, BUT TO  
10 RULE, AS IN SAILLE, THAT THE MODIFICATION OF EXPRESS  
11 MALICE ELIMINATED IMPERFECT SELF-DEFENSE AS A DEFENSE,  
12 THAT IT WAS AKIN TO DIMINISHED CAPACITY.

13 THE SUPREME COURT REFUSED TO DO EITHER.  
14 WHAT THAT COURT REFUSED TO DO, I WOULD ASK THIS COURT TO  
15 REFUSE TO DO, TO MAKE BAD LAW BECAUSE THIS IS A HARD  
16 CASE.

17 THE COURT: ALL RIGHT.

18 MS. ABRAMSON: NOW, ONE OTHER THING, YOUR HONOR.

19 THE COURT: ALL RIGHT.

20 MS. ABRAMSON: AND WE WOULD ASK THE COURT'S  
21 INDULGENCE.

22 THE COURT: MAKE IT QUICK, COUNSEL. MAKE IT  
23 QUICK.

24 MS. ABRAMSON: WE ARE TRYING TO FILE A WRIT TODAY  
25 ON THE COURT'S RULING OF PROVOCATION, NOW THAT WE HAVE  
26 THAT RULING, WHICH IT'S QUITE LATE IN THE MORNING. WE  
27 NEED A MINUTE ORDER AND A STAY UNTIL TOMORROW BEFORE

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1 ACTUALLY, IT'S ON BOTH, AN IMPERFECT SELF-DEFENSE AND  
2 PROVOCATION.

3 THE COURT: ALL RIGHT.

4 JUST TO RESPOND BRIEFLY TO YOUR REMARKS.

5 YOU REFER TO AUGUST THE 1ST OF 1995, AND I ALSO REFERRED  
6 TO THAT LAST FRIDAY.

7 THAT WAS A PROCEEDING IN THIS COURT DEALING  
8 WITH THE ISSUE OF IMPERFECT SELF-DEFENSE, AND THE ONLY  
9 REASON THAT ISSUE AROSE AT THAT TIME WAS TO PERMIT THE  
10 COURT TO CONSIDER WHETHER OR NOT EVIDENCE OF MENTAL  
11 STATE WOULD BE ADMISSIBLE IN THE TRIAL.

12 THE TRIAL HAD YET TO HAVE BEGUN. THE  
13 EVIDENCE PHASE OF THE TRIAL HAD NOT YET BEGUN, AND THERE  
14 WERE HEARINGS RELATING TO ADMISSIBILITY OF EVIDENCE, AND  
15 BEFORE -- AND TO GIVE THE PARTIES AN OPPORTUNITY TO BE  
16 HEARD, AND TO PRESENT THEIR VIEWS, AND TO HAVE A FEELING  
17 AS TO WHAT EVIDENCE WOULD OR WOULD NOT BE ADMISSIBLE,  
18 INCLUDING THE EXPERT EVIDENCE ULTIMATELY OFFERED BY THE  
19 DEFENDANT, ERIK MENENDEZ.

20 THE COURT SUGGESTED TO COUNSEL THAT THE  
21 THRESHOLD ISSUE SHOULD BE WHETHER OR NOT THERE WAS ANY  
22 EVIDENCE SUFFICIENT TO JUSTIFY THE ADMISSIBILITY OF THIS  
23 EVIDENCE THEORY OF IMPERFECT SELF-DEFENSE, AND THE COURT

24 MADE CERTAIN RULINGS AT THAT TIME.  
25 AND ALSO AT THAT TIME, AS I STATED ON  
26 FRIDAY, I OBSERVED MY VIEW OF IN RE CHRISTIAN S., THAT  
27 THERE IS BOTH A SUBJECTIVE AND OBJECTIVE ELEMENT TO THE  
28 CONCEPT OF IMMINENT DANGER, AND I REFERRED TO THAT ON

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1 FRIDAY, AND COUNSEL WERE FULLY AWARE OF THAT ANALYSIS  
2 WAY BACK IN AUGUST OF LAST YEAR.

3 THEN AT THE CONCLUSION OF THAT PHASE OF THE  
4 HEARING, THE COURT STATED THE FOLLOWING. THIS WAS ON  
5 PAGE 30,888, STARTING AT LINE 9.

6 (READING:)

7 "BASED ON THE EVIDENCE PRESENTED IN  
8 THE FIRST TRIAL, AND AGAIN, THERE IS NO  
9 ASSURANCE THAT THE SAME EVIDENCE WILL BE  
10 PRESENTED IN THE RETRIAL, THAT THE COURT  
11 ACCEPTS IT AS AN OFFER OF PROOF FOR THE  
12 PURPOSE OF DEALING WITH THE ISSUE OF  
13 RELEVANCE OF THE EXPERT TESTIMONY.

14 "IN ANALYZING THE SITUATION, THE  
15 EVIDENCE PRESENTED IN THE TRIAL, THE FIRST  
16 TRIAL, IT'S VERY CLOSE -- IT'S A VERY  
17 CLOSE ISSUE ON WHETHER THERE WAS  
18 SUBSTANTIAL EVIDENCE OF IMMINENT DANGER.

19 "MY VIEW IS THAT BECAUSE OF THE

20 CLOSENESS OF THE ISSUE; THE FACT THAT THE  
21 PROSECUTION ANALYZED IT IN THE FIRST TRIAL  
22 AS A SITUATION THAT REQUIRED THE  
23 INSTRUCTION ON IMPERFECT SELF-DEFENSE; THE  
24 FACT THAT SUCH AN INSTRUCTION WAS GIVEN IN  
25 THE FIRST TRIAL, AND RECOGNIZING THE FACT  
26 THAT THE SUPREME COURT HAS ADDRESSED THE  
27 ISSUE IN IN RE CHRISTIAN S., IT IS MY VIEW  
28 THAT BECAUSE IT IS SUCH A CLOSE ISSUE,

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1 THAT THE COURT IS INCLINED TO ANALYZE AND  
2 RULE THAT FOR THE PURPOSE OF THIS  
3 DISCUSSION, THERE WAS SUBSTANTIAL EVIDENCE  
4 TO JUSTIFY THE IMPERFECT SELF-DEFENSE  
5 INSTRUCTION TO BE GIVEN TO THE JURY.

6 "SO FOR THIS ANALYSIS, THE COURT  
7 WILL MAKE THAT RULING, UNDERSTANDING FULL  
8 WELL THAT THESE MATTERS, AS WE HAVE  
9 DISCUSSED, ARE MADE SOLELY FOR THE PURPOSE  
10 OF ANALYZING THE ISSUE OF RELEVANCE OF THE  
11 PROFFERED EVIDENCE."

12 THAT WAS THE COURT'S STATEMENT AT THE TIME,  
13 AND THE COURT MADE THAT STATEMENT TO PUT THE PARTIES ON  
14 NOTICE THAT IT WAS DOING SO SOLELY FOR THE PURPOSE OF  
15 ANALYZING THE ISSUE OF RELEVANCE AND ADMISSIBILITY OF

16 EVIDENCE; THAT THE COURT COULD ADDRESS THESE ISSUES AS  
17 THEY AROSE DURING THE COURSE OF THE TRIAL.

18 THE COURT DID NOT INDICATE HOW IT WOULD  
19 INSTRUCT THE JURY AT THE END OF THE CASE.

20 AS I OBSERVED, I HAD NO WAY OF KNOWING  
21 WHAT THE EVIDENCE WOULD BE, AND HOW IT WOULD BE  
22 PRESENTED DURING THE RETRIAL.

23 AND AS IT TURNED OUT, CERTAINLY THE  
24 EXAMINATION OF THE DEFENDANT, ERIK MENENDEZ, AND THE  
25 CROSS-EXAMINATION OF HIM, CRYSTALLIZED THE NATURE OF HIS  
26 BELIEF THAT HE HAD NO BELIEF OF IMMINENT DANGER. HIS  
27 BELIEF WAS OF DANGER IN THE FUTURE; AND THEREFORE, THERE  
28 WAS NO LEGAL BASIS FOR AN INSTRUCTION ON IMPERFECT

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1 SELF-DEFENSE.

2 THE COURT IS NOT MAKING NEW LAW. THE COURT  
3 IS ONLY APPLYING THE LAW AS ANNOUNCED BY THE APPELLATE  
4 COURTS, INCLUDING THE CALIFORNIA SUPREME COURT,  
5 AS I UNDERSTAND THAT LAW. AND IN DOING SO, I HAVE MADE  
6 THE RULINGS THAT I HAVE MADE.

7 I AM NOT ADDRESSING ANY ISSUES OUTSIDE OF  
8 THE REALM OF THIS CASE. THESE RULINGS ARE NOT MADE TO  
9 ADDRESS OTHER ISSUES IN OTHER FORUMS OR TO ADDRESS OTHER  
10 CIRCUMSTANCES OR SITUATIONS, ONLY THE EVIDENCE PRESENTED  
11 IN THIS TRIAL, AND THE LEGAL ISSUES THAT ARISE

12 THEREFROM.

13 THEREFORE, THE COURT'S RULINGS WILL STAND.

14 AS FAR AS THE REQUEST FOR A STAY, THAT  
15 REQUEST WILL BE DENIED. THIS CASE WILL GO TO ARGUMENT,  
16 AND WE WILL FINISH OFF OUR DISCUSSION OF INSTRUCTIONS SO  
17 THAT WE CAN HAVE ARGUMENT THIS AFTERNOON.

18 MS. TOWERY: YOUR HONOR, MAY WE HAVE AN IMMEDIATE  
19 MINUTE ORDER WITH RESPECT TO HEAT OF PASSION?

20 THE COURT: AS SOON AS THE CLERK CAN GET IT DONE.  
21 I WILL INSTRUCT HER TO PREPARE A MINUTE ORDER REFLECTING  
22 THE EVENTS THAT HAVE TRANSPIRED SO FAR ON THIS SUBJECT  
23 TODAY, WITH THE UNDERSTANDING THAT A FULLER MINUTE ORDER  
24 FOR THE BALANCE OF THE DAY WILL HAVE TO BE PREPARED BY  
25 THE CLERK.

26 MS. TOWERY: REALLY, YOUR HONOR, FOR PURPOSES OF  
27 THE WRIT, WE JUST NEED A MINUTE ORDER INDICATING THAT  
28 THE COURT REAFFIRMED ITS RULING WITH RESPECT TO HEAT OF

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1 PASSION ON FRIDAY.

2 THE COURT: OKAY.

3 MS. TOWERY: THANK YOU.

4 THE COURT: AND LET'S GO TO INSTRUCTIONS HERE.  
5 THERE WERE SOME LOOSE ENDS.

6 MS. ABRAMSON: YES, YOUR HONOR. I WOULD STILL --  
7 I WOULD ASK THE COURT TO CONSIDER ONCE MORE THE

8 INSTRUCTION THAT WAS GIVEN ON PAGE 57 OF THE PREVIOUS  
9 TRIAL. I HAVE LOOKED IT OVER --  
10 THE COURT: I DON'T HAVE THAT. IT WAS ONE OF  
11 YOUR SPECIALS AS WELL?  
12 MS. ABRAMSON: YES, YOUR HONOR. IT WAS:  
13 "DEFENDANT MAY ACT IN HEAT OF  
14 PASSION AT THE TIME OF THE KILLINGS AS A  
15 RESULT OF A SERIES OF EVENTS WHICH OCCUR  
16 OVER A CONSIDERABLE PERIOD OF TIME."  
17 I LOOKED BACK AT -- I THINK IT'S 8.44 --  
18 WHICH IS THE CALJIC VERSION, AND IT DOES NOT SAY:  
19 "SERIES OF EVENTS OVER A CONSIDERABLE TIME." IT SIMPLY  
20 TALKS OF PROVOCATION BEING OF A LONG DURATION.  
21 CONCEPTUALLY THAT'S DIFFERENT.  
22 SO WE ARE ASKING UNDER BORCHERS/BERRY THAT  
23 WE ALSO HAVE THIS INSTRUCTION.  
24 THE COURT: GO AHEAD. HAD YOU FINISHED?  
25 MS. ABRAMSON: IT'S NO. 4, YOUR HONOR.  
26 MS. TOWERY: IN THE ORIGINAL PACKET FOR THE  
27 DEFENDANT, LYLE MENENDEZ.  
28 MS. ABRAMSON: YES, THE ORIGINAL PACKET, WITH

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1 WHICH I JOIN. I DON'T SEE THE HARM.  
2 THE COURT: 8.42 IS THE INITIAL INSTRUCTION?  
3 MS. ABRAMSON: 8.42. I DON'T SEE THE HARM IN

4 GIVING THIS, YOUR HONOR.

5 THE COURT: IT SAYS: "LEGALLY ADEQUATE  
6 PROVOCATION MAY OCCUR OVER A SHORT OR CONSIDERABLE  
7 PERIOD OF TIME."

8 THAT'S 8.42.

9 MS. ABRAMSON: BUT THAT MAKES IT SOUND LIKE IT'S  
10 LONG IN DURATION. WE ARE TALKING ABOUT A SERIES OF  
11 EVENTS.

12 THE COURT: I DON'T THINK IT SAYS THAT.

13 OKAY. THAT REQUEST IS DENIED. I THINK WE  
14 HAVE ALREADY DISCUSSED THAT.

15 MS. ABRAMSON: YOUR HONOR, I AM ALSO REQUESTING  
16 8.45, INVOLUNTARY MANSLAUGHTER, BASED ON PEOPLE VERSUS  
17 BOBO, BUT I DIDN'T QUITE KNOW HOW TO WRITE IT.

18 THE COURT: WHAT DID MR. BOBO DO?

19 MS. ABRAMSON: IT WAS MRS. BOBO. MS. BOBO, SHE  
20 DID ONE OF THE MOST ATROCIOUS THINGS I HAVE EVER READ  
21 ABOUT IN A REPORTED CASE. SHE WAS QUITE CRAZY AT THE  
22 TIME.

23 MS. BOBO KILLED HER CHILDREN, SET HERSELF  
24 AND THEM ON FIRE. THAT'S A CASE THAT FOLLOWED -- THAT  
25 IS USING THE ANALYSIS OF THE NEW DEFINITION OF MALICE.

26 AND ALL THE CASE SAYS IS BECAUSE OF THE  
27 EVIDENCE OF DIMINISHED CAPACITY AND THE OVERTURNING OF  
28 ONLY, AND THE FACT THAT NEVERTHELESS THE LEGISLATURE



1 CAN'T PROHIBIT A DEFENDANT FROM SHOWING THAT HE DID NOT,  
2 IN FACT, HAVE A GIVEN MENTAL STATE, ALTHOUGH VOLUNTARY  
3 MANSLAUGHTER IS NO LONGER AVAILABLE AS LESSER-INCLUDED  
4 WHEN A DEFENDANT PRESENTS MENTAL STATE EVIDENCE,  
5 INVOLUNTARY MAY BE, AND THAT'S THE ULTIMATE OPINION OF  
6 PEOPLE VERSUS BOBO, AND --

7 MS. TOWERY: I HAVE THE CITATION FOR THAT, IF YOU  
8 WANT IT, YOUR HONOR. IT'S 29 CAL.APP.3D 1417, AND 3  
9 CAL.RPTR. 2D, 747.

10 MS. ABRAMSON: AND IT GIVES A VERY THOROUGH  
11 ANALYSIS OF THE CHANGE IN THE LAW BASED ON THE REPEALING  
12 OF DIMINISHED CAPACITY, AND THE RECASTING OF THE  
13 DEFINITION OF MALICE.

14 BUT IT DOES SEEM, AND IT MAKES CERTAIN  
15 LOGICAL SENSE, THAT IF ONE PUTS ON MENTAL STATE EVIDENCE  
16 THAT NEGATES OR THAT INDICATES A PERSON DIDN'T ACTUALLY  
17 HAVE A PARTICULAR MENTAL STATE -- THE MENTAL STATE AT  
18 LEAST OF INTENT TO KILL, AN INVOLUNTARY IS THE  
19 APPROPRIATE INSTRUCTION.

20 THE COURT: PEOPLE WISH TO BE HEARD?

21 MR. CONN: WE HAVE ALREADY ARGUED THIS, AND THE  
22 COURT CONCLUDED CORRECTLY THAT INVOLUNTARY MANSLAUGHTER  
23 DOES NOT APPLY TO THIS CASE. THERE IS SIMPLY NO  
24 EVIDENCE TO SUPPORT THAT THEORY OF THE CASE.

25 I WOULD SUBMIT THAT IT SHOULD BE DENIED.

26 MS. ABRAMSON: I THINK THERE IS MENTAL STATE  
27 EVIDENCE, YOUR HONOR, THAT SUPPORTS THAT THEORY OF THE  
28 CASE. THERE IS CONFLICT IN THE EVIDENCE BETWEEN

1 DR. DIETZ AND DR. WILSON CONCERNING WHETHER OR NOT MY  
2 CLIENT WAS IN THE -- WAS ACTUALLY PROCESSING OR NOT  
3 PROCESSING WHAT COULD BE CALLED HIGHER CORTICAL THOUGHT  
4 AT THE TIME, AND I THINK THAT'S THE ISSUE.

5 WE ARE NO LONGER TALKING ABOUT HIS FEAR, OR  
6 ANYTHING LIKE THAT. WE ARE TALKING ABOUT HIS MENTAL  
7 DISORDER. AND AS THE BOBO CASE INDICATES, THE PEOPLE  
8 STILL HAVE THE BURDEN OF PROVING THAT HE ACTUALLY FORMED  
9 THE MENTAL STATES, AND HE STILL HAS THE RIGHT TO SUBMIT  
10 MEDICAL EVIDENCE TO SHOW THAT HE DID NOT.

11 THE COURT: I WILL LOOK AT BOBO BEFORE WE HAVE A  
12 RULING.

13 MS. TOWERY: YOU MIGHT WANT TO LOOK AT SAILLE AS  
14 WELL, YOUR HONOR.

15 THE COURT: WELL, I AM FAMILIAR WITH THAT.

16 MS. TOWERY: OKAY.

17 THE COURT: WHAT ELSE ON INSTRUCTIONS HERE?

18 MS. ABRAMSON: WELL, I GAVE YOU 3.32, YOUR HONOR,  
19 BUT IT'S JUST A SORT OF --

20 THE COURT: THE PROBLEM WITH 3.32 IS THIS: IT  
21 REALLY IS AN INSTRUCTION TO LIMIT THE USE OF THIS  
22 EVIDENCE FOR ONLY CERTAIN PURPOSES.

23 THE PROBLEM IS THAT, FIRST OF ALL, THE  
24 DEFENSE HAS OFFERED THIS EVIDENCE OF MENTAL DISORDER FOR  
25 OTHER PURPOSES. YOU HAVE OFFERED IT TO SHOW THAT IT

26 WOULD CORROBORATE THE DEFENDANT'S TESTIMONY ABOUT  
27 CERTAIN THINGS.

28 MS. ABRAMSON: YOU SAID IT COULDN'T BE USED FOR

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1 THAT.

2 THE COURT: BUT YOU OFFERED IT, AND IT WAS  
3 RECEIVED, AND YOU PUT IT ON FOR THAT. AND IT WOULD  
4 DISPEL CERTAIN CONCEPTIONS ABOUT THINGS.

5 MS. ABRAMSON: IT WAS ALSO PUT ON TO SHOW WHAT  
6 HIS MENTAL STATE WAS.

7 THE COURT: BUT IT WAS PUT ON FOR OTHER THINGS.

8 MS. ABRAMSON: AND YOU HAVE DENIED ME THE RIGHT  
9 TO THOSE OTHER THINGS.

10 THE COURT: NO, I DIDN'T.

11 MS. ABRAMSON: YES, BY FAILING TO INSTRUCT ON  
12 OTHER THINGS.

13 THE FACT OF THE MATTER IS, WE PUT ON  
14 EVIDENCE OF A MENTAL DISEASE, DEFECT OR DISORDER, AND  
15 THIS IS THE STANDARD INSTRUCTION GOING BACK HISTORICALLY  
16 FOR DIMINISHED -- THIS IS THE DIMINISHED ACTUALITY  
17 INSTRUCTION. THERE IS NOTHING ELSE LEFT IN THE LAW NOW  
18 BUT THIS.

19 WE PUT ON THAT EVIDENCE IN THE FORM OF A  
20 DISORDER, BECAUSE PRETRIAL IT WAS DETERMINED THAT IT  
21 WASN'T ENOUGH TO SIMPLY DO -- TO PUT ON EVIDENCE TO

22 DISPEL COMMON MISPERCEPTIONS, BUT THAT NONE OF IT WOULD  
23 BE ADMISSIBLE UNLESS IT ROSE TO THE LEVEL OF A  
24 DIAGNOSABLE DISORDER OR SYNDROME.  
25 SO WE HAVE PUT ON EVIDENCE OF A MENTAL  
26 DISORDER AND HOW THAT DISORDER AFFECTS A PERSON'S MENTAL  
27 STATE AT THE TIME OF THE CRIME. IT IS NO DIFFERENT THAN  
28 IF WE HAD PUT ON EVIDENCE OF SCHIZOPHRENIA, AND WE ARE

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1 ENTITLED TO AN INSTRUCTION AS TO HOW THAT EVIDENCE OF  
2 MENTAL STATE CAN BE USED CONCERNING THE DEFENDANT'S  
3 ACTUALITY OF FORMING VARIOUS MENTAL STATES THAT ARE HERE  
4 INVOLVED, PREMEDITATION, DELIBERATION AND MALICE  
5 AFORETHOUGHT.

6 IT'S RECEIVED FOR A LIMITED PURPOSE, IS HOW  
7 THE INSTRUCTION HAS ALWAYS BEEN USED. THERE IS NOTHING  
8 IN THE USE NOTES THAT TELL ME WHY IT'S INDICATED THAT  
9 WAY, BUT I AM MORE THAN HAPPY TO TAKE OUT THAT LANGUAGE.  
10 THE FACT IS MENTAL DISEASE ISN'T OFFERED HERE AS AN  
11 EXCUSE FOR THE CRIME, OR AS RESULTING IN A NOT GUILTY  
12 JUST BECAUSE SOMEONE IS ILL. IT'S ONLY COMING IN FOR  
13 THAT PURPOSE, AND YOU ARE TELLING THEM THAT HERE.

14 THE COURT: OKAY. AND WHAT IS THE PEOPLE'S  
15 POSITION?

16 MS. ABRAMSON: AND THEY CAN ONLY CONSIDER IT FOR  
17 WHETHER THEY CAN DETERMINE WHETHER HE HAD THESE

18 REQUISITE MENTAL STATES.  
19 THE EVIDENCE IS IN, AND THE PEOPLE  
20 CERTAINLY DEALT WITH IT. WHATEVER MY ORIGINAL PURPOSE  
21 MAY HAVE BEEN, THE WHOLE PURPOSE FOR CALLING DR. DIETZ  
22 WAS WHETHER IT DEALT WITH PREMEDITATION AND DELIBERATION  
23 AND MENTAL STATEMENT.  
24 THE COURT: WHAT IS THE PEOPLE'S POSITION?  
25 MR. CONN: WE WOULD OPPOSE THIS INSTRUCTION, YOUR  
26 HONOR. I THINK THE JURY HAS HEARD THE EVIDENCE UP TO  
27 THIS POINT WITHOUT A LIMITING INSTRUCTION, AND THERE IS  
28 NO REASON NOW WHY THEY SHOULD BE GIVEN A LIMITING

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1 INSTRUCTION WITH REGARD TO THAT PARTICULAR EVIDENCE.  
2 ONE OF THE REASONS WHY IS IT WILL JUST LEAD TO A  
3 DISPUTE, AT LEAST FOR WHAT PURPOSE THE EVIDENCE CAME IN.  
4 THERE HAS BEEN NO INDICATION UP TO THIS  
5 TIME THAT IT WAS OFFERED TO CHALLENGE THE MENTAL STATE  
6 REQUIREMENT OF COUNT 3, CONSPIRACY TO COMMIT MURDER.  
7 THAT WAS NEVER ALLEGED BEFORE. THAT IS BEING ALLEGED  
8 FOR THE FIRST TIME TODAY; AND FOR THE OTHER ISSUES IN  
9 DISPUTE, AS NOTED BY THE COURT, CONCERNING THE PURPOSES  
10 FOR WHICH THE EVIDENCE WAS RECEIVED.  
11 SO RATHER THAN GIVE AN INSTRUCTION AT THIS  
12 TIME AND RECONSTRUCT THE TRIAL AND TRY TO DETERMINE THE  
13 PURPOSES FOR WHICH THAT EVIDENCE WAS RECEIVED, I THINK

14 IT'S JUST A LITTLE BIT TOO LATE TO START DOING THAT.

15 COUNSEL DID NOT RAISE THIS ISSUE EARLIER.

16 SHE DID NOT SAY IT SHOULD BE LIMITED TO A SPECIFIC

17 PURPOSE.

18 SO I DON'T THINK THAT THIS INSTRUCTION IS

19 NECESSARY. THE JURY HAS HEARD THE EVIDENCE, AND THE

20 JURY WILL APPLY THAT EVIDENCE AS IT DEEMS APPROPRIATE.

21 MS. ABRAMSON: FOR ONE THING, YOUR HONOR, I THINK

22 THERE IS A CONFUSION HERE. THE KIND OF INFORMATION THAT

23 WAS ELICITED CONCERNING COMMON MISPERCEPTION DOES NOT GO

24 TO STATE OF MIND AT THE TIME OF THE CRIME. STATE OF

25 MIND AT THE TIME OF THE CRIME WAS SOLELY BASED ON

26 POST-TRAUMATIC STRESS DISORDER, WHICH IS A MENTAL

27 DISORDER.

28 THE COURT: BUT YOU'RE SAYING THIS EVIDENCE CAN

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1 ONLY BE CONSIDERED FOR THAT PURPOSE,

2 MS. ABRAMSON: WELL, THEY WILL THEN --

3 THE COURT: BUT IT CAN BE CONSIDERED FOR OTHER

4 PURPOSES.

5 MS. ABRAMSON: THE EVIDENCE CONCERNING MENTAL

6 DISORDER AT THE TIME OF THE COMMISSION OF THE CRIME WAS

7 ONLY INTRODUCED FOR THAT PURPOSE OF MENTAL STATE AT THE

8 TIME OF THE COMMISSION OF THE CRIME. I MEAN, I DON'T

9 KNOW HOW IT CAN BE ANY CLEARER.

10 THE COURT: MENTAL DISORDER WAS INTRODUCED, OR  
11 EVIDENCE OF IT WAS INTRODUCED, REGARDING A DIAGNOSIS OF  
12 THAT DISORDER PREEXISTING THE SHOOTINGS AND OVER A LONG  
13 PERIOD OF TIME, AND WAS OFFERED TO DISPEL --

14 MS. ABRAMSON: THAT WAS OFFERED AS TO OTHER  
15 ISSUES IN THE CASE.

16 THE COURT: TO DISPEL MISCONCEPTIONS REGARDING  
17 THE DEFENDANT'S TESTIMONY FOR OTHER ISSUES.

18 MS. ABRAMSON: IT IS ALSO, HOWEVER, IN THE BIG  
19 DEBATE, AND THE REASON DR. DIETZ WAS ON THE WITNESS  
20 STAND WAS IT WAS INTRODUCED TO SHOW HOW THE MIND WORKS  
21 IN PEOPLE WITH POST-TRAUMATIC STRESS DISORDER, WHETHER  
22 OR NOT PROVOKED, TO BYPASS HIGHER CORTICAL THINKING; AND  
23 THEREFORE, DEFEAT THE CONCEPT OF PREMEDITATION,  
24 DELIBERATION AND PERHAPS MALICE.

25 THE COURT: WHAT IS IT THAT THE DEFENDANT -- OR  
26 WHY IS IT THAT DEFENDANT WANTS THIS INSTRUCTION? WHAT  
27 PURPOSE DOES IT SERVE?

28 MS. ABRAMSON: IT SERVES THE PURPOSE OF GIVING ME

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1 A BASIS TO ARGUE FOR ACQUITTAL ON COUNT 2.

2 THE COURT: ON WHAT BASIS WOULD THAT BE?

3 MS. ABRAMSON: ON THE BASIS THAT THERE IS MENTAL  
4 DISEASE OR DISORDER WHICH PREVENTED HIM FROM HARBORING  
5 MALICE.

6 THE COURT: WHAT DOES THAT DO WITH A REASONABLE  
7 MAN?

8 MS. ABRAMSON: THERE IS NO REASONABLE MAN WHEN  
9 YOU'RE MENTALLY DISEASED AND DISORDERED, YOUR HONOR.  
10 THAT'S THE HOLE IN THE LAW. THAT'S WHY I ENCOURAGE YOU  
11 TO READ THE BOBO CASE. THAT'S THE HOLE IN THE LAW THAT  
12 THE PEOPLE WERE SO OUTRAGED BY, DAN WHITE KILLING HARVEY  
13 MILK, HAS BROUGHT US.

14 THAT'S WHAT HAPPENED WHEN DIMINISHED  
15 CAPACITY WENT AWAY. YOU CANNOT, HOWEVER, TAKE AWAY A  
16 DEFENDANT'S RIGHT TO PUT ON EVIDENCE THAT THEY DID NOT  
17 ACTUALLY HARBOR A PARTICULAR MENTAL STATE, AND YOU CAN'T  
18 PREVENT THEM FROM DOING THAT BY WAY OF PSYCHIATRIC  
19 TESTIMONY.

20 AND SO WHAT HAPPENS IS BECAUSE THEY HAVE  
21 ELIMINATED NON-STATUTORY MANSLAUGHTER BASED ON ONLY,  
22 YOU WIND UP, AS BOBO SUGGESTS, WITH EITHER INVOLUNTARY  
23 MANSLAUGHTER --

24 THE COURT: NO, YOU DIDN'T RESPOND TO MY  
25 QUESTION. YOU ANSWERED THAT THIS WOULD PERMIT YOU TO  
26 ARGUE A CERTAIN WAY.

27 MS. ABRAMSON: YES.

28 THE COURT: HOW DOES NOT GIVING THIS INSTRUCTION

1 FORECLOSE YOU FROM ARGUING WHAT YOU WANT?



2 MS. ABRAMSON: BECAUSE I CAN'T ARGUE THAT BASED  
3 ON MENTAL DISORDER HE DID NOT FORM INTENT TO KILL.

4 THE COURT: WHY?

5 MS. ABRAMSON: THEY HAVE TO UNDERSTAND THE MENTAL  
6 DISORDER, AND THE MECHANISM OF THE MENTAL DISORDER IS  
7 PREVENTING HIM FROM DEMONSTRATING INTENT TO KILL,  
8 WHETHER SPECIFICALLY OR UNDER AN IMPLIED MALICE THEORY.

9 THE COURT: BUT YOU ARE ARGUING THAT -- YOU CAN  
10 ARGUE THAT. BUT THIS INSTRUCTION DOESN'T TELL THE JURY  
11 WHAT YOU CAN ARGUE AND WHAT YOU CAN'T ARGUE. IT JUST  
12 SAYS WHAT THE EVIDENCE WAS RECEIVED FOR. IT WAS  
13 RECEIVED SOLELY FOR A PARTICULAR PURPOSE, WHICH WAS NOT  
14 TRUE. IT WAS RECEIVED FOR OTHER PURPOSES.

15 MS. ABRAMSON: I AM JUST TELLING THEM THEY CAN  
16 CONSIDER THE EVIDENCE OF THE DISORDER.

17 THEN TAKE OUT THE WORD "SOLELY" SO THAT THE  
18 CAPTION IS NOT PART OF THE INSTRUCTION. TAKE OUT THE  
19 WORD "SOLELY," BECAUSE I DEFINITELY WANT THEM TO  
20 UNDERSTAND THAT THEY CAN USE THE MENTAL STATE, THE  
21 MENTAL DISORDER EVIDENCE, TO CONSIDER THE MENTAL STATES  
22 THAT ARE ALLEGED.

23 THE COURT: WELL, THIS INSTRUCTION IS A LIMITING  
24 INSTRUCTION. IT'S DESIGNED TO PREVENT THE JURY FROM  
25 USING IT FOR OTHER PURPOSES THAN THAT FOR WHICH YOU WANT  
26 IT TO BE USED.

27 MS. ABRAMSON: WHAT OTHER PURPOSE COULD WE  
28 POSSIBLY USE IT FOR?

1 THE COURT: YOU WANT IT FOR OTHER PURPOSES. YOU  
2 OFFERED IT FOR SUCH THINGS; AS I HAVE SAID, THE  
3 CORROBORATION OF THE DEFENDANT IN HIS TESTIMONY OF HIS  
4 LIFE HISTORY, DISPELLING COMMON MISCONCEPTIONS, ALL  
5 SORTS OF THINGS.

6 AND THE WAY THIS INSTRUCTION READS, IT'S  
7 LIMITED TO JUST ONE THING, AND NOTHING ELSE.

8 SO I JUST DON'T SEE HOW THIS INSTRUCTION  
9 APPLIES.

10 MS. ABRAMSON: OKAY. IF I AM NOT LIMITED, FINE.

11 THE COURT: WELL, ALL I AM SAYING IS THIS  
12 INSTRUCTION DOES NOT SAY WHAT IT IS THAT YOU SAY IT  
13 SAYS.

14 DO THE PEOPLE WISH TO BE HEARD?

15 MR. CONN: NO. I WOULD AGREE WITH THE COURT.  
16 THE INSTRUCTION SHOULD NOT BE GIVEN, AS THE COURT NOTED.

17 IF WE TAKE OUT THE WORD "SOLELY," AND IF WE  
18 ELIMINATE THAT LIMITATION, THAT DEFEATS THE PURPOSE OF  
19 THE INSTRUCTION.

20 SO THE INSTRUCTION SIMPLY SHOULD NOT BE  
21 GIVEN AT ALL. WHETHER OR NOT COUNSEL CAN ARGUE THE  
22 ARGUMENT SHE INTENDS TO ARGUE SHOULD BE ADDRESSED AT THE  
23 TIME OF THE ARGUMENT. BUT SHE CERTAINLY DOESN'T NEED  
24 THIS INSTRUCTION TO MAKE THE ARGUMENT.

25 THE COURT: OKAY. IN MY VIEW, I THINK THAT THE  
26 INSTRUCTION CREATES CONFUSION AND TENDS TO MISLEAD.

27           THEREFORE, IT WILL NOT BE GIVEN.  
28           LET'S SEE. THE DEFENSE SUBMITTED SOME NEW

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1 INSTRUCTIONS TODAY CONFORMING TO DISCUSSIONS WE HAD ON  
2 FRIDAY.

3       MS. TOWERY: CORRECT.

4       THE COURT: 6.23, 8.25, AND 8.85.15. THERE WAS  
5 AT LEAST ONE ADDITIONAL INSTRUCTION.

6       MS. TOWERY: THAT'S CORRECT, YOUR HONOR. IT WAS  
7 SPECIAL INSTRUCTION NO. 3.

8       THE COURT: YES.

9       MS. TOWERY: IN THE ORIGINALLY SUBMITTED PACKET.

10       YOU KNOW, I LOOKED AT THOMPCKINS, AND I  
11 LOOKED AT THE DISCUSSION ABOUT THIS PARTICULAR  
12 INSTRUCTION IN THE LAST TRIAL, AND I COULDN'T FIGURE OUT  
13 WHAT THE COURT WANTED ME TO DO.

14       THE COURT: I DON'T SEE HOW IT FITS IN UNDER  
15 THOMPCKINS, QUITE FRANKLY. LOOK AT THOMPCKINS. THERE WAS  
16 NOTHING IN THOMPCKINS THAT GAVE RISE TO THAT INSTRUCTION,  
17 ALTHOUGH THE APPELLATE COURT SAID THE TRIAL COURT SHOULD  
18 HAVE GIVEN IT. FACTUALLY, THERE WASN'T ANYTHING TO DO  
19 WITH THAT CASE.

20       MS. TOWERY: IN ANY EVENT, THE INSTRUCTION WAS  
21 APPROVED AND THE LANGUAGE IN THE INSTRUCTION IN  
22 THOMPCKINS WAS -- WHICH DESCRIBED THE EMOTIONS, WAS

23 DELETED BY THE COURT IN THE LAST TRIAL.  
24 SO I DON'T KNOW WHAT THE COURT WANTS ME TO  
25 DO TO REVISE THIS FURTHER.  
26 THE COURT: WELL, GIVE ME AN IDEA OF WHAT IT IS  
27 THAT WAS DONE IN THE FIRST TRIAL. THIS WAS NO. 3, SO  
28 SHOW ME WHAT IT IS.

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1 MS. TOWERY: IT'S IN VOLUME 137, PAGE 24,160, AND  
2 WHAT THE COURT DID WAS -- THE INSTRUCTION IN THOMPKINS  
3 READS AS FOLLOWS:  
4  
5 " THE PASSION NECESSARY TO  
6 CONSTITUTE HEAT OF PASSION NEED NOT MEAN  
7 RAGE OR ANGER, BUT MAY BE ANY VIOLENT  
8 INTENT, OVER-WROUGHT OR ENTHUSIASTIC  
9 EMOTION, WHICH CAUSES A PERSON TO ACT  
10 IRRATIONALLY AND WITHOUT DELIBERATION AND  
11 REFLECTION."  
12 THE COURT, AS BEST I COULD DETERMINE,  
13 WANTED THE LANGUAGE AS TO ANY VIOLENT INTENT,  
14 OVER-WROUGHT OR ENTHUSIASTIC EMOTION DELETED FROM THE  
15 THOMPKINS INSTRUCTION, WHICH HAS BEEN DONE. AND I THINK  
16 WE ADDED FEAR, BECAUSE THAT'S FACT SPECIFIC IN THIS  
17 PARTICULAR CASE, AND THE CASE LAW CERTAINLY SUPPORTS  
18 THAT THAT CAN BE AN EMOTION WHICH SUPPORTS HEAT OF

19 PASSION.

20 SO I DON'T KNOW WHAT THE COURT WANTS ME TO

21 DO.

22 MS. ABRAMSON: THE COURT WAS SAYING SOMETHING

23 ABOUT REVENGE, BUT I THINK 8.44 TALKS ABOUT THE FACT IT

24 CAN'T BE REVENGE.

25 THE COURT: WELL, IT REALLY DOESN'T. THAT'S THE

26 PROBLEM.

27 MS. ABRAMSON: NO. I THINK THE WORD "REVENGE" IS

28 THERE, JUDGE.

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1 THE COURT: I KNOW. BUT IT DOESN'T SAY -- IT

2 TALKS ABOUT FEAR AS WELL. IT SAYS:

3 "NEITHER FEAR, REVENGE, NOR THE

4 EMOTION INDUCED BY AND ACCOMPANYING OR

5 FOLLOWING INTENT TO COMMIT A FELONY, NOR

6 ANY OR ALL OF THESE EMOTIONAL STATES, IN

7 AND OF THEMSELVES, CONSTITUTE THE HEAT OF

8 PASSION REFERRED TO IN THE LAW OF

9 MANSLAUGHTER."

10 MS. ABRAMSON: I THINK THAT'S A STRANGE

11 INSTRUCTION, BECAUSE IT SOUNDS BACKWARDS.

12 THE COURT: IT SAYS NEITHER FEAR, REVENGE OR THE

13 EMOTION INDUCED. YOU CAN READ AS WELL AS I CAN.

14 "ALL OF THESE EMOTIONS MAY BE INVOLVED IN

15 HEAT OF PASSION, WHICH CAUSES. . ." ET CETERA, ET

16 CETERA.

17 SO THAT INSTRUCTION BASICALLY SAYS THAT

18 THAT INSTRUCTION MAY BE INVOLVED IN THE HEAT OF PASSION

19 THAT CAUSES JUDGMENT TO GIVE WAY TO IMPULSE OR RASHNESS.

20 YET THE SUPREME COURT OVER AND OVER

21 AGAIN --

22 MS. ABRAMSON: SAYS IT ISN'T.

23 THE COURT: SAYS THAT REVENGE CANNOT.

24 SO YOU FIGURE THAT ONE OUT.

25 MS. TOWERY: WELL, I AM JUST ASKING THE COURT FOR

26 GUIDANCE AS TO WHAT THE COURT WANTS THIS INSTRUCTION TO

27 READ LIKE. IF THE COURT WANTS THAT REVENGE IS NOT A

28 PERMISSIBLE EMOTION, WHICH I THINK MS. ABRAMSON ARGUED,

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1 THAT'S NOT AN EMOTION, IT'S A MOTIVE.

2 MS. ABRAMSON: RIGHT.

3 MS. TOWERY: BUT I NEED GUIDANCE FROM THE COURT

4 ON HOW TO REDRAFT THIS.

5 I WOULD SUBMIT THAT IT'S NOT NECESSARY TO

6 REDRAFT IT.

7 THE COURT: WHY DO WE NEED THE INSTRUCTION?

8 DOESN'T IT JUST FOLLOW 8.44? WHAT DOES IT ADD TO 8.44?

9 MS. ABRAMSON: WE ARE JUST TRYING TO PINPOINT THE

10 EMOTION WE ARE RELYING ON.

11 MS. TOWERY: AND IT CERTAINLY IS CLEARER THAN

12 8.44.

13 THE COURT: THAT WAS DISCUSS IN THE HEARINGS, AND

14 IT FOUND THAT 8.44 WAS SUFFICIENT ON THAT SUBJECT, AM I

15 RIGHT?

16 MS. TOWERY: I'M SORRY?

17 THE COURT: DOESN'T ARIS SAY THAT 8.44 COVERED

18 THAT TERRITORY?

19 MR. GESSLER: IT WENT INTO -- IF I MAY, YOUR

20 HONOR -- INTO A KIND OF CONTRIVED ANALYSIS, SAYING THE

21 JURY COULD UNDERSTAND THAT FEAR WAS ENOUGH FOR HEAT OF

22 PASSION BASED ON THAT INSTRUCTION BEING GIVEN, BUT

23 ALSO -- IT ALSO HAD TO STRAIN AND STRETCH AS TO HOW THE

24 JURY COULD UNDERSTAND THAT, AND IT SEEMS TO ME, SO THAT

25 THEY DO UNDERSTAND IT, THAT OUR INSTRUCTION IS

26 NECESSARY.

27 MS. TOWERY: ALSO, YOUR HONOR, WE HAVE THE SECOND

28 PARAGRAPH.

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1 THE COURT: YES.

2 MS. TOWERY: WHICH HAS APPROVED THE THOMPCKINS

3 INSTRUCTION, WHICH WE FEEL IS NECESSARY TO POINT OUT TO

4 THE JURY WHAT KIND OF PROVOCATORY CONDUCT IS ADEQUATE.

5 THE COURT: YES. OKAY.

6 WHAT IS THE PEOPLE'S POSITION?

7 MR. CONN: WE WOULD OPPOSE THE INSTRUCTION. I  
8 THINK THAT 8.44 IS ADEQUATE TO EXPRESS THE CONCEPTS THAT  
9 COUNSEL IS SEEKING TO EXPRESS IN THIS INSTRUCTION, AND  
10 WE ARE RUNNING INTO A PROBLEM OF HOW WE ARE GOING TO  
11 MODIFY 8.44.

12 IF WE ARE GOING TO MODIFY 8.44, THEN I  
13 THINK IT IS NECESSARY THAT WE GET INTO A FURTHER  
14 ELABORATION UPON THE CONCEPT OF WHY REVENGE CANNOT  
15 CONSTITUTE THE EMOTION THAT PROVIDES THE BASIS FOR THE  
16 DEFENSE.

17 SO, EITHER 8.44 IS ADEQUATE, AND THEY  
18 SUGGEST THAT 8.44 IS ADEQUATE INSOFAR AS IT REFERS TO  
19 REVENGE.

20 WELL, IF IT IS ADEQUATE FOR REVENGE, THEN  
21 IT IS ADEQUATE FOR FEAR. I THINK THAT WE SHOULD JUST GO  
22 WITH THE CALJIC INSTRUCTION THAT FAIRLY STATES THESE  
23 ISSUES TO THE JURY.

24 THE COURT: I AM INCLINED TO DO JUST THAT.  
25 LOOKING AT THOMPCKINS, THE FACTS IN THOMPCKINS HAD NOTHING  
26 DO WITH THIS INSTRUCTION. MR. THOMPCKINS FOUND HIS  
27 ESTRANGED WIFE IN BED WITH SOMEBODY ELSE, AND REACTED AS  
28 HE REACTED IN SHOOTING HER AND KILLING HER, AND

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1 COMMITTING AN ASSAULT ON THE MAN. NOTHING TO DO WITH  
2 THIS TYPE OF LANGUAGE.



3 I DON'T KNOW HOW IT CAME ABOUT THAT THOSE  
4 INSTRUCTIONS WERE AN ISSUE IN THOMPkins OR HOW THEY --  
5 OR WHY THE APPELLATE COURT FELT THEY SHOULD BE APPROVED.  
6 THEY WERE NOT AT ISSUE IN THAT CASE.

7 SO IF THAT COURT APPROVED THEM, THAT  
8 DOESN'T ADD TO THE ISSUE OR THE INFERRING OF THE JURY IN  
9 THIS CASE. THEY ARE INFORMED IN 8.44 THAT -- THE FIRST  
10 SENTENCE TALKS ABOUT FEAR. THEN THE NEXT SENTENCE TALKS  
11 ABOUT: "ANY OR ALL OF SUCH EMOTIONS MAY BE INVOLVED IN  
12 A HEAT OF PASSION THAT CAUSES JUDGMENT TO GIVE WAY TO  
13 IMPULSE AND RASHNESS."

14 THAT CERTAINLY IS SUFFICIENT TO COVER THE  
15 ISSUE OF FEAR. AND THEREFORE, I DON'T SEE THAT THERE IS  
16 ANY REASON FOR GIVING NO. 3, AND IT JUST DEFEATS WHAT'S  
17 COVERED IN OTHER INSTRUCTIONS.

18 THEREFORE, THE COURT WILL DENY NO. 3.

19 REGARDING CONSPIRACY, THERE WAS DISCUSSION  
20 THAT THE DEFINITION OF CONSPIRACY MUST INCLUDE THE  
21 REQUIREMENT OF EXPRESS MALICE, AND SOMEBODY WAS TO  
22 PREPARE THAT, I BELIEVE THE PROSECUTION. I HAVEN'T  
23 RECEIVED ANYTHING.

24 MR. CONN: NO. I BELIEVE THE DEFENSE INDICATED  
25 THAT THEY WERE GOING TO PREPARE THAT. THE COURT  
26 INDICATED THAT IF THEY WERE THE ONES WHO WERE SEEKING  
27 THAT CLARIFICATION, THEY WERE THE ONES THAT SHOULD  
28 PREPARE IT.

1 THE COURT: THAT IS THE LAW NOW. THE SUPREME  
2 COURT SAYS THAT'S THE LAW. THERE HAS TO BE A FINDING  
3 BY -- OR AN ELEMENT OF CONSPIRACY TO COMMIT MURDER IS  
4 EXPRESS MALICE.

5 SO THAT WILL BE IN 6.10.

6 MR. GESSLER: MY RECOLLECTION, YOUR HONOR, WAS  
7 THAT THAT WAS SPECIFICALLY ON THE PROSECUTION.

8 THE COURT: OKAY.

9 MR. GESSLER: WE HAD THE REST, BUT I THINK THAT  
10 ONE WAS THEIR BABY.

11 THE COURT: LET'S TALK ABOUT IT RIGHT HERE, SO I  
12 CAN JUST MODIFY -- THE PROSECUTION CAN MODIFY IT, BUT  
13 WHERE IT SHOULD BE INSERTED.

14 6.10 SAYS:

15 "A CONSPIRACY IS AN AGREEMENT  
16 ENTERED INTO BETWEEN TWO OR MORE PERSONS  
17 WITH A SPECIFIC INTENT TO AGREE TO COMMIT  
18 THE OFFENSE OF MURDER, AND WITH THE  
19 FURTHER SPECIFIC INTENT TO COMMIT SUCH  
20 OFFENSE, AND WITH A FURTHER -- AND FURTHER  
21 REQUIRING EXPRESS MALICE AFORETHOUGHT AS  
22 OTHERWISE -- AS DEFINED ELSEWHERE IN THESE  
23 INSTRUCTIONS."

24 MS. ABRAMSON: THAT'S CLUMSY. WHY NOT ALSO  
25 REQUIRING INTENT TO KILL?

26 MR. GESSLER: IT HAS TO BE INTENT TO KILL  
27 UNLAWFULLY.

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1 SO EITHER WAY COULD DO IT. OKAY.

2 MS. ABRAMSON: HOW ABOUT EXPRESS MALICE,  
3 PARENTHESES. . .

4 THE COURT: NO. WE CAN DEFINE IT AS: "EXPRESS  
5 MALICE AS DEFINED."

6 MS. ABRAMSON: AS SPECIFIC INTENT TO KILL.

7 THE COURT: PEOPLE WISH TO BE HEARD ON THAT?

8 MR. CONN: NO. I THINK THAT THAT LANGUAGE IS  
9 APPROPRIATE.

10 THE COURT: OKAY. THEN WE'LL ADD -- WELL, WITH  
11 FURTHER SPECIFIC INTENT TO COMMIT SUCH OFFENSE, AND WITH  
12 THE SPECIFIC INTENT TO KILL.

13 MR. GESSLER: BUT THE SPECIFIC INTENT TO KILL  
14 MUST BE UNLAWFUL, YOUR HONOR.

15 THE COURT: OKAY. WITH THE SPECIFIC INTENT TO  
16 UNLAWFULLY KILL -- OR TO KILL UNLAWFULLY. IT SOUNDS  
17 MORE GRAMMATICALLY CORRECT.

18 OKAY. ALL RIGHT. ANYTHING ELSE NOW ON  
19 INSTRUCTIONS? I THINK WE HAVE COVERED IT.

20 MR. CONN: I BELIEVE THAT THE DEFENSE ALSO  
21 SUBMITTED A MODIFICATION OF CALJIC 6.23.

22 THE COURT: 6.23.

23 MR. CONN: YES. THE PEOPLE HAD SUBMITTED A

24 MODIFICATION WHICH TRACKED THE LANGUAGE THAT WAS GIVEN  
25 IN THE FIRST TRIAL.  
26 IN THE MODIFICATION SUBMITTED BY THE  
27 DEFENSE, IT INCLUDES LANGUAGE WHICH IS TAKEN FROM THE  
28 INDICTMENT, AND IT CONTAINS, IN REFERENCE TO THE

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1 CONSPIRACY, THE SPECIFICATION THAT IT WAS COMMITTED WITH  
2 ANOTHER PERSON OR PERSONS WHOSE IDENTITY IS UNKNOWN.

3 I THINK THAT THAT JUST --

4 THE COURT: WELL, THAT'S SURPLUSAGE, AND MY  
5 INCLINATION WOULD BE TO DELETE THAT, BECAUSE IT IS  
6 SURPLUSAGE, AND HAS NOTHING TO DO WITH THE FACTS OF THIS  
7 CASE. IT WOULD BE CONFUSING.

8 DO YOU WISH TO BE HEARD ON THAT,  
9 MR. GESSLER?

10 MR. GESSLER: MAY I HAVE JUST A MOMENT, YOUR  
11 HONOR?

12 THE COURT: NORMALLY WHEN I READ THE INDICTMENT  
13 TO THE JURY, I DON'T REFER TO THAT, OR I HAVEN'T  
14 REFERRED TO THAT.

15 MR. GESSLER: I THINK THE, "AND WITH ANOTHER  
16 PERSON AND PERSON'S WHOSE IDENTITY IS UNKNOWN," COULD BE  
17 TAKEN OFF, BUT IT MUST BE, "WILLFULLY AND UNLAWFULLY  
18 CONSPIRED TOGETHER." THAT IS NOT SURPLUSAGE.

19 THE COURT: OKAY. OKAY.

20 WE WILL REMOVE THAT REFERENCE TO, "AND  
21 PERSONS WHOSE IDENTITY IS UNKNOWN." OTHERWISE, THAT  
22 WILL BE GIVEN.

23 OKAY. ANYTHING ELSE NOW ON INSTRUCTIONS?

24 ON EXHIBITS, I DID REVIEW THE TRANSCRIPT,  
25 AND THE DEFENDANT, ERIK MENENDEZ, DID IDENTIFY THE KNIFE  
26 AS THE WEAPON USED BY HIS FATHER.

27 THEREFORE, CERTAINLY THAT IS EVIDENCE THAT  
28 THE JURY MAY CONSIDER, AND THE EXHIBIT THEN WOULD BE

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1 RECEIVED.

2 MS. ABRAMSON: WITH RESPECT TO THAT AMMUNITION,  
3 YOUR HONOR, I DID REVIEW THE TESTIMONY OF DWIGHT  
4 VAN HORN, AND HE WAS SIMPLY SHOWN, FIRST OF ALL, THE  
5 FIRST EXHIBIT, WHICH I THINK IS THE EIGHT AND A HALF  
6 SIZE .410. THAT'S A COMPLETELY DIFFERENT SHOTGUN SIZE.  
7 HE'S JUST SHOWN IT, AND HE IDENTIFIES IT AS TARGET  
8 SHOOTING AMMUNITION, AND THERE IS NEVER A FOUNDATION  
9 LAID FOR THAT.

10 AND THEN HE IS SHOWN A HANDFUL OF OTHER  
11 SHELLS, AND ASKED IF HE KNOWS WHAT THEY ARE, AND CALLS  
12 THEM OVER POWDER-WAD AMMUNITION, AND THERE IS AGAIN NO  
13 FOUNDATION AS TO WHERE THOSE CAME FROM, AND THERE NEVER  
14 WAS ANY EFFORT TO -- OR WHETHER THEY'RE HOMEMADE OR  
15 COMMERCIALY SOLD, AND THERE WAS NO EFFORT TO FURTHER

16 IDENTIFY THEM.

17 SO WE OBJECT TO THOSE COMING IN AS

18 IRRELEVANT AND NO FOUNDATION.

19 THE COURT: PEOPLE WISH TO BE HEARD?

20 MS. NAJERA: YES, YOUR HONOR. WITH REGARDS TO

21 THE FIRST, THE OVER-WAD, I BELIEVE THAT THE TESTIMONY

22 FROM PAGES 42,213 TO 42,217 WAS THAT HE STATED THAT YOU

23 COULD NOT GET THIS PARTICULAR KIND OF SHOT WAD -- OR IT

24 WAS NOT AVAILABLE, AND HE DID NOT SPECIFY WHETHER IT WAS

25 AVAILABLE COMMERCIALY OR PRIVATELY. HE SIMPLY SAID IT

26 WAS NOT AVAILABLE.

27 AND WE SIMPLY BROUGHT IT OUT TO SHOW THAT

28 IT WAS AVAILABLE, AND ON THAT ISSUE IT WOULD BE

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1 RELEVANT, THAT IT WAS AVAILABLE.

2 THE COURT: OKAY.

3 MS. NAJERA: NOW, AS TO THE EIGHT AND A HALF BIRD

4 SHOT, HE TALKED ABOUT IT BEING COMMERCIALY AVAILABLE,

5 AND THAT THAT SIZE DID NOT EXIST.

6 AND WE BROUGHT THAT OUT TO SHOW THAT THAT

7 SIZE DID EXIST, AND I BELIEVE THERE IS NO NEED TO GO

8 FURTHER THAN THAT. I BELIEVE MR. CONN COVERED THAT IN

9 THE TESTIMONY WITH DEPUTY VAN HORN, AND I THINK IT WAS

10 USED TO REFUTE HIS TESTIMONY, AND HE ACKNOWLEDGED IT AS

11 SUCH WHEN HE WAS ON THE STAND.

12 MS. ABRAMSON: IT NEVER PROVED WHAT THE PEOPLE  
13 WANTED TO PROVE, THAT ANY OF THIS WAS COMMERCIALY  
14 AVAILABLE. FOR ALL WE KNOW, ROGER MC CARTHY MADE IT ALL  
15 IN HIS LABORATORY IN MENLO PARK THERE. THERE WAS  
16 ABSOLUTELY NO FOUNDATION LAID.

17 MOREOVER, THE WITNESS TESTIFIED THERE WAS  
18 NO EIGHT AND A HALF, AND THERE ISN'T ANY FOR A .12-GAUGE  
19 SHOTGUN. THEY CAME UP WITH A .410 LOAD.

20 THE COURT: OKAY. I AM GOING TO SUSTAIN THE  
21 OBJECTIONS TO THOSE TWO. THEY WILL NOT BE RECEIVED.

22 ANYTHING ELSE NOW?

23 MS. ABRAMSON: THERE WERE TWO PAGES OF  
24 DR. WILSON'S NOTES, BUT I DON'T THINK THEY NEED  
25 REDACTING.

26 THE COURT: OKAY. I DON'T RECALL WHICH SIDE WAS  
27 ASKING TO HAVE THEM REDACTED.

28 MS. ABRAMSON: I WAS. BUT I REVIEWED THEM, AND

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1 THEY ARE OKAY.

2 MS. NAJERA: YOUR HONOR, I ACTUALLY REVIEWED THEM  
3 AS WELL, AND THEY DO NEED REDACTING, AND I WILL DO IT  
4 AND SHOW THE COURT AFTERWARDS.

5 THE COURT: YOU HAVE TO SHOW ME BOTH VERSIONS.

6 MS. NAJERA: I WILL.

7 THE COURT: ANYTHING ELSE BEFORE WE RECESS, SO WE

8 CAN START ARGUMENT THIS AFTERNOON?

9 MR. GESSLER: YES, YOUR HONOR.

10 I JOIN THE MOTION MADE BY MS. ABRAMSON THAT  
11 THIS ARGUMENT GO OVER TO TOMORROW MORNING, BECAUSE WE  
12 ARE IN THE PROCESS OF FILING A WRIT AND ASKING FOR A  
13 STAY FROM THE DISTRICT COURT OF APPEAL.

14 WE HAVE INVESTED FIVE MONTHS, FROM JURY  
15 SELECTION TO THIS DAY. WE ARE ASKING FOR ONE AFTERNOON,  
16 BECAUSE OF THE TREMENDOUS DANGER THAT IF WE ARE RIGHT  
17 AND WE GET A STAY, AND ON EXPEDITED ARGUMENT, REVERSAL  
18 OF THE COURT'S DECISION ON THE INSTRUCTIONS TO BE GIVEN,  
19 AND THE APPLICABLE LAW ON VOLUNTARY MANSLAUGHTER.

20 IF THE DISTRICT ATTORNEY HAS ALREADY  
21 COMMENCED THEIR ARGUMENT AND GOTTEN INTO TELLING THE  
22 JURY FACTS OR LAW BASED ON WHAT THE COURT HAS ALREADY  
23 SAID HE WILL INSTRUCT, WE WOULD BE LEFT WITH NOTHING AS  
24 A REMEDY EXCEPT TO ASK FOR A MISTRIAL, BASED ON THE  
25 DISTRICT COURT OF APPEAL, OR THE SUPREME COURT'S  
26 DECISION BASED ON OUR WRIT.

27 WE DON'T WANT TO DO THAT, AND I DON'T THINK  
28 THE PROSECUTION WANTS TO DO THAT. I AM SURE THE COURT

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1 DOESN'T WANT TO DO THAT.

2 THE COURT: WHY WOULD YOU NEED A MISTRIAL IF THE  
3 PEOPLE START, AND I WILL PREFACE ANY ARGUMENT WITH



4 REMARKS THAT:

5 "THE LAWYERS WILL BE DISCUSSING THE LAW,  
6 BUT I WILL BE INSTRUCTING YOU ON THE LAW AT THE END OF  
7 THE TRIAL. IF THEY MISSTATE THE LAW OR SAY THINGS  
8 INCORRECTLY OR DIFFERENTLY THAN I STATE IT AT THE END OF  
9 THE TRIAL, DISREGARD WHAT THEY SAY, AND THE LAW AS I  
10 STATE IT APPLIES."

11 THEY ARE THE ONES THAT ARE GOING TO BE AT A  
12 DISADVANTAGE, IF THEY START ARGUING AND THE LAW IS GIVEN  
13 DIFFERENTLY TO THE JURY AT THE END OF THE CASE.

14 MR. GESSLER: THEY ARE GOING TO BE OF NO MORE OF  
15 A DISADVANTAGE OTHER THAN THE JURY IS GOING TO BE  
16 HOPELESSLY CONFUSED, WHICH IS TO NOBODY'S BENEFIT, YOUR  
17 HONOR. WE ALL TRY TO TIE OUR FACTS AND REASONABLE  
18 DOUBTS INTO THE LAW, WHICH IS WHY WE HAVE GONE SO  
19 CAREFULLY OVER INSTRUCTIONS AT THIS POINT IN TIME.

20 ALL WE ARE ASKING AT THIS POINT IS FOR A  
21 HALF DAY. THE RISK OF GIVING UP ONE-HALF DAY AT THIS  
22 POINT, VERSUS THE POSSIBLE RISK OF LOSING FIVE MONTHS OF  
23 TRIAL, THE ODDS WOULD SEEM TO BE TREMENDOUSLY IN FAVOR  
24 OF GIVING US ONE-HALF DAY TO SEE WHAT THE COURT OF  
25 APPEAL, OR THE SUPREME COURT AT THIS POINT, IS WILLING  
26 TO DO.

27 THE COURT: I JUST DON'T SEE THAT IT WOULD CREATE  
28 AN OBSTACLE TO CONTINUING WITH THE ARGUMENT, WITH THE

1 CHANGE OF INSTRUCTIONS, IF THE APPELLATE COURT TELLS ME  
2 THAT IT SHOULD BE CHANGED.

3 MS. ABRAMSON: WELL, I THINK THAT IF THE PEOPLE  
4 ARE WILLING -- I MEAN, IF THE COURT IS WILLING TO ORDER  
5 THE PEOPLE NOT TO DISCUSS INSTRUCTIONS, OR WHY THERE IS  
6 NO MANSLAUGHTER INSTRUCTIONS.

7 THE COURT: WELL, HE IS NOT GOING TO ARGUE WHY  
8 THERE ISN'T AN INSTRUCTION.

9 MS. ABRAMSON: JUDGE, WE VOIR DIRED THIS JURY ON  
10 IMPERFECT SELF-DEFENSE. IT WAS IN THE QUESTIONNAIRE.  
11 WE ASKED THEM QUESTIONS ABOUT IT. IT WAS IN OPENING  
12 STATEMENTS.

13 NOW THEY'RE NOT GOING TO HEAR ANYTHING  
14 ABOUT IT, AND THEY ARE NOT GOING TO HEAR ANYTHING FROM  
15 THE PEOPLE'S ARGUMENT ABOUT THE APPLICABILITY OF  
16 MANSLAUGHTER TO COUNT 2.

17 IF THE COURT WILL ORDER THEM NOT TO TALK  
18 ABOUT THE FACT THAT MANSLAUGHTER ISN'T APPLICABLE TO  
19 COUNT 2, OR THE FACT THAT THE PROVOCATION THEORY IS THE  
20 ONLY THEORY AVAILABLE TO COUNT 1, WE CAN MOVE FORWARD.

21 BUT THE MINUTE THEY SAY OTHERWISE, THEY'VE  
22 MADE AN IMPROPER ARGUMENT. BUT IT'S NOT THEIR FAULT,  
23 BECAUSE THEY HAVE MADE AN ARGUMENT SOME OTHER COURT SAYS  
24 IS IMPROPER.

25 THE COURT: FIRST OF ALL, ARE YOU GOING TO BE  
26 ARGUING THE LAW THIS AFTERNOON, OR JUST THE FACTS?

27 MR. CONN: YES, YOUR HONOR, I WILL BE ARGUING THE  
28 LAW. I ALWAYS DO THAT IN THE BEGINNING OF MY ARGUMENT.

1           BUT I THINK WE SHOULD PROCEED. I THINK THE  
2 COURT MADE RULINGS THAT ARE WELL-SUPPORTED BY THE LAW,  
3 AND I DON'T SEE THE POTENTIAL THAT THEY MIGHT GET A  
4 DIFFERENT RULING FROM A COURT OF APPEAL AS SUFFICIENT  
5 REASON TO DELAY THIS ANY FURTHER.

6           THE COURT: WELL, AS I SAID, IF THE ARGUMENT  
7 COMMENCES AND REFERS TO DISCUSSION OF LAW THAT IS  
8 DIFFERENT THAN WHAT THE COURT ULTIMATELY INSTRUCTS, THEN  
9 THOSE WHO REFER TO IT AT AN EARLY STAGE -- AND AT THIS  
10 POINT WE ARE TALKING ABOUT THE PROSECUTION -- WOULD  
11 SUFFER, NOT THE DEFENSE.

12           I CAN'T SEE HOW THIS WOULD WORK TO THE  
13 DETRIMENT OF THE DEFENSE, THAT THE PEOPLE HAVE MISSTATED  
14 THE LAW, IF THAT DOES OCCUR, ULTIMATELY, BASED UPON  
15 INSTRUCTIONS THE COURT GIVES.

16           AND FURTHER, I AM SATISFIED WITH THE STATE  
17 OF THE RECORD HERE AND MY RULINGS, AND I JUST DON'T FEEL  
18 THAT IT'S NECESSARY AT THIS POINT TO DELAY THE  
19 PROCEEDINGS ANY FURTHER.

20           SO, THE REQUEST FOR A DELAY UNTIL TOMORROW  
21 IS DENIED.

22           OKAY. WE WILL RESUME AT 1:30.

23           (AT 12:10 P.M. PROCEEDINGS WERE

24           ADJOURNED UNTIL 1:30 P.M

25           OF THE SAME DAY)

1 VAN NUYS, CALIFORNIA; FEBRUARY TUESDAY, 20, 1995

2 1:50 P.M.

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

4 (APPEARANCES AS HERETOFORE NOTED.)

5 (MARILYN A. FADALE, OFFICIAL REPORTER.)

6 (MARY LU MURPHY, OFFICIAL REPORTER.)

7

8 (THE FOLLOWING PROCEEDINGS WERE

9 HELD IN OPEN COURT, OUT OF THE

10 PRESENCE OF THE JURY:)

11

12 THE COURT: EVERYBODY IS PRESENT.

13 A COUPLE OF MATTERS HERE. ONE OF THEM

14 HAS TO DO WITH THE DEFENDANT, ERIK MENENDEZ',

15 REQUEST FOR AN INSTRUCTION ON INVOLUNTARY

16 MANSLAUGHTER, CITING THE CASE OF PEOPLE VERSUS BOBO,

17 229 CAL.APP.3D. I'VE READ THAT CASE, AND THE

18 PORTION SPECIFICALLY REFERRED TO BY COUNSEL IN

19 ARGUMENT.

20 I FIND THAT, ALTHOUGH THAT CASE REFLECTS

21 THE THINKING OF THE APPELLATE COURT IN REGARD TO THE

22 GENERAL SUBJECT, THE FACTS OF THIS CASE, BEFORE THIS

23 COURT, DOES NOT SUPPORT AN INSTRUCTION ON

24 INVOLUNTARY MANSLAUGHTER FOR THE REASONS PREVIOUSLY

25 STATED; THEREFORE, THAT INSTRUCTION WILL NOT BE

26 GIVEN. THE COURT NOTES THAT IT WAS NOT GIVEN IN THE

27 BOBO CASE AS WELL.

28 AS FAR AS THE EXHIBIT THAT WAS REFERRED

50852

1 TO THIS MORNING AS WELL, THE NOTES OF DR. WILSON, WE  
2 CAN DEFER FURTHER DISCUSSION OF THAT IF IT'S NOT  
3 GOING TO BE REFERRED TO THIS AFTERNOON BY THE  
4 PROSECUTION.

5 MS. ABRAMSON: I WASN'T GIVEN A REDACTION.

6 THE COURT: LET'S SEE IF -- I DON'T KNOW IF  
7 THEY HAD A COPY FOR YOU.

8 DO YOU HAVE A COPY FOR THE DEFENSE?

9 MS. NAJERA: I DON'T EVEN HAVE A COPY FOR  
10 MYSELF, YOUR HONOR. THAT'S THE ONLY COPY WE HAVE.

11 THE COURT: LET'S GIVE IT TO THE DEFENSE TO  
12 LOOK AT.

13 MS. ABRAMSON: IT'S ONLY TWO PAGES.

14 THE COURT: SHE HAS THE REDACTED AND  
15 UNREDACTED.

16 MS. ABRAMSON: I SEE.

17 THE COURT: WHAT ELSE IS THERE YOU WANT TO  
18 TALK ABOUT BEFORE THE JURY COMES OUT?

19 MS. ABRAMSON: TWO OF THE CHARTS. WE'VE  
20 LOOKED THROUGH THE PROSECUTOR'S CHARTS, MR. GESSLER,  
21 AND MYSELF; AND WE THINK THE CONSPIRACY TO COMMIT

22 MURDER ONE IS MISLEADING AND MISSTATES THE LAW.  
23 COUNSEL IS FREE TO ARGUE WHATEVER HE WANTS, BUT WHAT  
24 THAT SAYS: "NUMBER ONE, AGREEMENT BETWEEN TWO OR  
25 MORE PERSONS TO COMMIT MURDER; AND TWO, WITH THE  
26 SPECIFIC INTENT TO DO SO."  
27 TO DO WHAT? AGREE? WE KNOW FROM SWAIN  
28 THERE MUST BE A SPECIFIC INTENT TO KILL.

50853

1 THE COURT: I ASSUME THAT THAT'S BEEN  
2 PREPARED PRIOR TO THE MODIFICATION THAT WAS MADE ON  
3 THAT INSTRUCTION.  
4 MR. CONN: THAT IS CORRECT. AND I INTEND --  
5 COUNSEL CAN'T JUST LOOK AT A CHART AND SAY THAT  
6 THAT'S GOING TO REPRESENT THE PEOPLE'S ARGUMENT.  
7 I'M GOING TO BE CLARIFYING WHAT IS CONTAINED IN THAT  
8 CHART. I WILL CLARIFY WHAT THE SPECIFIC INTENT  
9 MEANS.  
10 THE COURT: WHAT I WILL DO IS, ANY CHARTS  
11 USED BY EITHER SIDE THAT REFLECT WHAT YOU UNDERSTAND  
12 THE INSTRUCTIONS OF THE COURT TO BE ON THE LAW, THAT  
13 THEY BE STATED IN WRITING WHAT IT IS THAT THE COURT  
14 HAS INDICATED. SO IF THIS ONE DOES NOT DO SO, YOU  
15 CAN PUT IN WRITING, IN HANDWRITING, WHATEVER IT IS,  
16 THAT MODIFICATION, WHICH IS A SUBSTANTIAL ONE,

17 RELATING TO A SUPREME COURT DECISION ON THAT  
18 SUBJECT. BEFORE YOU USE THAT YOU'LL HAVE TO INSERT  
19 THE REQUIREMENT OF AN INTENT TO KILL.

20 MR. CONN: HOW ABOUT IF I JUST FILL IT IN AS  
21 I EXPLAIN IT TO THE JURY?

22 THE COURT: DO IT IN WRITING. THAT'S FINE.  
23 AS LONG AS IT'S IN WRITING WHEN IT SITS UP THERE, SO  
24 THAT THE JURORS WHO TAKE NOTES WON'T SOMEHOW ASSUME  
25 THAT THIS WRITING THERE IS ACTUALLY WHAT IS THE LAW,  
26 RATHER THAN WHAT YOU'RE SAYING. SO THAT YOU PUT IN  
27 WRITING PRECISELY WHAT IT IS THAT YOU UNDERSTAND THE  
28 LAW TO BE.

50854

1 WHAT ELSE IS THERE?

2 MS. ABRAMSON: THERE'S THIS VERY SILLY THING  
3 WHICH DOESN'T REALLY SAY VERY MUCH, EXCEPT AN  
4 IMPLICATION THAT --

5 THE COURT: THIS IS AN OBJECTION ON THE  
6 GROUNDS OF SILLINESS?

7 MS. ABRAMSON: NO, IT'S NOT AN OBJECTION.  
8 IT'S AN OBJECTION BASED ON THIS. THIS IS HOW ERIK  
9 MENENDEZ PUT HIS STORY TOGETHER; AND, OF COURSE,  
10 THERE'S NOTHING HERE ABOUT WHERE HE PUT HIS STORY  
11 TOGETHER OR WHAT HE NEEDS TO SAY.

12 BUT THE PROBLEM IS WHERE I WANT TO GO --  
13 VOLUNTARY MANSLAUGHTER BASED ON A SELF-DEFENSE-TYPE  
14 OF ARGUMENT. WELL, I WISH IT WERE TRUE, BUT IT  
15 ISN'T. I THINK THIS MISLEADS THE JURY INTO THINKING  
16 WE SOMEHOW HAVE A SELF-DEFENSE-TYPE OF ARGUMENT  
17 WHERE ALL WE'VE BEEN PRESENTING IS A PROVOCATION  
18 THEORY, AND I WOULD OBJECT --

19 THE COURT: AT THIS POINT I WILL RULE THAT  
20 REFERENCE BE DELETED, WITH THE UNDERSTANDING THAT --  
21 DEPENDING ON HOW THE DEFENSE ARGUES -- IF IT ARGUES  
22 PROVOCATION IS AN EMOTIONAL STATE IN REGARD TO JOSE  
23 MENENDEZ OF FEAR, AND THINGS OF THAT NATURE, THEN  
24 DEPENDING --

25 MS. ABRAMSON: IT'S STILL NOT SELF-DEFENSE.

26 THE COURT: DEPENDING ON HOW IT'S  
27 ARTICULATED.

28 MR. CONN: THE ONLY PROBLEM WITH THAT IS THAT

50855

1 WILL THEN TAKE ALL THE WIND OUT OF THE ARGUMENT. I  
2 WANT TO MAKE THE ARGUMENT --

3 THE COURT: LET'S NOT TALK SO LOUDLY.

4 MR. CONN: I WANT TO MAKE THE ARGUMENT NOW,  
5 NOT TO MAKE INCOMPLETE OR INADEQUATE ARGUMENT, TO  
6 SEE IF COUNSEL IS GOING TO ARGUE THAT THE DEFENDANTS



7 THOUGHT THEY WERE GOING TO BE KILLED.

8 THE COURT: YOU'RE TALKING TOO LOUDLY. WE  
9 HAVE THE JURY IN THE JURY ROOM. THERE'S NO --

10 MS. ABRAMSON: DOES THE COURT WANT TO  
11 CONTINUE TO SEE THIS?

12 MR. CONN: THAT IS THEIR DEFENSE. THEIR  
13 DEFENSE IS THEY BELIEVE THEIR PARENTS WERE GOING TO  
14 KILL THEM. WHETHER OR NOT IMPERFECT SELF-DEFENSE IS  
15 GIVEN TO THE JURY AS AN INSTRUCTION, WE ALL KNOW  
16 THAT COUNSEL IS GOING TO ARGUE THAT THE DEFENDANTS  
17 THOUGHT THAT THEY WERE ACTING IN SELF-DEFENSE AT THE  
18 TIME OF THE COMMISSION OF THE CRIME.

19 SO IT IS A VOLUNTARY MANSLAUGHTER WHICH  
20 IS BASED ON A SELF-DEFENSE-TYPE OF ARGUMENT. IT IS  
21 NOT BASED UPON IMPERFECT SELF-DEFENSE.

22 BUT THE ARGUMENT SHE IS MAKING, THE  
23 PROMISE THAT IT IS A FEAR WHICH IS MOTIVATED BY NEED  
24 TO DEFEND THEMSELVES. SO I DON'T THINK THAT  
25 MISSTATES --

26 THE COURT: WHY DON'T YOU JUST CHANGE IT TO  
27 "FEAR" INSTEAD OF "SELF-DEFENSE."

28 MR. CONN: ALL RIGHT. I'LL CHANGE IT.

50856

1 MS. ABRAMSON: IF YOU'RE JUST GOING TO STRIKE

2 OUT "SELF-DEFENSE" SO IT'S STILL READABLE...

3 THE COURT: IT'S JUST A CHART. THIS IS NOT  
4 EVEN AN INSTRUCTION OR A CHART RELATING TO  
5 INSTRUCTIONS.

6 THE COURT: OKAY. ANYTHING ELSE?

7 MS. ABRAMSON: YEAH. CAN I LEAVE NOW? OH, I  
8 GUESS I HAVE TO STICK AROUND. I COULD READ THE  
9 TRANSCRIPT.

10 THE COURT: ANYTHING ELSE FROM EITHER SIDE?

11 MS. ABRAMSON: NO.

12 THE COURT: OKAY. THEN LET'S GET THE JURY  
13 OUT.

14 (THE JURY ENTERED THE COURTROOM  
15 AND THE FOLLOWING PROCEEDINGS  
16 WERE HELD:)

17

18 THE COURT: AND THE JURY IS IN THE JURY BOX.

19 A WET GOOD AFTERNOON. HOPEFULLY, YOU  
20 DIDN'T GET TOO WET COMING OVER HERE.

21 I'M SORRY FOR THE DELAY. THERE WERE  
22 SOME LAST-MINUTE MATTERS THAT THE LAWYERS AND I HAD  
23 TO IRON OUT BEFORE WE COULD START WITH CLOSING  
24 ARGUMENTS, AND WE HAVE DONE THAT. SO WE'RE NOW  
25 READY TO PROCEED.

26 JUST TO REMIND YOU OF SOME THINGS. THE  
27 COMMENTS OF THE LAWYERS DURING THE TRIAL, WHETHER  
28 DURING THE PROCEEDINGS THAT HAVE ALREADY OCCURRED,

1 OR DURING ARGUMENT AT THIS PHASE, ARE NOT EVIDENCE  
2 UNLESS THE LAWYERS HAVE STIPULATED TO CERTAIN  
3 MATTERS, AND THERE WERE SOME STIPULATIONS, AND YOU  
4 WERE MADE AWARE OF THOSE AT THE TIME THE  
5 STIPULATIONS WERE ANNOUNCED.

6 BUT OTHERWISE, THE COMMENTS OF COUNSEL  
7 ARE NOT EVIDENCE, AND SHOULD NOT BE CONSIDERED BY  
8 YOU AS EVIDENCE.

9 SO WHEN THE LAWYERS ARGUE THE CASE TO  
10 YOU, DON'T CONSIDER THIS EVIDENCE. THEY'LL REMIND  
11 YOU OF THAT THEMSELVES. THEY ARE AT THIS POINT  
12 SUMMARIZING THE EVIDENCE AS THEY RECALL IT. THEY'LL  
13 COMMENT ON THE EVIDENCE, GIVE YOU INTERPRETATIONS OF  
14 THE EVIDENCE AS THEY SEE IT, AND HOW THEY VIEW THE  
15 EVIDENCE IN THE CASE IN REGARD TO THE APPLICATION OF  
16 THE EVIDENCE TO THE LAW AND THE LAW TO THE  
17 EVIDENCE.

18 BUT ULTIMATELY, AS YOU'RE AWARE, YOU ARE  
19 THE JUDGES OF THE EVIDENCE. SO AT THIS POINT THE  
20 LAWYERS HAVE AN OPPORTUNITY TO COMMENT ON THE  
21 EVIDENCE. BUT AT THE END OF THE CASE, YOU ARE THE  
22 JUDGES OF THE EVIDENCE.

23 AS FAR AS THE LAW IS CONCERNED, THE  
24 LAWYERS WILL BE REFERRING TO VARIOUS RULES AND

25 PRINCIPLES OF LAW IN THEIR ARGUMENT. AFTER ALL THE  
26 ARGUMENT HAS BEEN COMPLETED, I WILL GIVE YOU  
27 INSTRUCTIONS ON THE LAW. SOMETIMES IT HAPPENS THAT  
28 DURING ARGUMENT THE LAWYERS DISCUSS LEGAL RULES IN A

50858

1 DIFFERENT WAY THAN I TELL YOU THE RULES ARE AT THE  
2 END OF THE CASE. SOMETIMES THINGS ARE LEFT OUT OR  
3 MISSTATED, OR SOMETIMES THINGS JUST AREN'T SAID IN  
4 QUITE THE SAME WAY BY THE LAWYERS ABOUT THE LAW AS I  
5 WILL TELL YOU AT THE END OF THE CASE.

6 TO REMIND YOU AGAIN, THE LAW IN THIS  
7 CASE IS THE LAW I TELL YOU APPLIES AT THE END OF THE  
8 CASE, AFTER THE ARGUMENT IS COMPLETED, DURING THE  
9 INSTRUCTIONS WHICH I WILL READ TO YOU HERE IN OPEN  
10 COURT. THAT WILL BE A WHILE YET, SINCE WE HAVE TO  
11 WAIT FOR THE COMPLETION OF ALL THE ARGUMENT.

12 ARGUMENT PROCEEDS BY THE PROSECUTION  
13 PRESENTING AN OPENING ARGUMENT; THEN ARGUMENT BY  
14 EACH DEFENDANT; AND THEN FINAL ARGUMENT BY THE  
15 PROSECUTION. IT WILL TAKE A WHILE BEFORE ALL THAT  
16 IS COMPLETE, AS YOU CAN IMAGINE.

17 ALL RIGHT. THEN I'LL TURN TO COUNSEL,  
18 AND FIRST THE PROSECUTION, AND INQUIRE WHETHER OR  
19 NOT YOU'RE READY TO PROCEED?

20 MR. CONN: YES, YOUR HONOR.

21 THE COURT: OKAY.

22

23 OPENING ARGUMENT

24 BY MR. CONN:

25 GOOD AFTERNOON, LADIES AND GENTLEMEN.

26 IT'S BEEN A LONG TRIAL, AND I GUESS THERE WERE TIMES

27 WHEN YOU THOUGHT WE WOULD NEVER GET HERE. BUT THIS

28 IS THE END OF THE TRIAL, AND THIS IS OUR CHANCE TO

50859

1 ARGUE THE CASE TO YOU.

2 I'D LIKE TO BEGIN BY, FIRST OF ALL,

3 THANKING YOU ON BEHALF OF THE PEOPLE OF THE STATE OF

4 THE CALIFORNIA AND ON BEHALF OF THE DISTRICT

5 ATTORNEY'S OFFICE FOR THE ATTENTIVENESS THAT YOU

6 HAVE SHOWN DURING THE COURSE OF THIS TRIAL. YOU

7 HAVE BEEN DILIGENT IN YOUR ATTENDANCE, AND YOU HAVE

8 FAITHFULLY FOLLOWED ALL OF THE INSTRUCTIONS OF THE

9 COURT, INCLUDING THE REQUIREMENT THAT YOU AVOID

10 OUTSIDE INFLUENCES, AND YOU HAVE SERVED AS EXEMPLARY

11 JURORS. YOU ARE TO BE APPLAUDED FOR YOUR

12 PERFORMANCE IN THIS CASE, AND WE SINCERELY THANK

13 YOU, ON BEHALF OF MY OFFICE AND THE PEOPLE OF THE

14 STATE OF CALIFORNIA, FOR YOUR PARTICIPATION IN THIS

15 TRIAL. WE JUST CAN'T DO IT WITHOUT YOU.

16 NOW, WE'VE BEEN HERE FOR A LONG TIME AND  
17 WE'RE GOING TO BE DISCUSSING A LOT OF DIFFERENT  
18 ISSUES. I'M GOING TO BE DISCUSSING THE LAW WITH  
19 YOU, AND I'M GOING TO BE DISCUSSING FACTS WITH YOU.  
20 THAT IS YOUR JOB IN THIS CASE; TO TAKE THE LAW AND  
21 TO APPLY IT TO THE FACTS.

22 SO I WILL BE DISCUSSING ALL OF THE  
23 WITNESSES WHO TESTIFIED IN THIS TRIAL. I WILL BE  
24 DISCUSSING PROSECUTION WITNESSES. I WILL BE  
25 DISCUSSING THE DEFENSE WITNESSES, AND I WILL BE  
26 DISCUSSING THE WITNESSES THAT WE CALLED IN RESPONSE,  
27 THE REBUTTAL WITNESSES, DURING THE COURSE OF THE  
28 TRIAL.

50860

1 IT'S ALSO IMPORTANT FOR YOU TO  
2 UNDERSTAND THE LAW, AND SO I WILL BE DISCUSSING WITH  
3 YOU THE SPECIFIC RULES OF LAW THAT APPLY TO THIS  
4 CASE.

5 AS THE JUDGE INDICATED, HE WILL INSTRUCT  
6 YOU ON THE LAW. HE WILL TELL YOU WHAT THE RULES OF  
7 LAW ARE. HE WILL NOT DO IT BY WAY OF EXAMPLE. THAT  
8 IS SOMETHING THAT IS LEFT TO THE ATTORNEYS TO  
9 EXPLAIN IN THEIR OWN WORDS, AND BOTH SIDES WILL BE

10 TALKING ABOUT THE LAW, EXPRESSING IT IN OUR OWN  
11 WORDS, TO ASSIST YOU IN UNDERSTANDING THE VARIOUS  
12 CONCEPTS THAT APPLY TO THIS CASE. SO YOU'RE GOING  
13 TO HAVE A CRASH COURSE IN CRIMINAL LAW.

14 BUT BEFORE I GET INTO THE DETAILS OF THE  
15 LAW, AND BEFORE I GET INTO THE DETAILS OF THE FACTS,  
16 BECAUSE IT IS GOING TO BE A LONG INSTRUCTION THAT  
17 YOU WILL RECEIVE FROM THE COURT, IT'S GOING TO BE A  
18 LONG PRESENTATION THAT YOU WILL RECEIVE FROM ME. I  
19 WANT TO GIVE YOU AN OVERVIEW OF BASICALLY WHAT OUR  
20 POSITION IS IN THIS CASE. SO THAT AS I BEGIN TO GO  
21 INTO THE DETAILS OF THE LAW AND THE DETAILS OF THE  
22 WITNESSES WHO TESTIFIED IN THIS CASE, YOU'LL BE ABLE  
23 TO PUT IT IN PERSPECTIVE, AND YOU WILL HAVE SOME  
24 SENSE OF WHERE I'M GOING DURING THE COURSE OF MY  
25 ARGUMENT.

26 MY POSITION IN THIS CASE, LADIES AND  
27 GENTLEMEN, IS PRECISELY WHAT I TOLD YOU IN MY  
28 OPENING STATEMENT, AND THAT IS: THAT THIS IS A

50861

1 CLASSIC CASE OF FIRST-DEGREE MURDER. WE ASK YOU TO  
2 FIND THE DEFENDANTS GUILTY OF MURDER IN THE FIRST  
3 DEGREE, FOR BOTH THE KILLING OF THEIR MOTHER AND THE  
4 KILLING OF THEIR FATHER.

5           THERE'S A THIRD CHARGE, WHICH IS  
6 CONSPIRACY TO COMMIT MURDER; AND WE ASK YOU TO FIND  
7 THE DEFENDANTS GUILTY OF THAT CHARGE AS WELL.

8           I WILL BE SHOWING YOU A CHART SETTING  
9 FORTH ALL OF THE CHARGES IN THIS CASE AND THE  
10 FINDINGS THAT YOU'RE GOING TO BE CALLED UPON TO  
11 MAKE.

12          LADIES AND GENTLEMEN, I SAY IT IS A  
13 CLASSIC FIRST-DEGREE MURDER CASE BECAUSE IT HAS ALL  
14 THE COMPONENTS OF, AS YOU WILL LEARN, PREMEDITATED  
15 AND DELIBERATE MURDER.

16          WE HAVE DEMONSTRATED DURING THIS TRIAL  
17 THAT THE DEFENDANTS PURCHASED GUNS DAYS BEFORE THEY  
18 SHOT THEIR PARENTS TO DEATH. WE'VE DEMONSTRATED IN  
19 THIS TRIAL THAT THE DEFENDANTS HAD A MOTIVE TO KILL  
20 THEIR PARENTS; THAT THERE WAS A DISPUTE IN THE  
21 MENENDEZ HOME; THAT THERE WAS ONGOING TENSION AND  
22 ONGOING DISPUTES CONCERNING MONEY, CONCERNING  
23 RESPONSIBILITY, AND CONCERNING THE RELATIONSHIP  
24 BETWEEN THE DEFENDANTS AND THEIR PARENTS.

25          WE PRESENTED EVIDENCE TO YOU OF A  
26 COVER-UP WHICH BEGAN THAT VERY NIGHT OF THE KILLING,  
27 WHICH INCLUDED EFFORTS TO CREATE AN ALIBI AND TO  
28 GIVE AN ALIBI TO THE POLICE.



1 WE PRESENTED EVIDENCE OF FABRICATION OF  
2 EVIDENCE AND DESTRUCTION OF EVIDENCE.

3 AND FINALLY, WE PRESENTED EVIDENCE OF  
4 FINANCIAL GAIN, THE ULTIMATE MONEY MOTIVE IN THIS  
5 CASE, WHICH PROVOKED THE DEFENDANTS TO KILL THEIR  
6 PARENTS.

7 AND I SUBMIT TO YOU, LADIES AND  
8 GENTLEMEN, THAT IN PRESENTING THIS EVIDENCE OF  
9 FIRST-DEGREE MURDER -- AND THAT IS FIRST-DEGREE  
10 MURDER -- YOU WILL LEARN THERE ARE DIFFERENT  
11 THEORIES FOR FIRST-DEGREE MURDER. AND AS I WILL  
12 SHOW TO YOU, WE DEMONSTRATED FIRST-DEGREE MURDER BY  
13 MEANS OF SEVERAL DIFFERENT THEORIES.

14 WE CAUGHT THE DEFENDANTS ESSENTIALLY  
15 RED-HANDED. WE HAVE THE DEFENDANTS IN THIS CASE  
16 ABSOLUTELY GUILTY OF KILLING THEIR PARENTS, AND  
17 THERE'S NO WAY THEY CAN GET AROUND THAT. THERE'S NO  
18 WAY THAT THE DEFENDANTS CAN DENY THEY KILLED THEIR  
19 PARENTS. WE HAVE THEM, OF COURSE, ON TAPE. THE  
20 DECEMBER 11 TAPE IS A TAPE-RECORDING IN WHICH THE  
21 DEFENDANTS SPEAK ABOUT KILLING THEIR PARENTS; AND AS  
22 I WILL SHOW TO YOU, THEY DO SO WITH WORDS THAT ARE  
23 THE EQUIVALENT OF PREMEDITATION.

24 AND WE HAVE THEM PURCHASING THE GUNS.  
25 WE PROVED THAT THE TWO OF THEM PURCHASED GUNS DAYS  
26 BEFORE KILLING THEIR PARENTS.

27 SO WE HAVE SOLID EVIDENCE IN THIS CASE  
28 OF THE GUILT OF THE DEFENDANTS.

1           NOW, WHAT CAN THE DEFENDANTS DO TO TRY  
2 TO COUNTER THAT EVIDENCE? WHAT CAN THE DEFENDANTS  
3 DO TO TRY TO PUT ON A DEFENSE? WHAT TYPE OF A  
4 DEFENSE STEMS FROM THAT?

5           WELL, LADIES AND GENTLEMEN, I WOULD  
6 SUBMIT TO YOU THAT THERE ARE REALLY ONLY TWO  
7 DEFENSES IN CRIMINAL LAW. THE FIRST DEFENSE IS:  
8 "I DIDN'T DO IT." AND THAT IS THE PREFERRED  
9 DEFENSE, BECAUSE THAT IS THE DEFENSE BY WHICH A  
10 PERSON CAN AVOID RESPONSIBILITY ALTOGETHER, AVOID  
11 PUNISHMENT ALTOGETHER. AND WE KNOW THAT THAT WAS  
12 THE PREFERRED POSITION OF THE DEFENDANTS IN THIS  
13 CASE, BECAUSE FROM THE VERY TIME OF THE COMMISSION  
14 OF THE MURDER THE DEFENDANTS IN THIS CASE DENIED  
15 THEIR INVOLVEMENT, COVERED UP THEIR ACTIVITIES, AND  
16 LIED. THEY LIED TO THE POLICE. THEY LIED TO  
17 FRIENDS, AND THEY LIED TO FAMILY MEMBERS.

18          SO WE KNOW THAT THAT IS THEIR PREFERRED  
19 DEFENSE. BUT NOW THE EVIDENCE AGAINST THEM IS JUST  
20 TOO STRONG. THEY HAVE TO MOVE ON TO THE SECOND  
21 DEFENSE.

22          SO I WOULD SUBMIT THAT THE SECOND  
23 DEFENSE, LADIES AND GENTLEMEN, IS, AS I INDICATED ON

24 THIS CHART -- THE ONLY OTHER DEFENSE IN CRIMINAL LAW  
25 IS: "OKAY, I DID IT, BUT I DIDN'T DO IT THE WAY THAT  
26 THE PROSECUTION SAID I DID IT." THOSE ARE THE ONLY  
27 TWO DEFENSES.

28 AND WHAT YOU HAVE TO UNDERSTAND IS THAT

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1 THE DEFENDANTS, ONCE THEY ARE ARRESTED AND ONCE THEY  
2 GO FROM DEFENSE NO. 1 TO DEFENSE NO. 2, THEY DO NOT  
3 GIVE UP THAT DRIVE, THAT ENERGY, THAT DESIRE TO  
4 AVOID PUNISHMENT. SO ALL OF THE EFFORT, ALL OF THE  
5 ENERGY THAT YOU WOULD EXPECT SOMEONE TO PUT INTO  
6 DEFENSE NO. 1: "I DIDN'T DO IT," IS ALL GOING TO GO  
7 INTO DEFENSE NO. 2. ALL THE CREATIVITY, ALL THE  
8 IMAGINATION, ALL THE EFFORT.

9 AND YOU KNOW THAT THE DEFENDANTS IN THIS  
10 CASE HAVE BEEN IN CUSTODY FOR A PERIOD OF TIME, AND  
11 THEY HAVE HAD PLENTY OF TIME TO THINK THROUGH THEIR  
12 PREDICAMENT AND THINK ABOUT MANUFACTURING EVIDENCE  
13 AND PRESENTING A FALSE DEFENSE, AND THAT IS  
14 PRECISELY WHAT WE DEMONSTRATED HERE. WE  
15 DEMONSTRATED -- AND I WILL GO THROUGH EACH OF THESE  
16 WITNESSES -- EFFORTS ON THE PART OF THE DEFENDANTS TO  
17 FABRICATE EVIDENCE, TO DESTROY EVIDENCE, TO PRESENT  
18 FALSE EVIDENCE; AND THROUGH THE TESTIMONY OF ERIK

19 MENENDEZ, TO TESTIFY FALSELY.

20       YOU HAVE TO UNDERSTAND THAT ONCE SOMEONE  
21 LIKE THE DEFENDANTS HERE ARE ARRESTED, THEY DO NOT  
22 TURN INTO HONEST CITIZENS OVERNIGHT. YOU SHOULD NOT  
23 EXPECT THAT ONCE THEY ARE ARRESTED, THEY ARE GOING  
24 TO GO FROM A DESIRE TO AVOID RESPONSIBILITY  
25 ALTOGETHER, TO AN ADMISSION OF THEIR TRUE  
26 RESPONSIBILITY.

27       DEFENSE NO. 2 IS SIMPLY A DEFENSE WHICH  
28 MINIMIZES RESPONSIBILITY. IT DOESN'T AVOID

50865

1 RESPONSIBILITY ALTOGETHER; IT DOESN'T AVOID  
2 PUNISHMENT ALTOGETHER. IT MINIMIZES PUNISHMENT.  
3 AND THAT'S PRECISELY WHAT THEY HAVE TO DO HERE.

4       YOU COME TO A POINT WHERE YOU HAVE TO  
5 CUT YOUR LOSSES. YOU HAVE TO SAY, OKAY, THE  
6 PROSECUTION CAN PROVE THIS, AND THERE'S NO GETTING  
7 AROUND THAT. DEFENSE NO. 1 IS OUT OF THE QUESTION.  
8 A JURY WILL NEVER BUY THAT.

9       NOW, LET'S FOCUS ON DEFENSE NO. 2. WHAT  
10 CAN WE PUT TOGETHER? WHAT CAN WE MANUFACTURE? WHAT  
11 CAN WE CREATE TO MITIGATE PUNISHMENT TO GET OFF A  
12 LITTLE? WE'RE NOT JUST GOING TO ROLL OVER AND SAY  
13 FIRST-DEGREE MURDER. AND THAT'S WHERE THEY BEGAN,

14 LADIES AND GENTLEMEN, A PATTERN OF LIES.

15 WE HAVE THE TESTIMONY OF ERIK MENENDEZ,  
16 FOR EXAMPLE, WHO TESTIFIED IN THIS CASE AND WHO GAVE  
17 YOU A VERSION OF THE EVENTS. AND WHAT YOU HAVE TO  
18 UNDERSTAND, LADIES AND GENTLEMEN, IS THAT YOU  
19 SHOULDN'T BELIEVE WHAT THE DEFENDANT IS SAYING JUST  
20 BECAUSE HE IS ON THE STAND AND TESTIFYING. DON'T BE  
21 FOOLED BY THE FACT THAT SOMEONE TAKES THE STAND AND  
22 SAYS, "OKAY, I DID IT." THAT HE IS NECESSARILY  
23 TELLING THE TRUTH. ALL HE IS DOING NOW IS FOCUSING  
24 ON DEFENSE NO. 2, WHICH IS HOW TO MINIMIZE  
25 RESPONSIBILITY, HOW TO MINIMIZE PUNISHMENT IN THIS  
26 CASE.

27 SO AS YOU WOULD VIEW SOMEONE CLAIMING  
28 DEFENSE NO. 1, WITH SKEPTICISM AND CRITICALLY

50866

1 EVALUATING THE PRESENTATION THAT THEY ARE MAKING TO  
2 YOU, SO TOO, LADIES AND GENTLEMEN, YOU SHOULD  
3 CRITICALLY EVALUATE DEFENSE NO. 2, DESPITE THE FACT  
4 THAT ERIK MENENDEZ HAS TESTIFIED.

5 IT WAS POINTED OUT, FOR EXAMPLE, THAT  
6 ERIK MENENDEZ GAVE A STATEMENT TO PARK DIETZ.  
7 COUNSEL BROUGHT OUT THE FACT FROM PARK DIETZ: ISN'T  
8 IT TRUE THAT SOMETIMES YOU INTERVIEW PEOPLE, YOU

9 INTERVIEW CRIMINAL DEFENDANTS WHO ARE ORDERED TO  
10 GIVE A STATEMENT TO AN EXPERT APPOINTED BY THE  
11 PROSECUTION, AND THAT PERSON REFUSES, AND ERIK  
12 MENENDEZ DID NOT REFUSE?

13 WELL, THAT'S TRUE. ERIK MENENDEZ DID  
14 NOT REFUSE. BUT HE DID NOT REFUSE ONLY BECAUSE IT  
15 SERVED HIS OWN SELF-INTEREST NOT TO REFUSE. HOW  
16 WOULD IT LOOK IF HE HAD BEEN ORDERED TO SPEAK TO  
17 PARK DIETZ AND HE HAD REFUSED TO DO SO?

18 SO DON'T ASSUME THAT JUST BECAUSE HE  
19 GAVE A STATEMENT TO PARK DIETZ, THAT HE'S AN HONEST,  
20 TRUSTWORTHY PERSON, AND DON'T ASSUME JUST BECAUSE HE  
21 TESTIFIED HERE IN COURT AND TOOK THE WITNESS STAND  
22 AND PROMISED TO TELL THE TRUTH, THAT HE'S  
23 NECESSARILY TELLING THE TRUTH.

24 I'LL BE TALKING A GREAT DEAL ABOUT ERIK  
25 MENENDEZ AND HIS CREDIBILITY DURING THE COURSE OF  
26 THIS TRIAL. I'LL GET TO SOME OF THAT LATER.

27 SO BEARING IN MIND, LADIES AND  
28 GENTLEMEN, THAT YOU CAN EXPECT SOMEONE TO MINIMIZE

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1 PUNISHMENT AND TO MINIMIZE THEIR RESPONSIBILITY IN A  
2 CRIME. I SUBMIT TO YOU, LADIES AND GENTLEMEN, THAT  
3 THIS DEFENSE THAT WAS PRESENTED TO YOU -- AND I WILL

4 GIVE YOU ALL THE REASONS WHY -- WAS A ONE HUNDRED  
5 PERCENT TOTAL FABRICATION. IT WAS TOTALLY MADE UP  
6 OUT OF WHOLE CLOTH; AND WHAT WAS MADE UP OUT OF  
7 WHOLE CLOTH WAS NOT ONLY THE EVENTS OF AUGUST THE  
8 20TH 1989, THAT IS, THIS WHOLE STORY ABOUT WELL, I  
9 THOUGHT MY PARENTS WERE GOING TO KILL ME; AND I WAS  
10 RUNNING DOWN THE HALL; AND I WENT OUT TO THE CAR;  
11 AND I HAD TO LOAD AND UNLOAD. I SUBMIT TO YOU THAT  
12 ALL OF THAT IS MADE UP, A PRODUCT OF THE DEFENDANTS'  
13 IMAGINATION AND CREATIVITY, IN AN EFFORT TO MINIMIZE  
14 PUNISHMENT.

15 BUT EVEN THE BACKGROUND INFORMATION IS  
16 ALSO A FABRICATION. THERE IS NO RELIABLE EVIDENCE  
17 IN THIS CASE THAT THE DEFENDANTS WERE EVER SEXUALLY  
18 ABUSED BY THEIR PARENTS. AND I WENT THROUGH THAT  
19 PAINSTAKINGLY, SOME OF THE WITNESSES, AND I THINK  
20 YOU GOT AN IDEA OF PRECISELY HOW I WOULD BE  
21 PRESENTING THAT TO YOU AT THE CONCLUSION OF THE  
22 CASE, BECAUSE I THINK I MADE, THROUGH MY  
23 EXAMINATION, MY POINT VERY CLEAR.

24 THERE ARE NO EYEWITNESSES WHATSOEVER TO  
25 ANY OF THE PHYSICAL ABUSE THAT IS ALLEGED; THAT IS,  
26 THE SEXUAL ABUSE THAT IS ALLEGED BY ERIK MENENDEZ.  
27 NOT A SINGLE EYEWITNESS. THERE ARE NO REPORTS.  
28 THERE ARE NO -- THERE'S NO MEDICAL EVIDENCE. THERE

1 IS SIMPLY NO WAY OF CORROBORATING THE ALLEGATIONS OF  
2 ERIK MENENDEZ THAT HE WAS SEXUALLY ABUSED BY HIS  
3 FATHER.

4       WHAT THEY TRIED TO DO IN THIS CASE IS  
5 THEY TRIED TO BRING -- THEY TRIED TO PRESENT THE  
6 TESTIMONY OF EXPERTS TO BRIDGE THAT GAP. WHAT THEY  
7 WANTED TO DO WAS PUT DR. WILSON THERE ON THE STAND  
8 AND HAVE DR. WILSON SAY: WELL, I CONCLUDED HE WAS  
9 SEXUALLY ABUSED.

10       LADIES AND GENTLEMEN, I'LL DISCUSS  
11 DR. WILSON'S TESTIMONY IN DETAIL WHEN I GET TO THAT  
12 PART OF THE CASE. BUT ESSENTIALLY EXPERT WITNESSES  
13 CAN'T SAY THAT FOR SURE. ALL THEY CAN DO IS HAVE AN  
14 OPINION, LIKE ANYONE ELSE. THEY CAN HAVE AN  
15 OPINION. THERE ARE NO TELL-TALE SYMPTOMS THEY CAN  
16 LOOK AT AND CAN SAY: BECAUSE OF THIS PARTICULAR  
17 SYMPTOM, I CAN TELL YOU THE DEFENDANT HAS BEEN  
18 ABUSED. THERE'S NO WAY OF DOING THAT.

19       SYMPTOMS FROM ABUSE ARE JUST LIKE  
20 SYMPTOMS FROM ANYTHING ELSE. SOME PEOPLE GET THESE  
21 SYMPTOMS; SOME PEOPLE GET OTHER SYMPTOMS; SOME  
22 PEOPLE GET NO SYMPTOMS. THERE'S NO WAY AN EXPERT  
23 CAN TELL YOU THIS PARTICULAR PERSON WAS SEXUALLY  
24 ABUSED. IT JUST CAN'T BE DONE.

25       THEY TRY TO PRESENT EXPERT TESTIMONY TO  
26 BRIDGE THAT GAP FOR YOU, BECAUSE YOU WOULD BE LEFT



27 IN THE DARK, AND YOU WOULD WONDER TO YOURSELF: HOW

28 CAN I DO IT? HOW CAN I DETERMINE WHETHER OR NOT HE

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1 WAS ABUSED? AND YOU WOULD DO IT THE ONLY WAY YOU  
2 CAN DO IT, WHICH IS BY MAKING YOUR OWN CREDIBILITY  
3 CALL, BY EVALUATING THE EVIDENCE FOR YOURSELF. YOU  
4 SEE?

5 WHAT THEY TRIED TO DO IN THIS CASE WAS  
6 TO ASSERT THAT DECISION-MAKING OF THE JURY, TO PUT  
7 AN EXPERT WITNESS ON THE STAND AND TRY TO PRETEND  
8 THEY CAN PROVE IT THROUGH A WITNESS, WHEN, IN FACT,  
9 THEY CAN'T APPROVE IT THROUGH A WITNESS. THERE'S NO  
10 WAY TO PROVE THAT THROUGH AN EXPERT WITNESS.

11 LADIES AND GENTLEMEN, I SUBMIT TO YOU  
12 THAT THE ABUSE IN THIS CASE WAS A TOTAL FABRICATION  
13 WHICH WAS DONE FOR A REASON, A VERY CONSCIOUS,  
14 STRATEGICAL REASON, AND THAT IS -- STRATEGY -- THE  
15 DEFENSE STRATEGY IS TO GET YOU TO HATE KITTY AND  
16 JOSE MENENDEZ. IT'S A VERY IMPORTANT PART OF THE  
17 DEFENSE. IF YOU CAN GET THE JURY TO HATE THE  
18 VICTIMS, THEN PERHAPS YOU'LL LEAN A LITTLE TOWARD  
19 THE DEFENDANT, AND PERHAPS WHEN THE DEFENDANT, ERIK  
20 MENENDEZ, TAKES THE STAND AND TESTIFIES, YOU WILL BE  
21 MORE INCLINED TO GO ALONG WITH HIS VERSION OF THE

22 EVENTS, SIMPLY BECAUSE YOU'RE ALREADY PRECONDITIONED  
23 TO HATE THE VICTIMS IN THIS CASE.  
24 AND TO GET YOU TO HATE THE VICTIMS IN  
25 THIS CASE, WHAT THEY DID WAS -- WHAT ERIK MENENDEZ  
26 DID WAS HE ACCUSED HIS PARENTS OF ONE OF THE WORST  
27 CRIMES IMAGINABLE, SEXUAL ABUSE. LET'S ADMIT IT.  
28 WE ALL KNOW WHAT HORROR THAT STRIKES IN THE MINDS OF

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1 ALL OF US WHEN WE HEAR SOMETHING LIKE THAT. SEXUAL  
2 ABUSE OF A CHILD IS A HORRIBLE, HORRIBLE THING, AND  
3 THEY KNOW IT, YOU SEE. THEY KNOW IT.

4 MS. ABRAMSON: YOUR HONOR, I'M GOING TO  
5 OBJECT. IMPROPER ARGUMENT, USING THE MORAL --  
6 THE COURT: OVERRULED. YOU MAY CONTINUE.

7 MR. CONN: SEXUAL ABUSE IS THE PERFECT  
8 BACKDROP FOR ALLEGATIONS CONCERNING THE PARENTS.

9 WELL, SEXUAL ABUSE HAPPENS BEHIND CLOSED  
10 DOORS. WELL, THAT'S TRUE. SEXUAL ABUSE DOES HAPPEN  
11 BEHIND CLOSED DOORS. BUT WHAT DOES THAT TELL YOU?  
12 DOES IT PROVE THAT IT HAPPENED JUST BECAUSE IT  
13 HAPPENS BEHIND CLOSED DOORS? NO. IT DOESN'T PROVE  
14 THAT IT HAPPENED.

15 WHAT IT REALLY COMES DOWN TO, ONCE  
16 AGAIN, IS THE CREDIBILITY OF THE DEFENDANT. THERE'S

17 NO WAY THEY CAN PROVE THAT TO YOU. BUT IT'S A

18 PERFECT DEFENSE.

19 SOMEONE ONCE SAID A GOOD DEFENSE -- THE

20 PERFECT DEFENSE IS A GOOD OFFENSE. THAT'S PRECISELY

21 WHAT THEY'RE DOING HERE. ACCUSE THE PARENTS, ACCUSE

22 THE VICTIMS. PUT THE VICTIMS ON TRIAL.

23 AND LADIES AND GENTLEMEN, THIS HAS BEEN

24 THE TRIAL OF KITTY AND JOSE MENENDEZ. THEY WERE ON

25 TRIAL IN THIS CASE, AND IT WAS THE DEFENDANTS WHO

26 PUT THEM ON TRIAL, JUST AS MUCH AS THESE TWO

27 DEFENDANTS WERE ON TRIAL. THEY PUT THEIR PARENTS ON

28 TRIAL. AND IT HAS BEEN A JOINT TRIAL OF FOUR

50871

1 PEOPLE, DESIGNED TO PUT YOU IN THAT FRAME OF MIND

2 WHERE YOU WOULD THEN BEGIN TO LEAN TOWARD THEM, FEEL

3 SYMPATHY TOWARDS THEM, HATE THE PARENTS A LITTLE

4 BIT, AND PERHAPS MAKE THE LEAP IN LOGIC THAT IS

5 REQUIRED TO BUY THEIR DEFENSE.

6 WHAT THEY PRESENTED HERE COULD BE CALLED

7 "THE ABUSE EXCUSE." AN ABUSE EXCUSE, REFERRING TO

8 I WAS ABUSED AND, THEREFORE, EXCUSE MY CONDUCT.

9 THAT'S A LITTLE BUT TOO SIMPLISTIC. JURIES WON'T

10 BUY THAT, YOU SEE. YOU HAVE TO DO IT IN A MORE

11 DEVIOUS WAY, IN A MORE SUBTLE WAY; AND THE WAY YOU

12 DO IT IS BY PUTTING THE VICTIMS ON TRIAL AND PUTTING  
13 YOUR MENTAL STATE IN ISSUE. THEN IT BECOMES A WAY  
14 OF TALKING ABOUT YOUR MENTAL STATE. YOU NO LONGER  
15 DIRECTLY ARE ACCUSING THE VICTIMS. YOU'RE NO LONGER  
16 DIRECTLY ATTACKING THE VICTIMS.

17       YOU'RE NOT GOING TO HEAR MS. ABRAMSON,  
18 OR ANY OF THE DEFENSE ATTORNEYS GET UP AND TALK  
19 ABOUT WHAT A TERRIBLE MOTHER AND FATHER KITTY AND  
20 JOSE WERE. SHE DOESN'T WANT TO ADMIT THAT IS THE  
21 FOCUS OF HER ARGUMENT. SHE'S GOING TO SAY: I DON'T  
22 CARE ABOUT THEM. I'M JUST TALKING ABOUT THE MENTAL  
23 STATE OF ERIK MENENDEZ. BUT THE STRATEGICAL IMPORT  
24 OF THAT IS THE SAME, TO PUT THE VICTIMS ON TRIAL, TO  
25 GET YOU TO HATE THE VICTIMS.

26       EVEN ERIK MENENDEZ PLAYED HIS CARDS  
27 PERFECTLY IN THIS TRIAL. WHAT HE DID IS HE TAKES THE  
28 STAND. AND DID HE SAY THESE WERE HORRIBLE PARENTS?

50872

1 NO. HE SAID: I LOVED MY MOTHER.

2       WHAT A GREAT STRATEGY THAT WAS. WHAT A  
3 GREAT STRATEGY THAT WAS. BECAUSE THEN HE DOESN'T  
4 HAVE TO BE THE BAD GUY. IT DOESN'T LOOK LIKE HE'S  
5 ATTACKING THE VICTIM. IT DOESN'T LOOK LIKE HE'S  
6 PUTTING ON TRIAL THE VERY TWO PEOPLE THAT HE

7 KILLED. IT LOOKS LIKE HE'S JUST CAUGHT UP IN THIS  
8 SITUATION, AND HE DOESN'T WANT TO PUT THEM ON  
9 TRIAL.

10 BUT THE FACTS SPEAK FOR THEMSELVES. AND  
11 HE SAYS IN SO MANY WORDS: LET MY MENTAL HEALTH  
12 PROFESSIONALS HANDLE THE REST FOR ME. YOU SEE?

13 AND THEN DR. WILSON BECOMES THE BAD  
14 GUY. HE BECOMES THE HATCHET MAN. HE GETS UP ON THE  
15 STAND AND HE TALKS ABOUT WHAT A TERRIBLE MOTHER  
16 KITTY MENENDEZ WAS, WHAT A TERRIBLE FATHER JOSE  
17 MENENDEZ WAS; AND, SO INDIRECTLY, THEY ACCOMPLISH  
18 THEIR PURPOSE.

19 AND YOU COULD BE SURE, LADIES GENTLEMEN,  
20 THAT AS MUCH AS ERIK MENENDEZ STOOD ON THE STAND AND  
21 SAID: I LOVE MY MOTHER, WHEN DR. WILSON WAS CALLED  
22 TO THE STAND, YOU COULD BE SURE ERIK MENENDEZ WAS  
23 SITTING THERE SAYING: GO TEAM, GO. NOW IS THE  
24 TIME. ATTACK MY MOTHER. ATTACK MY MOTHER.

25 THAT IS THE STRATEGY, TO PUT THE PARENTS  
26 ON TRIAL. AND THE PURPOSE FOR MAKING THESE  
27 HORRIFYING ALLEGATIONS AGAINST THEIR PARENTS WAS  
28 SIMPLY TO CONDITION YOU TO ACCEPT THE DEFENSE, WHICH

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1 REQUIRES A TREMENDOUS LEAP IN LOGIC. THEY KNOW --

2 ERIK MENENDEZ KNOWS THAT HIS DEFENSE MAKES NO SENSE  
3 WHATSOEVER. HE WANTS YOU TO BELIEVE SOMEHOW THAT HE  
4 WAS ACTING IN A PANIC EMOTIONAL STATE AND HAD TO  
5 KILL HIS PARENTS, OR THOUGHT IT WAS NECESSARY TO  
6 KILL HIS PARENTS. HOW COULD THAT POSSIBLY BE? THIS  
7 DEFENSE MAKES ABSOLUTELY NO SENSE WHATSOEVER. THIS  
8 DEFENSE FALLS LOGICALLY, PSYCHOLOGICALLY, AND  
9 LEGALLY. AND I WILL SHOW YOU DETAIL BY DETAIL WHY  
10 THAT IS SO.

11         ERIK AND LYLE MENENDEZ WERE OUTSIDE  
12 THEIR HOUSE WITH LOADED GUNS AND WITH A CAR TO DRIVE  
13 AWAY; AND THERE WAS GAS IN THE CAR; AND THEY HAD CAR  
14 KEYS IN THEIR POCKET; AND THEY DECIDED TO COME INTO  
15 THE HOUSE? SHOOT THE PARENTS TO DEATH? HOW CAN  
16 THAT POSSIBLY BE? HOW CAN THAT POSSIBLY, POSSIBLY  
17 HAPPEN? THERE'S SIMPLY NO NEED THERE TO DO THAT.

18         THE DEFENSE MAKES ABSOLUTELY NO SENSE.

19         BUT TO BRIDGE THE GAP THEY TRY TO CALL  
20 AN EXPERT TO MAKE IT MORE UNDERSTANDABLE, TO ACCEPT  
21 WHAT YOUR NATURAL LOGIC AND NATURAL INTUITION WOULD  
22 CAUSE YOU TO REJECT; THAT PERHAPS BY SOME  
23 PSYCHIATRIC MUMBO-JUMBO, SOMEHOW THAT IS THE NATURAL  
24 AND LOGICAL CONSEQUENCE OF THEIR BEHAVIOR OR THEIR  
25 BACKGROUND OR SOMETHING LIKE THAT.

26         BUT THE ONLY WAY THAT THEY CAN  
27 CONDITION, THE ONLY WAY THEY CAN TRULY PRECONDITION  
28 THE JURY TO ACCEPT THAT IS BY GETTING THE JURY TO

1 HATE THE VICTIMS A LITTLE BIT, AND TO FEEL SYMPATHY  
2 FOR THEM, BECAUSE IF YOU JUST JUDGE THIS BASED UPON  
3 THE EVENTS OF THAT DAY, LADIES GENTLEMEN, I WOULD  
4 SUBMIT, THERE'S NO WAY YOU CAN BUY INTO THE  
5 DEFENSE.

6       AND SO ERIK MENENDEZ DID WHAT HE HAD TO  
7 DO IN ORDER TO MAKE HIS DEFENSE WORK, AND THAT IS HE  
8 CAME UP WITH A STORY. HE CAME UP WITH A STORY THAT  
9 WOULD SUPPORT THE GOAL THAT HE WANTS TO ACHIEVE IN  
10 THIS CASE. AND WE ALL KNOW WHAT THE GOAL IS THAT HE  
11 WANTS TO ACHIEVE IN THIS CASE, BECAUSE HE ADMITTED  
12 THAT ON CROSS-EXAMINATION. I ASKED HIM: "ISN'T IT  
13 TRUE THAT WHAT YOU SEEK TO OBTAIN IS A VOLUNTARY  
14 MANSLAUGHTER?"

15       AND HE ACKNOWLEDGES THAT THAT IS HIS  
16 GOAL. ONCE AGAIN, LADIES AND GENTLEMEN, THE  
17 VOLUNTARY MANSLAUGHTER IS HIS GOAL AS PART OF THE  
18 SECOND CRIMINAL DEFENSE. HE KNOWS HE CAN'T GO SCOTT  
19 FREE, BUT HE GOES FOR THE NEXT BEST THING, MINIMIZE  
20 RESPONSIBILITY, MINIMIZE PUNISHMENT AND GET A  
21 VOLUNTARY MANSLAUGHTER.

22       SO HE SAYS WHAT HE HAS TO SAY, AND IT'S  
23 VERY EASY IF YOU KNOW WHERE YOU'RE GOING. IF YOU  
24 KNOW WHERE YOUR GOAL IS, IT'S VERY EASY TO COME UP  
25 WITH A RIGHT STORY. JUST KEEP THAT GOAL IN MIND AND

26 START OUT AND ASK YOURSELF: WHAT CAN THE  
27 PROSECUTION PROVE? AND THEN COME UP WITH WHAT NEEDS  
28 TO BE FILLED IN BETWEEN.

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1 ONE WAY OF LOOKING AT IT IS LIKE  
2 THIS: HOW ERIK MENENDEZ PUT HIS STORY TOGETHER.  
3 YOU START OUT HERE. WHAT CAN THE PROSECUTION  
4 PROVE? AND YOU USE THAT AS A BASIS, AS YOUR  
5 GROUNDWORK, AND YOU LIST ALL THE EVIDENCE AGAINST  
6 YOU. WELL, ON ONE HAND WE PURCHASED SHOTGUNS TWO  
7 DAYS BEFORE WE KILLED OUR PARENTS. HOW CAN WE  
8 POSSIBLY CLAIM WE DID IT OUT OF FEAR IF WE'RE  
9 SITTING ON OUR SHOTGUNS FOR TWO DAYS AND DIDN'T KILL  
10 OUR PARENTS? HOW CAN WE POSSIBLY EXPLAIN THAT  
11 AWAY?

12 WE WENT ON A FISHING TRIP UNARMED. HOW  
13 CAN WE POSSIBLY EXPLAIN THAT AWAY? IF WE WERE SO  
14 FRIGHTENED OF OUR PARENTS, HOW CAN WE EXPLAIN GOING  
15 ON A FISHING TRIP WITH NO GUNS?

16 OF COURSE, WE CONFESSED. ERIK MENENDEZ  
17 SAYS: I CONFESSED TO DR. OZIEL. I CONFESSED TO  
18 CRAIG CIGNARELLI. AND I CAN GO ON AND ON AND LIST  
19 ALL THE PROSECUTION'S EVIDENCE IN THIS CASE. THESE  
20 ARE THE PROBLEMS PRESENTED TO HIM, AND HE HAS TO



21 LOOK AT THIS, AND HE HAS TO FIGURE OUT: WHERE DO I  
22 GO FROM HERE? THIS IS HIS GOAL. WHERE I WANT TO GO  
23 IS VOLUNTARY MANSLAUGHTER BASED ON FEAR. THAT'S THE  
24 LEGAL THEORY, ROOTED IN FEAR, ROOTED IN THIS  
25 PASSION.

26 HOW CAN HE GET THERE? HOW CAN HE  
27 JUSTIFY KILLING THE PARENTS ON SUNDAY WHEN HE WENT  
28 TO PURCHASE GUNS TWO DAYS EARLIER? YOU FILL IN THE

50876

1 GAPS. YOU JUST START FROM HERE. GUNS PURCHASED TWO  
2 DAYS EARLIER. WELL, BECAUSE I THOUGHT MY PARENTS  
3 MIGHT KILL ME. THERE YOU GO. NOT SURE. THEY MIGHT  
4 KILL ME.

5 AND WE WENT ON THE FISHING TRIP  
6 UNARMED. HOW CAN I HANDLE THAT? WELL, I WAS SURE  
7 THAT MY PARENTS WERE GOING TO KILL ME, BUT NOT TOO  
8 SURE. OKAY. NOT YET SURE. OKAY.

9 AND YOU JUST WORK AROUND -- YOU JUST  
10 WORK AROUND EVERYTHING THE PROSECUTION CAN PROVE.  
11 AND THAT'S PRECISELY, I WOULD SUBMIT TO YOU, HOW  
12 ERIK MENENDEZ PUT HIS DEFENSE TOGETHER.

13 I WILL GO THROUGH HIS TESTIMONY STEP BY  
14 STEP AND ESTABLISH THAT POINT, BECAUSE HE DID IT, HE  
15 DID IT, AND YOU CAN TELL THAT HE DID IT THAT WAY

16 BECAUSE THEIR STORY, WHICH I WILL CALL HIS SCRIPT,  
17 REALLY MAKES NO SENSE. IT IS THE SILLIEST, MOST  
18 RIDICULOUS STORY EVER TOLD IN A COURTROOM. BUT HE  
19 HAS TO STICK TO IT BECAUSE IT'S THE ONLY WAY TO GET  
20 OVER HERE TO HIS END GOAL OF VOLUNTARY  
21 MANSLAUGHTER.

22 HE CONFESSED TO CRAIG CIGNARELLI. SO  
23 WHAT CAN HE SAY ABOUT THAT? WELL, JUST SAY CRAIG IS  
24 LYING. WHY WOULD CRAIG LIE? I'LL GET INTO ALL THE  
25 DETAILS LATER.

26 DR. OZIEL. WHAT CAN I SAY ABOUT  
27 DR. OZIEL? AFTER ALL, THE PSYCHIATRIST IS LYING.  
28 WELL, PUT WORDS IN MY MOUTH. THERE YOU GO.

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1 DR. OZIEL PUT WORDS IN MY MOUTH.

2 AND THIS IS HOW HE PUT HIS DEFENSE  
3 TOGETHER, LADIES AND GENTLEMEN, BY JUST FILLING IN  
4 THE BLANKS.

5 AS I GO THROUGH HIS STATEMENTS, AS I GO  
6 THROUGH HIS STORY, THROUGH HIS TESTIMONY HERE IN  
7 COURT, WE WILL SHOW YOU THAT THE ONLY REASONABLE  
8 CONCLUSION IS THAT'S PRECISELY HOW HE DID IT,  
9 BECAUSE HIS STORY IS SO ILLOGICAL AND SO  
10 CONTRADICTORY AND SO CONTRARY TO THE TESTIMONY OF

11 ALL THE WITNESSES THAT WE PRESENTED IN THIS CASE,  
12 AND SO CONTRARY TO THE RELIABLE AND KNOWN FACTS,  
13 THAT THE ONLY EXPLANATION FOR SUCH A CRAZY STORY IS  
14 THAT HE HAD A GOAL IN MIND, AND IT'S ALL DIRECTED  
15 TOWARDS THAT GOAL.

16 AND ONCE YOU SEE HOW IT'S ALL  
17 DIRECTED TOWARD THAT GOAL, THEN, OF COURSE, HIS  
18 STORY, AS CRAZY AS IT IS, MAKES SENSE IN A CRAZY,  
19 MIXED UP -- CRAZY KIND OF WAY. BUT, OF COURSE, IT  
20 IS A CRAZY STORY WHICH SHOULD NOT BE BELIEVED.

21 I WOULD SUBMIT TO YOU, LADIES AND  
22 GENTLEMEN, THAT ERIK MENENDEZ WANTS A VOLUNTARY  
23 MANSLAUGHTER, AND HE WANTS IT VERY BAD. HE WANTS IT  
24 SO BAD HE CAN TASTE IT. BUT YOU SHOULD NOT GIVE IT  
25 TO HIM. BECAUSE IN THIS CASE THE EVIDENCE WARRANTS  
26 NOTHING LESS THAN FIRST-DEGREE PREMEDITATED MURDER.  
27 AND DON'T BE IMPRESSED, LADIES AND GENTLEMEN, WITH  
28 THE ELABORATENESS OF THE TALE THAT WAS TOLD TO YOU

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1 BY ERIK MENENDEZ, BECAUSE IT IS INDEED AN ELABORATE  
2 TALE.

3 I MEAN, WE HEARD ABOUT ROUGH SEX AND  
4 NICE SEX AND PLAIN OLD SEX AND SO ON AND SO FORTH.  
5 AND WE HEARD ABOUT ABUSE GOING BACK TO THE AGE OF

6 FIVE AND SIX, OR WHATEVER AGES IT STARTED; AND WE

7 HEARD TALE AFTER TALE AFTER TALE.

8 AS I TRIED TO SHOW IN MY

9 CROSS-EXAMINATION OF ERIK MENENDEZ, WHERE IS THE

10 CORROBORATION OF THAT? YES, YOU SHOWED US HOUSES

11 WHERE IT TOOK PLACE, AND YOU SHOWED US PHOTOGRAPHS

12 OF VASELINE THAT SUPPOSEDLY YOUR FATHER USED TO

13 MOLEST YOU. WHERE IS THE CORROBORATION OF THAT? HE

14 CAN'T CORROBORATE THAT.

15 LADIES AND GENTLEMEN, IF YOU WERE IN

16 JAIL FOR FIVE YEARS, AND IF YOU HAD TIME TO FIGURE

17 OUT A SET OF CIRCUMSTANCES OR A SET OF FACTS TO

18 MITIGATE YOUR RESPONSIBILITY, YOU COULD DO THE SAME

19 THING. YOU COULD COME UP WITH A VERY ELABORATE

20 TALE. YOU COULD REWRITE THE HISTORY OF WESTERN

21 CIVILIZATION WITH A WHOLE NEW CAST OF CHARACTERS IF

22 YOU HAD TO. ONCE YOU HAVE THE MOTIVATION AND TIME,

23 YOU CAN BE VERY CREATIVE AND YOU CAN COME UP WITH A

24 VERY GOOD STORY.

25 AND I WOULD SUBMIT TO YOU THAT -- DO NOT

26 BUY THE TALE OF THE DEFENDANT SIMPLY BECAUSE IT IS

27 AN ELABORATE TALE. THAT'S NOT A VALID BASIS FOR

28 ACCEPTING THAT TALE.

1 I WILL ASK YOU, LADIES AND GENTLEMEN,  
2 AFTER I FINISH DISCUSSING THE LAW WITH YOU, AND I  
3 FINISH DISCUSSING MY CASE WITH YOU, WHICH POINTS  
4 TOWARDS A FIRST-DEGREE MURDER, AND AFTER I FINISH  
5 DISCUSSING THE DEFENSE WITH YOU, WHICH I WOULD ARGUE  
6 IS UNRELIABLE AND SHOULD BE REJECTED, THAT YOU  
7 SHOULD FIND THE DEFENDANTS GUILTY OF MURDER IN THE  
8 FIRST DEGREE, BECAUSE -- AND THAT YOU SHOULD REJECT  
9 THE TESTIMONY OF ERIK MENENDEZ, BECAUSE NOT ONLY  
10 DOES HE HAVE A MOTIVE TO LIE, NOT ONLY DOES HE HAVE  
11 A LONG HISTORY OF LYING, AS ESTABLISHED BY HIS  
12 BEHAVIOR BEFORE THE TIME OF HIS ARREST, NOT ONLY WAS  
13 HE INVOLVED IN THE DESTRUCTION OF EVIDENCE AND  
14 EFFORTS TO FABRICATE EVIDENCE, BUT BECAUSE HIS STORY  
15 MAKES ABSOLUTELY NO SENSE, IS CONTRADICTED BY OTHER  
16 EVIDENCE, AND IS SIMPLY UNWORTHY OF YOUR BELIEF.

17 NOW, TURNING TO THE CHARGES IN THIS  
18 CASE. IT'S IMPORTANT THAT YOU KEEP AN EYE ON  
19 PRECISELY THE REASON WHY YOU ARE HERE, WHAT YOU ARE  
20 HERE TO DECIDE, AND WHAT YOU ARE NOT HERE TO  
21 DECIDE. AND BEFORE YOU IS A CHART WHICH ILLUSTRATES  
22 THE CHARGES IN THIS CASE.

23 YOU HAVE, FIRST OF ALL, IN COUNT 1,  
24 MURDER IN THE FIRST DEGREE. THE DEFENDANTS ARE  
25 CHARGED WITH THE FIRST-DEGREE MURDER OF JOSE  
26 MENENDEZ, AND THERE IS SOMETHING CALLED A SPECIAL  
27 CIRCUMSTANCE THAT IS ALLEGED, AND I WILL BE  
28 EXPLAINING ALL OF THESE TERMS TO YOU. THIS GIVES

1 YOU THE BROAD OVERVIEW, FIRST OF ALL.

2 THE SPECIAL CIRCUMSTANCE THAT IS ALLEGED  
3 IS LYING IN WAIT. IN COUNT 2 IT IS ALLEGED THAT THE  
4 DEFENDANTS BOTH KILLED THEIR MOTHER, MARY LOUISE  
5 MENENDEZ, AND THAT IT WAS MURDER IN THE FIRST  
6 DEGREE. THE SAME SPECIAL CIRCUMSTANCE IS ALLEGED,  
7 THAT THE MURDER WAS COMMITTED WHILE THE DEFENDANTS  
8 WERE LYING IN WAIT.

9 THEN THERE'S ANOTHER SPECIAL  
10 CIRCUMSTANCE, AND YOU CAN SEE I OFFSET IT A LITTLE  
11 BIT FROM THE FIRST TWO COUNTS, BECAUSE IT IS A  
12 SPECIAL CIRCUMSTANCE WHICH IS NOT ALLEGED  
13 INDIVIDUALLY AS TO EACH COUNT. IT IS ALLEGED ONCE  
14 AND ONLY ONCE, BUT IT APPLIES TO BOTH COUNTS; AND  
15 THAT IS, MULTIPLE MURDERS WERE COMMITTED IN THIS  
16 CASE, AND THAT IS THE EASIEST SPECIAL CIRCUMSTANCE  
17 TO EXPLAIN. SO I'LL JUST EXPLAIN THAT RIGHT NOW.

18 THIS SIMPLY MEANS THAT IF YOU FIND THE  
19 DEFENDANT GUILTY, IF YOU FIND A DEFENDANT GUILTY OF  
20 MURDER IN THE FIRST DEGREE, YOU ARE THEN ASKED TO  
21 MAKE A SPECIAL FINDING, AND THAT IS, IN THIS CASE  
22 WAS THE DEFENDANT CONVICTED OF MORE THAN ONE COUNT  
23 OF MURDER? AND THE SECOND COUNT COULD BE MURDER IN

24 THE SECOND DEGREE.

25 SO, FOR EXAMPLE, IF YOU WERE TO FIND THE  
26 DEFENDANT, EITHER ONE -- AND YOU DO HAVE TO DECIDE  
27 RESPONSIBILITY INDIVIDUALLY, OF COURSE -- IF YOU  
28 WERE TO FIND THE DEFENDANT GUILTY OF FIRST-DEGREE

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1 MURDER FOR COUNT 1, FIRST-DEGREE MURDER IN COUNT 2,  
2 THEN YOU COULD FIND THE SPECIAL CIRCUMSTANCE OF  
3 MULTIPLE MURDERS TRUE. THAT'S THE ONLY FINDING  
4 YOU'RE ASKED TO MAKE. IS IT A TRUE ALLEGATION OR A  
5 FALSE ALLEGATION? AS YOU CAN SEE, IT FOLLOWS  
6 AUTOMATICALLY. IT'S JUST COMMON SENSE. IF YOU  
7 FOUND THEM GUILTY OF TWO COUNTS OF MURDER, THEN, OF  
8 COURSE, THE MULTIPLE MURDERS ALLEGATION IS TRUE.

9 NEVERTHELESS, YOU ARE ASKED TO MAKE THAT  
10 SPECIFIC FINDING, AND YOU DO HAVE TO MAKE THAT  
11 FINDING. THE COURT DOESN'T MAKE THAT FINDING FOR  
12 YOU.

13 IF YOU WERE TO FIND, FOR EXAMPLE -- JUST  
14 SAY HYPOTHETICALLY SPEAKING -- FIRST DEGREE FOR THE  
15 KILLING OF THEIR MOTHER, MARY LOUISE MENENDEZ, AND  
16 SECOND-DEGREE MURDER OF JOSE MENENDEZ, JUST SPEAKING  
17 HYPOTHETICALLY, WELL, THE SPECIAL CIRCUMSTANCE WOULD  
18 STILL BE TRUE, BECAUSE YOU FOUND THE DEFENDANT

19 GUILTY IN THIS PROCEEDING OF MORE THAN ONE COUNT OF  
20 MURDER.

21 OF COURSE, IT WOULDN'T APPLY IF YOU  
22 FOUND TWO COUNTS OF MURDER IN THE SECOND DEGREE,  
23 BECAUSE, LIKE I SAID, YOU ARE ONLY ASKED TO MAKE A  
24 FINDING OF A SPECIAL CIRCUMSTANCE IF YOU FIND THE  
25 DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE.

26 SO IF YOU HAVE TWO COUNTS OF MURDER OR  
27 ONE COUNT OF MURDER IN -- IF YOU HAVE TWO COUNTS OF  
28 MURDER IN THE FIRST DEGREE, OR ONE COUNT OF MURDER

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1 IN THE FIRST DEGREE, AND ONE COUNT OF MURDER IN THE  
2 SECOND DEGREE, YOU SHOULD, IN EVERY CASE, FIND THIS  
3 SPECIAL CIRCUMSTANCE OF MULTIPLE MURDERS TO BE  
4 TRUE. IT'S NECESSARILY TRUE. IT FOLLOWS, JUST AS A  
5 MATTER OF LOGIC.

6 THEN, YOU HAVE ONE MORE CHARGE TO FIND  
7 IN THIS CASE, AND THAT IS CONSPIRACY TO COMMIT  
8 MURDER. THAT'S COUNT 3. THE DEFENDANTS ARE CHARGED  
9 WITH CONSPIRACY TO COMMIT MURDER; AND ONCE AGAIN, I  
10 WILL BE GOING THROUGH THE ELEMENTS OF ALL THESE  
11 DEFENSES WITH YOU SO YOU UNDERSTAND PRECISELY WHAT  
12 THESE MEAN. BUT THESE ARE ALL OF THE CHARGES IN  
13 THIS CASE, AND THESE ARE ALL OF THE FINDINGS THAT



14 YOU WILL BE CALLED UPON TO MAKE. AND WHAT WE'LL BE  
15 ASKING YOU TO DO THEN, AS YOU CAN TELL VERY CLEARLY  
16 JUST FROM THIS CHART -- THE PROSECUTION WILL BE  
17 ASKING YOU TO FIND BOTH DEFENDANTS GUILTY OF MURDER  
18 IN THE FIRST DEGREE FOR COUNT 1; TO FIND THE SPECIAL  
19 CIRCUMSTANCE OF LYING IN WAIT TO BE TRUE; TO FIND  
20 BOTH DEFENDANTS GUILTY OF MURDER OF THE FIRST  
21 DEGREE; AND FINALLY, TO FIND THE SPECIAL  
22 CIRCUMSTANCE OF LYING IN WAIT TO BE TRUE; TO FIND  
23 THE SPECIAL CIRCUMSTANCE OF MULTIPLE MURDER TO BE  
24 TRUE, FIRST OF ALL, IN REGARD TO BOTH, AND ALSO TO  
25 FIND THE DEFENDANTS GUILTY OF CONSPIRACY TO COMMIT  
26 MURDER. AND WE SUBMIT, AT THIS POINT YOUR JOB WILL  
27 BE DONE.

28 NOW, THOSE ARE THE SPECIFIC FINDINGS

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1 THAT YOU WILL BE ASKED TO MAKE. BUT IT'S ALSO  
2 IMPORTANT FOR YOU TO BEAR IN MIND WHY YOU ARE NOT  
3 HERE, JUST AS MUCH AS WHY YOU ARE HERE.  
4 ARE YOU HERE TO DECIDE IF JOSE MENENDEZ  
5 MISTREATED HIS SONS? ARE YOU HERE TO DECIDE IF JOSE  
6 MENENDEZ MOLESTED ERIK MENENDEZ? WELL, THAT IS NOT  
7 YOUR KEY PURPOSE FOR BEING HERE. THAT'S ONE OF THE  
8 ISSUES THAT HAS BEEN RAISED BY THE DEFENSE. IT WILL

9 BE ARGUED BY THE DEFENSE, AND IT WILL BE ARGUED BY  
10 THE PROSECUTION. BUT IT'S IMPORTANT FOR YOU TO  
11 UNDERSTAND THE PRECISE ROLE OF THE JURY.  
12       YOU ARE BEING CALLED UPON TO ANSWER VERY  
13 SPECIFIC QUESTIONS, AND THAT IS NOT ONE OF THE  
14 SPECIFIC QUESTIONS THAT YOU ARE BEING CALLED UPON TO  
15 DECIDE: DID JOSE MENENDEZ DO THIS OR DO THAT? IT  
16 MAY EVENTUALLY BE PART OF YOUR DISCUSSION, AND IT  
17 SHOULD BE PART OF YOUR DISCUSSION. BUT IT'S  
18 IMPORTANT FOR YOU TO UNDERSTAND YOUR JOB SO THAT YOU  
19 CAN ALWAYS GET BACK ON TRACK, TO KNOW WHERE YOU ARE  
20 GOING, WHAT YOU ARE HERE TO DECIDE. SO YOU CAN  
21 DECIDE THE QUESTION OF WHETHER JOSE MENENDEZ  
22 MOLESTED HIS SONS OR ABUSED HIS SONS IN ANY WAY, AND  
23 AS MUCH AS YOU WANT, BUT ALWAYS COME BACK TO THE  
24 CHARGES IN THIS CASE, AND ALWAYS COME BACK TO THE  
25 ELEMENTS OF THE OFFENSE. DON'T GET CAUGHT UP INTO  
26 ANY OF THE DETAILS OF THE CASE. ALWAYS COME BACK TO  
27 THESE ISSUES; THAT IS, THE ACTIONS OF THE  
28 DEFENDANTS.

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1       AND, OF COURSE, THEY'RE NOT DENYING THE  
2 ACTIONS. BOTH COUNSEL IN THEIR OPENING STATEMENTS  
3 ADMITTED THAT THE DEFENDANTS COMMITTED THESE

4 CRIMES. WE'RE REALLY TALKING ABOUT, IN THIS CASE,  
5 NOT WHETHER OR NOT THEY ARE GUILTY, BUT THE DEGREE  
6 OF HOMICIDE IN THIS CASE. THAT IS THE ISSUE BEFORE  
7 YOU.

8         SO IN ORDER TO UNDERSTAND, IN ORDER TO  
9 MAKE A FINDING CONCERNING THE DEGREE OF HOMICIDE,  
10 YOU MUST UNDERSTAND THE LAW. YOU MUST APPLY THE LAW  
11 TO THE FACTS; AND THE FACTS ARE SIMPLY THE TOOLS BY  
12 WHICH YOU MAKE THE ULTIMATE DETERMINATION FOR WHICH  
13 YOU ARE HERE TO MAKE. SO STAY FOCUSED ON THE  
14 CHARGES. STAY FOCUSED ON THE ELEMENTS OF THE  
15 CHARGE, AND KEEP COMING BACK TO THAT ISSUE, BECAUSE  
16 JURORS MAY FEEL -- MAY SOMETIMES SEE EVIDENCE  
17 DIFFERENTLY, AND IT'S NOT SURPRISING THAT YOU WILL.  
18 PEOPLE -- YOU ALL COME FROM DIFFERENT BACKGROUNDS AND  
19 ALL LOOK AT THE WORLD DIFFERENTLY AND SEE EVIDENCE  
20 DIFFERENTLY; AND YOU MAY REACH DIFFERENT CONCLUSIONS  
21 CONCERNING SOME OF THE ISSUES THAT ARE IN DISPUTE  
22 HERE IN THIS TRIAL. YOU MAY SEE ONE WITNESS ONE  
23 WAY, AND THEN THERE MIGHT BE ANOTHER JUROR WHO SEES  
24 THAT WITNESS TOTALLY DIFFERENTLY. AND THAT'S FINE.

25         IN THE END THE ISSUE IS: DO YOU AGREE  
26 AS TO WHAT DEGREE OF HOMICIDE THE DEFENDANT IS  
27 GUILTY OF? DON'T WORRY TOO MUCH ABOUT THE FACT THAT  
28 YOU MIGHT VIEW SOME ISSUES OF EVIDENCE DIFFERENTLY.

1 ALWAYS COME BACK TO THE PURPOSE FOR WHICH YOU ARE  
2 HERE; THAT IS, WHAT ARE THE DEFENDANTS GUILTY OF?  
3 NOW, HOW DO YOU MAKE THAT  
4 DETERMINATION? HOW DO YOU DETERMINE WHAT THE  
5 DEFENDANTS ARE GUILTY OF? BEAR IN MIND THAT YOU ARE  
6 HERE AS JUDGES NOW, AND AS JUDGES, YOU DON'T SHOOT  
7 FROM THE HIP. YOU HAVE TO BASE IT UPON THE LAW.  
8 YOUR REASON SHOULD BE ROOTED IN THE LAW AND ROOTED  
9 IN A CAREFUL APPLICATION OF THE LAW TO THE FACTS OF  
10 THIS CASE. YOU DON'T DECIDE IT BASED UPON YOUR  
11 FEELINGS. YOU DON'T SAY, WELL, I FEEL DIFFERENTLY  
12 ABOUT THIS DEFENDANT THAN ONE DEFENDANT; OR THIS  
13 DEFENDANT SOMEHOW STRIKES ME AS BEING MORE CULPABLE  
14 OR MORE RESPONSIBLE ON SOME SORT OF A MORAL LEVEL  
15 THAN THE OTHER DEFENDANT. THAT'S NOT UNCOMMON, AND  
16 YOU MIGHT FEEL THAT. JUST AS YOU ALL COME FROM  
17 DIFFERENT BACKGROUNDS, TWO DEFENDANTS IN A TRIAL IN  
18 ANY GIVEN CASE MAY BOTH BE RESPONSIBLE FOR THE CRIME  
19 AND MAY BOTH BE LEGALLY RESPONSIBLE IN PRECISELY THE  
20 SAME WAY, AND YET THEY MAY BE TWO VERY DIFFERENT  
21 TYPES OF PERSONS, YOU SEE.

22 SO AS YOU LOOK TO THE DEFENDANTS IN THIS  
23 CASE DON'T SAY: WELL, ERIK MENENDEZ STRIKES ME AS A  
24 VERY DIFFERENT PERSON THAN LYLE MENENDEZ, AND BASED  
25 UPON THAT I'M GOING TO DECIDE THIS CASE DIFFERENTLY  
26 FOR ONE AS OPPOSED TO THE OTHER.

27 LADIES AND GENTLEMEN, IF YOU HAPPEN TO

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1 HAS TO BE BASED UPON THE LAW. IT CAN'T BE BASED  
2 UPON YOUR FEELINGS TOWARDS THEM AS PERSONS OR THAT  
3 THEY'RE DIFFERENT. YOU HAVE TO ASK YOURSELF: IS  
4 THERE A LEGAL DISTINCTION? IS THERE A LEGAL BASIS  
5 TO DECIDE THE CASE DIFFERENTLY FOR ONE AS OPPOSED TO  
6 THE OTHER?

7       AND WHAT I SUBMIT TO YOU, LADIES AND  
8 GENTLEMEN, ALTHOUGH IT IS YOUR RESPONSIBILITY IN  
9 THIS CASE TO EVALUATE THE DEFENDANTS' RESPONSIBILITY  
10 INDIVIDUALLY AND SEPARATELY, THAT IS YOUR DUTY. I  
11 ASK YOU, LADIES AND GENTLEMEN, IN THE END -- AND I  
12 WILL SHOW YOU WHY -- TO FIND THE DEFENDANTS EQUALLY  
13 GUILTY OF THESE CHARGES, TO FIND BOTH DEFENDANTS  
14 GUILTY OF MURDER IN THE FIRST DEGREE FOR THE  
15 KILLINGS OF BOTH OF THEIR PARENTS, TO FIND THE  
16 SPECIAL CIRCUMSTANCES TRUE AS TO EACH OF THE  
17 DEFENDANTS, AND TO FIND BOTH DEFENDANTS GUILTY OF  
18 CONSPIRACY TO COMMIT MURDER.

19       AND WHY? BECAUSE UNDER THE LAW, LADIES  
20 AND GENTLEMEN, BY A STRICT APPLICATION OF THE LAW TO  
21 THE FACTS OF THE CASE, THESE DEFENDANTS ARE EQUALLY  
22 RESPONSIBLE.

23           NOW, YOU MIGHT FEEL THEY PLAYED A  
24 DIFFERENT ROLE, AND I DON'T THINK THERE'S ANY  
25 QUESTION ABOUT THAT. MANY OF YOU MAY FEEL AT THIS  
26 POINT THAT LYLE MENENDEZ WAS MORE OF A LEADER IN THE  
27 COMMISSION OF THIS CRIME, AND I THINK THERE'S  
28 SUBSTANTIAL EVIDENCE TO WARRANT THAT; AND NO DOUBT,

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1 AS YOU LISTEN TO THE EVIDENCE, MANY OF YOU PROBABLY  
2 GOT THAT SENSE OF IT TOO.

3           BUT LADIES AND GENTLEMEN, IS THAT A  
4 DIFFERENT -- A LEGAL DIFFERENCE IN TERMS OF WHAT  
5 CRIME YOU ULTIMATELY HOLD THE DEFENDANTS RESPONSIBLE  
6 FOR? AS I WILL SHOW YOU, LADIES GENTLEMEN, THAT IS,  
7 LEGALLY SPEAKING, IT MAKES NO DIFFERENCE. BOTH  
8 DEFENDANTS ARE EQUALLY GUILTY.

9           SO YOU CAN SEE THAT IT IS VERY IMPORTANT  
10 TO UNDERSTAND THE RULES OF LAW THAT APPLY TO THIS  
11 CASE AND TO DECIDE THIS CASE, NOT BASED UPON A GUT  
12 REACTION OF HOW EACH DEFENDANT STRIKES YOU, BUT  
13 BASED UPON THE LAW.

14           NOW, BEFORE I GO TO SOME OF THE SPECIFIC  
15 RULES OF LAW, LET ME SPEAK FIRST ABOUT CRIMINAL  
16 RESPONSIBILITY IN CRIME AND HOW WE DETERMINE  
17 CRIMINAL RESPONSIBILITY FOR A CRIME. THERE ARE

18 DIFFERENT THEORIES OF CRIMINAL RESPONSIBILITY THAT  
19 APPLY, AND EACH THEORY APPLIES TO THE SAME CRIMINAL  
20 ACT.

21       THERE'S SOMETHING IN THE LAW CALLED  
22 PRINCIPALS TO A CRIME; THAT IS, FOR INSTANCE, A  
23 CRIME REFERS TO THE PEOPLE WHO ARE ACTUALLY INVOLVED  
24 IN THE COMMISSION OF THE CRIME, WHO ACTUALLY GET  
25 INVOLVED IN COMMITTING THE CRIME.

26       THERE ARE TWO TYPES OF INDIVIDUALS WHO  
27 GET INVOLVED IN THE COMMISSION OF THE CRIME; AND  
28 THAT IS THE PERSONS WHO ACTUALLY COMMIT IT, AND THEN

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1 THERE ARE THOSE WHO AID AND ABET. AID AND ABET --  
2 YOU WILL HEAR THE PRECISE INSTRUCTIONS BY THE  
3 COURT. IT MEANS ESSENTIALLY TO HELP OR TO ASSIST IN  
4 ANY WAY.

5       AND WE WILL SUBMIT TO YOU, LADIES AND  
6 GENTLEMEN, THAT AS YOU EVALUATE THE ROLE OF EACH  
7 DEFENDANT IN THIS CRIME, YOU WILL SEE THAT EACH  
8 DEFENDANT IS RESPONSIBLE UNDER BOTH THEORIES OF  
9 RESPONSIBILITY, BECAUSE ACCORDING TO ERIK MENENDEZ,  
10 BOTH DEFENDANTS WENT INTO THAT ROOM AND SHOT THEIR  
11 PARENTS TO DEATH. BOTH DEFENDANTS HAD THEIR HANDS  
12 ON THE GUNS, FIRED SHOTS, PULLED THE TRIGGER AND

13 SHOT THE PARENTS. BOTH OF THOSE DEFENDANTS ARE  
14 RESPONSIBLE FOR THE PERSONAL COMMISSION OF THE  
15 CRIME. BUT UNDER THE THEORY OF AIDING AND ABETTING,  
16 IT SAYS THAT A PERSON AIDS AND ABETS THE COMMISSION  
17 OF A CRIME WHEN, WITH KNOWLEDGE OF THE UNLAWFUL  
18 PURPOSE OF THE PERPETRATOR, AND WITH THE INTENT OR  
19 PURPOSE OF COMMITTING, ENCOURAGING, OR FACILITATING  
20 THE COMMISSION OF THE CRIME, BY ACT OR ADVICE, THAT  
21 PERSON PROMOTES, ENCOURAGES, OR INSTIGATES THE  
22 COMMISSION OF THE CRIME.

23 SO YOU CAN SEE THAT THERE IS ANOTHER WAY  
24 OF BEING HELD RESPONSIBLE FOR A CRIME, EVEN IF YOU  
25 DON'T ACTUALLY PULL THE TRIGGER.

26 NOW, PROBABLY AN EXAMPLE COMES TO MIND.  
27 WHEN YOU THINK OF AIDING AND ABETTING, FOR MOST  
28 PEOPLE IT IS THE IDEA OF THE BANK ROBBER AND THE

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1 GETAWAY MAN OUTSIDE. THAT'S PROBABLY THE EXAMPLE  
2 THAT'S FAMILIAR TO MOST PEOPLE, YOU SEE. THE BANK  
3 ROBBER IS THE ONE WHO GOES INSIDE AND STEALS THE  
4 MONEY. THE GETAWAY MAN STAYS OUTSIDE TO DRIVE AWAY  
5 THE CAR; AND HE NEVER POINTS A GUN AT ANYONE, YOU  
6 SEE. BUT HE IS EQUALLY RESPONSIBLE UNDER THE THEORY  
7 OF AIDING AND ABETTING, BECAUSE HE WAS A FULL



8 PARTICIPANT IN THAT CRIME. HE HAD KNOWLEDGE OF THE  
9 UNLAWFUL PURPOSE OF THE ACT, HE INTENDED TO ASSIST  
10 IN THAT CRIME, AND HE DID SOMETHING; AND WHAT HE DID  
11 IS NOT IMPORTANT, AS LONG AS IT AIDED OR PROMOTED OR  
12 ENCOURAGED THE COMMISSION OF THE CRIME.

13 SO WHY IS THAT PRINCIPAL IMPORTANT TO  
14 THIS CASE? THAT PRINCIPAL IS IMPORTANT TO THIS CASE  
15 BECAUSE THAT'S WHY IT'S NOT TOO IMPORTANT TO ASK  
16 YOURSELF, WELL, HOW MANY SHOTS DID ERIK MENENDEZ  
17 ACTUALLY FIRE? HOW MANY TIMES DID ERIK MENENDEZ  
18 ACTUALLY STRIKE HIS MOTHER VERSUS HIS FATHER?  
19 SUPPOSE HE ONLY SHOT HIS MOTHER AND HE DIDN'T SHOOT  
20 HIS FATHER? WHAT DIFFERENCE DOES IT MAKE?

21 YOU SEE, IT DOESN'T MAKE ANY DIFFERENCE  
22 UNDER THE THEORY OF AIDING AND ABETTING. UNDER THE  
23 THEORY OF PERSONAL RESPONSIBILITY, HE'S RESPONSIBLE  
24 FOR SHOOTING HIS MOTHER TO DEATH. THE FACT HE SHOT  
25 HIS FATHER, UNDER THE THEORY OF AIDING AND ABETTING,  
26 IT DOESN'T MATTER WHETHER HE SHOT HIS FATHER AT  
27 ALL. YOU CAN FIND THAT BASED ON THE FACTS OF THIS  
28 CASE HE ENTERED THE ROOM -- DIDN'T HE TELL HIS

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1 BROTHER "HURRY, HURRY"? AND WASN'T HE THERE AT THE  
2 CAR WITH HIM, BY HIS OWN ADMISSION, LOADING THEIR

3 GUNS TOGETHER, RUNNING IN TOGETHER, OPENING THE  
4 DOORS TOGETHER?

5 SO YOU CAN FIND, BASED UPON ALL OF THESE  
6 ACTS, THAT EACH ONE WAS AN AIDER AND ABETTER.  
7 THAT'S WHY YOU DON'T HAVE TO GET CAUGHT UP INTO A  
8 DETERMINATION OF WHO SHOT WHO. IT DOESN'T MATTER.  
9 UNDER THE THEORY OF AIDING AND ABETTING THEY'RE BOTH  
10 RESPONSIBLE FOR THE KILLING OF THEIR PARENTS.

11 THERE'S ONE MORE THEORY OF CRIMINAL  
12 RESPONSIBILITY THAT I WOULD LIKE TO DISCUSS, AND  
13 THAT IS THE THEORY OF CONSPIRATORIAL LIABILITY.  
14 THAT'S ANOTHER RULE OF LAW WHICH APPLIES TO THIS  
15 CASE, BECAUSE THE DEFENDANTS IN THIS CASE ARE  
16 CHARGED, AS YOU KNOW, WITH CONSPIRACY TO COMMIT  
17 MURDER. THERE'S A RULE OF LAW WHICH SAYS WHEN YOU  
18 CONSPIRE TO COMMIT A CRIME, YOU ARE RESPONSIBLE, NOT  
19 ONLY FOR THE PARTICULAR CRIME THAT YOU CONSPIRED TO  
20 COMMIT, BUT YOU'RE ALSO RESPONSIBLE FOR THE NATURAL  
21 AND PROBABLE CONSEQUENCE OF THAT CRIME.

22 SO, FOR EXAMPLE, LET'S SAY YOU AND I  
23 CONSPIRE WE'RE GOING TO COMMIT A BURGLARY. OKAY?  
24 AND AS PART OF THAT CONSPIRACY, THEN, YOU GO AND YOU  
25 BANG SOMEONE OVER THE HEAD TO GET INTO THE  
26 LOCATION. EVEN IF I'M NOT PRESENT AT THE TIME, IF  
27 THERE WAS, IN FACT, A CONSPIRACY, AND I KNOWINGLY  
28 ENTERED INTO THAT CONSPIRACY, I'M RESPONSIBLE FOR

1 THE FACT YOU BANGED SOMEONE OVER THE HEAD. A JURY  
2 CAN FIND ME RESPONSIBLE. WHY? BECAUSE WHEN YOU  
3 COMMITTED THE BURGLARY -- IT'S AN OCCUPIED  
4 RESIDENCE. IT'S VERY LIKELY SOMEONE IS GOING TO GET  
5 HIT OVER THE HEAD DURING THE COURSE OF THE CRIME.

6 UNDER THAT THEORY YOU CAN FIND A PERSON  
7 RESPONSIBLE EVEN IF THEY'RE NOT PRESENT AT THE TIME,  
8 BECAUSE IT'S A NATURAL AND PROBABLE CONSEQUENCE.  
9 THE SPECIFIC LANGUAGE OF THE LAW SAYS THIS:

10 "A MEMBER OF A CONSPIRACY IS NOT  
11 ONLY GUILTY OF THE PARTICULAR CRIME  
12 THAT TO HIS KNOWLEDGE HIS CONFEDERATES  
13 AGREE TO AND DID COMMIT, BUT IS ALSO  
14 LIABLE FOR THE NATURAL AND PROBABLE  
15 CONSEQUENCES OF ANY CRIME OF A  
16 COCONSPIRATOR TO FURTHER THE OBJECT OF  
17 THE CONSPIRACY, EVEN THOUGH SUCH CRIME  
18 WAS NOT INTENDED AS A PART OF THE  
19 AGREED-UPON OBJECTIVE, AND EVEN THOUGH  
20 HE WAS NOT PRESENT AT THE TIME OF THE  
21 COMMISSION OF THE CRIME."

22 YOU SEE? SO I CAN'T USE AS AN EXCUSE,  
23 IF YOU AND I CONSPIRED TO COMMIT THAT BURGLARY, I  
24 CAN'T LATER SAY IN A COURT OF LAW, WELL, GEE, DON'T  
25 HOLD ME RESPONSIBLE FOR THE FACT THAT SOMEONE GOT

26 HIT OVER THE HEAD. BUT THE LAW SAYS OTHERWISE. YOU  
27 REALIZED WHAT YOU WERE DOING. YOU ENTERED INTO THAT  
28 CONSPIRACY, AND THAT'S THE PROBLEM WITH CRIMINAL

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1 CONSPIRACIES. VERY OFTEN ONE PERSON WHO IS  
2 SUPPORTED AND REINFORCED BY ANOTHER WILL THEN BE  
3 EVEN MORE ENCOURAGED TO GO OUT AND COMMIT THAT  
4 CRIME. AND FOR THAT REASON EACH MEMBER OF THE  
5 CONSPIRACY IS HELD RESPONSIBLE.

6 AND HOW DOES THAT RULE APPLY TO FACTS OF  
7 THIS CASE? YOU'LL RECEIVE THE FOLLOWING INSTRUCTION  
8 FROM THE COURT:

9 (READING):

10 "YOU DETERMINE WHETHER THE  
11 DEFENDANT IS GUILTY AS A MEMBER OF A  
12 CONSPIRACY TO COMMIT THE ORIGINALLY  
13 AGREED-UPON CRIME OR CRIMES."

14 REMEMBER, THEY ARE CHARGED WITH  
15 CONSPIRACY TO COMMIT THE MURDER. OKAY?

16 NOW, IF YOU FIND THE DEFENDANTS GUILTY  
17 OF CONSPIRACY TO COMMIT THE MURDER, OKAY, YOU CAN  
18 ALSO FIND THE CRIME ALLEGED IN COUNT 1 AND 2, MURDER  
19 IN THE FIRST DEGREE -- YOU CAN THEN DECIDE WHETHER  
20 THESE CRIMES WERE PERPETRATED BY A COCONSPIRATOR IN

21 FURTHERANCE OF SUCH CONSPIRACY, AND WAS A NATURAL  
22 AND PROBABLE CONSEQUENCE OF THE AGREED-UPON CRIMINAL  
23 OBJECTIVE OF SUCH CONSPIRACY.

24 SO, YOU SEE, NOT ONLY IS IT NOT  
25 NECESSARY FOR THE PROSECUTION TO SHOW, JUST BY WAY  
26 OF EXAMPLE -- IT'S NOT NECESSARY FOR ME TO SHOW THAT  
27 ERIK MENENDEZ ACTUALLY SHOT HIS FATHER, BECAUSE  
28 UNDER THE THEORY OF AIDING AND ABETTING, HE'S

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1 EQUALLY RESPONSIBLE AS A PRINCIPAL TO THAT CRIME.  
2 BUT UNDER THE THEORY OF CONSPIRACY TO  
3 COMMIT MURDER, HE COULD ALSO BE HELD ACCOUNTABLE FOR  
4 THAT CRIME, EVEN IF HE WASN'T PRESENT THAT DAY. YOU  
5 SEE? I'LL GET BACK MORE LATER WITH YOU CONCERNING  
6 THE LAW OF CONSPIRACY. BUT THAT GIVES YOU AN  
7 OVERVIEW OF THE TYPES OF CRIMINAL RESPONSIBILITY  
8 THAT APPLIES TO THIS CASE.

9 NOW, I'D LIKE TO DISCUSS WITH YOU AT  
10 THIS TIME THE LAW OF HOMICIDE, BECAUSE THEY ARE THE  
11 KEY CHARGES IN THIS CASE THAT ARE ALLEGED IN COUNT 1  
12 AND COUNT 2.

13 HOMICIDE. HOMICIDE IS DEFINED AS A  
14 KILLING OF ANOTHER HUMAN BEING. AND IT BREAKS DOWN  
15 INTO TWO DIFFERENT TYPES. THERE IS MURDER; THEN

16 THERE'S MANSLAUGHTER. AND MURDER IS FURTHER BROKEN  
17 DOWN IN TERMS OF DEGREES. FIRST-DEGREE MURDER AND  
18 SECOND-DEGREE MURDER; AND ONCE AGAIN, THIS IS THE  
19 CHART THAT GIVES YOU JUST THE OVERVIEW. AND I'LL BE  
20 DISCUSSING EACH OF THESE ELEMENTS AND EACH OF THESE  
21 CONCEPTS WITH YOU INDIVIDUALLY.

22       YOU CAN SEE THAT ONE OF THE DIFFERENCES  
23 BETWEEN, OR -- I SHOULDN'T SAY NOT ONE OF THE  
24 DIFFERENCES, BUT THE KEY DIFFERENCE BETWEEN MURDER  
25 AND MANSLAUGHTER IS THE NOTION OF MALICE  
26 AFORETHOUGHT. MURDER INCLUDES MALICE AFORETHOUGHT;  
27 WHEREAS, MANSLAUGHTER AS KILLING WITHOUT MALICE  
28 AFORETHOUGHT.

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1       WHAT IS MALICE? MALICE DOESN'T MEAN --  
2 MALICE SHOULD NOT BE INTERPRETED IN TERMS OF THE  
3 GENERAL USE OF THE WORD. WE SOMETIMES USE THE WORD  
4 "MALICE" AS ILL-WILL OR HATRED OR ANGER OR  
5 SOMETHING LIKE THAT. THE COMMON LAY DEFINITION OF  
6 MALICE IS SUCH. IN THE LAW MALICE DOESN'T MEAN  
7 THAT. MALICE IS A TERM OF ART THAT IS USED IN THE  
8 LAW THAT HAS SPECIFIC MEANING.

9       MALICE IS THE INTENTION UNLAWFULLY TO  
10 KILL ANOTHER HUMAN BEING, AND THAT IS DEMONSTRATED

11 IN TWO CIRCUMSTANCES; WHERE THERE IS EXPRESS MALICE  
12 AND WHERE THERE IS IMPLIED MALICE.

13       HERE'S A CHART WHICH BREAKS DOWN THOSE  
14 CONCEPTS FOR YOU. EXPRESS MALICE IS SHOWN WHERE  
15 THERE IS MANIFESTED AN INTENTION UNLAWFULLY TO KILL  
16 A HUMAN BEING.

17       SO, IN OTHER WORDS, WHEN YOU INTEND TO  
18 KILL, YOU HAVE THAT SPECIFIC INTENT IN YOUR MIND TO  
19 KILL UNLAWFULLY; THAT IS EXPRESS MALICE. IN OTHER  
20 WORDS, YOU KNOW YOU'RE GOING TO KILL SOMEONE, YOU  
21 KNOW IT'S UNLAWFUL, BUT YOU GO AHEAD AND DO IT  
22 ANYWAY. THAT IS EXPRESS MALICE, AND THAT IS  
23 MURDER.

24       IMPLIED MALICE IS SHOWN WHEN THE  
25 FOLLOWING IS SHOWN: NUMBER ONE, A KILLING RESULTED  
26 FROM AN INTENTIONAL ACT; NUMBER TWO, THE NATURAL  
27 CONSEQUENCE OF THE ACT ARE DANGEROUS TO HUMAN LIFE;  
28 AND NUMBER THREE, THE ACT WAS DELIBERATELY PERFORMED

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1 WITH THE KNOWLEDGE OF THE DANGER TO AND CONSCIOUS  
2 DISREGARD FOR HUMAN LIFE.

3       LET ME GIVE YOU AN EXAMPLE THAT WILL  
4 SHOW YOU HOW MALICE IS DEMONSTRATED IN THE FOLLOWING  
5 TWO CIRCUMSTANCES: SUPPOSE YOU'RE SITTING IN YOUR

6 HOME AND PEOPLE ARE WALKING BY OUTSIDE. IT'S A  
7 CROWDED STREET OUTSIDE AND YOU TAKE YOUR RIFLE AND  
8 YOU DECIDE TO SHOOT SOME OF THE PEOPLE WALKING BY,  
9 AND YOU STICK YOUR RIFLE OUT THE WINDOW AND YOU AIM;  
10 AND YOU KNOW THAT YOU'RE GOING TO KILL THEM, AND YOU  
11 SAY: "THAT'S OKAY WITH ME. I'LL JUST GO AHEAD AND  
12 KILL THEM." AND YOU FIRE YOUR RIFLE AT THAT PERSON  
13 AS THAT PERSON IS WALKING BY OUTSIDE YOUR WINDOW.  
14 THAT'S AN EXAMPLE OF EXPRESS MALICE. THAT IS  
15 MURDER. OKAY? BECAUSE, REMEMBER, MURDER IS SHOWN  
16 WHERE MALICE IS SHOWN, BECAUSE WHEN YOU ARE FIRING  
17 YOUR RIFLE OUTSIDE OF THAT WINDOW YOU ARE  
18 MANIFESTING, BY YOUR BEHAVIOR, AND A JURY CAN  
19 CONCLUDE YOUR STATE OF MIND BASED UPON THAT  
20 BEHAVIOR, THAT THERE IS -- THAT YOU HAVE AN  
21 INTENTION UNLAWFULLY TO KILL A HUMAN BEING. YOU  
22 KNOW WHAT YOU'RE DOING IS WRONG. YOU KNOW YOU'RE  
23 GOING TO KILL THEM, BUT YOU GO AHEAD AND YOU DO IT  
24 ANYWAY. THAT IS MURDER.

25 LET'S SAY, NOW, YOU CLOSE YOUR EYES AND  
26 YOU'RE NOT LOOKING AT YOUR TARGET, AND WITH YOUR  
27 EYES CLOSED YOU'RE STICKING THAT RIFLE OUT THE  
28 WINDOW, AND YOU'RE STILL PULLING THE TRIGGER.



1 OKAY? YOU DON'T KNOW IF YOU'RE GOING TO HIT  
2 SOMEONE. THERE'S ALWAYS THE POSSIBILITY THAT YOU'RE  
3 GOING TO MISS.

4 NOW, IS THAT NOT MURDER? NO. THAT IS  
5 STILL MURDER. WHY? UNDER THE THEORY OF IMPLIED  
6 MALICE. IMPLIED MALICE IS SHOWN WHEN A KILLING  
7 RESULTS IN AN INTENTIONAL ACT, THE NATURAL  
8 CONSEQUENCES OF THE ACT ARE DANGEROUS TO HUMAN LIFE,  
9 AND THE ACT WAS DELIBERATELY PERFORMED WITH  
10 KNOWLEDGE OF THE DANGER TO AND CONSCIOUS DISREGARD  
11 FOR HUMAN LIFE.

12 SO IF YOU HAVE YOUR EYES CLOSED AND YOU  
13 STICK YOUR RIFLE OUT THE WINDOW AND YOU'RE FIRING  
14 SHOTS, YOU KNOW YOU'RE GOING TO SHOOT SOMEONE. YOU  
15 KNOW YOU'RE GOING TO KILL SOMEONE. YOU MAY NOT  
16 SPECIFICALLY INTEND TO KILL A SPECIFIC PERSON.  
17 MAYBE YOU'RE PLAYING AND YOU JUST WANT TO SEE  
18 WHETHER OR NOT YOU KILL THEM. BUT, NEVERTHELESS,  
19 IT'S STILL MURDER UNDER THE THEORY OF IMPLIED  
20 MALICE. THAT GIVES YOU AN IDEA OF WHAT EXPRESS AND  
21 IMPLIED MALICE IS.

22 HOW DOES THE THEORY OF IMPLIED MALICE  
23 HAVE APPLICATION TO THIS PARTICULAR CASE? WELL,  
24 LADIES AND GENTLEMEN, WHEN YOU RUSH INTO A ROOM AND  
25 YOU FIRE A GUN IN A ROOM -- LET'S SAY YOU FIRE A  
26 SHOTGUN AT TWO PEOPLE AND THE ROOM IS DARK, AND YOU  
27 KNOW WHAT'S GOING TO HAPPEN WHEN YOU SHOOT THAT GUN  
28 AT THOSE TWO PEOPLE. YOU KNOW YOU'RE GOING TO KILL

1 THOSE TWO PEOPLE. IT DOESN'T MATTER WHETHER YOU  
2 INTEND TO KILL THOSE TWO PEOPLE IN THE ROOM OR NOT.  
3 JUST BY FIRING THAT GUN, SQUEEZING THAT TRIGGER AT  
4 THOSE PEOPLE IN THIS DARK ROOM, YOU KNOW YOU'RE  
5 GOING TO KILL THEM. YOU CAN'T SAY: WELL, I DIDN'T  
6 INTEND TO KILL. I DIDN'T HAVE EXPRESS MALICE. IT  
7 DOESN'T MATTER WHETHER YOU HAD EXPRESS MALICE. YOU  
8 STILL HAD IMPLIED MALICE. IT'S STILL MURDER, NO  
9 MATTER HOW YOU CUT IT, YOU SEE?

10 I'M NOT ASKING YOU TO FIND THE  
11 DEFENDANTS GUILTY BASED ON THE THEORY OF IMPLIED  
12 MALICE. I THINK THAT IS THE WORST FINDING YOU CAN  
13 MAKE. I'M ASKING YOU TO FIND THEM GUILTY BASED UPON  
14 EXPRESS MALICE. I'M ASKING YOU TO FIND WHEN THEY  
15 WENT INTO THAT ROOM, THEY WENT IN WITH THE INTENT TO  
16 KILL. I WOULD ASK YOU, THAT'S THE ONLY REASONABLE  
17 CONCLUSION THAT COULD BE DRAWN IN THIS CASE, IS THAT  
18 THEY WENT IN THERE WITH THE INTENT TO KILL. BUT I  
19 DO WANT TO POINT THAT OUT TO YOU, THAT IMPLIED  
20 MALICE, IN ANY EVENT, WOULD APPLY TO THAT CASE. OUR  
21 THEORY IS BASED UPON EXPRESS MALICE.

22 NOW, LET ME TALK ABOUT SOME OF THE  
23 CHARGES THAT APPLY TO THIS CASE. I ALREADY TOLD YOU  
24 THE CHARGES THAT APPLY TO THIS CASE. LET ME

25 INTRODUCE YOU TO A CONCEPT CALLED LESSER-INCLUDED  
26 OFFENSES.

27 NOW, YOU KNOW, AS I INDICATED TO YOU ON  
28 THE CHART, AND AS I INDICATED TO YOU IN MY OPENING

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1 STATEMENT, THAT THE DEFENDANTS ARE CHARGED WITH THE  
2 FIRST-DEGREE MURDER OF THEIR PARENTS.

3 NOW, THE LAW DOES NOT SIMPLY SAY THEY  
4 ARE GUILTY OF THIS CRIME AND NOTHING ELSE. YOU  
5 EITHER FIND THEM GUILTY OR NOT GUILTY AND GO HOME.  
6 SOMETIMES WHAT THE LAW DOES IS THE LAW APPLIES,  
7 DEPENDING UPON THE FACTS OF THE CASE; AND IT DOES  
8 DEPEND UPON THE SPECIFIC FACTS OF THE CASE. THE LAW  
9 MAY PROVIDE FOR SOMETHING CALLED A LESSER-INCLUDED  
10 OFFENSE.

11 AND WHAT THAT MEANS IS THAT IF THE JURY  
12 WERE TO FIND THAT THE DEFENDANT IS NOT GUILTY OF  
13 FIRST-DEGREE MURDER, FOR EXAMPLE, THERE'S KIND OF A  
14 BACK-UP CHARGE THAT APPLIES THAT YOU COULD FIND THE  
15 DEFENDANT GUILTY OF. YOU SEE? THAT'S CALLED A  
16 LESSER-INCLUDED OFFENSE. I'M NOT ASKING YOU TO FIND  
17 A LESSER-INCLUDED OFFENSE IN THIS CASE. IT IS MY  
18 POSITION, AND I WILL ARGUE MY POSITION OVER,  
19 THROUGHOUT THE COURSE OF MY ARGUMENT, AS TO WHY THIS

20 IS ABSOLUTELY A FIRST-DEGREE MURDER.

21 BUT NEVERTHELESS, YOU SHOULD BE FAMILIAR  
22 WITH THE CONCEPT, AND I WANT TO DISCUSS THAT CONCEPT  
23 WITH YOU.

24 IN THE FOLLOWING CHART, WHAT I'VE  
25 DEMONSTRATED IS THE CHARGES THAT APPLY TO THIS CASE  
26 AND THE LESSER-INCLUDED OFFENSES.

27 NOW, KITTY MENENDEZ, AS YOU KNOW, IS  
28 ALLEGED BY THE PROSECUTION TO HAVE BEEN KILLED BY

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1 THE DEFENDANTS IN THE COURSE OF MURDER IN THE FIRST  
2 DEGREE; AND THAT IS WHAT WE ARE ASKING YOU TO FIND  
3 IN THIS CASE, AND NOTHING ELSE.

4 BUT THERE IS A LESSER-INCLUDED OFFENSE  
5 TO MURDER IN THE FIRST DEGREE, WHICH IS MURDER IN  
6 THE SECOND DEGREE.

7 JOSE MENENDEZ, AS YOU KNOW, IT IS  
8 ALLEGED BY THE PROSECUTION, THAT HE WAS KILLED BY  
9 THE DEFENDANTS IN THE COURSE OF THE CRIME OF MURDER  
10 IN THE FIRST DEGREE. ONCE AGAIN, THE CRIME OF  
11 MURDER IN THE SECOND DEGREE APPLIES AS TO HIM.

12 NOW, AS TO JOSE MENENDEZ ALONE -- IT  
13 DOES NOT APPLY TO KITTY MENENDEZ -- THERE IS A  
14 LESSER-INCLUDED OFFENSE TO THE CRIME OF

15 SECOND-DEGREE MURDER, WHICH IS CALLED, AS YOU KNOW,  
16 THE CRIME OF MANSLAUGHTER.

17 NOW, THIS IS SOMETHING -- ONCE AGAIN,  
18 THE PROSECUTION IS NOT ASKING YOU TO FIND THIS TO BE  
19 TRUE.

20 I PRESENT THIS CHART TO YOU JUST TO MAKE  
21 IT VERY CLEAR TO YOU THAT IN NO EVENT DOES THE CRIME  
22 OF MANSLAUGHTER APPLY TO KITTY MENENDEZ. IT IS A  
23 CRIME WHICH THEORETICALLY COULD APPLY TO JOSE  
24 MENENDEZ. BUT AGAIN, I'M ASKING YOU TO REJECT EACH  
25 OF THOSE LESSER-INCLUDEDs, TO FIND THE DEFENDANTS  
26 GUILTY OF MURDER IN THE FIRST DEGREE.

27 NOW, I WOULD LIKE TO DISCUSS WITH YOU  
28 THEN WHAT IS MURDER IN THE FIRST DEGREE. THAT IS

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1 THE CHARGE THE PROSECUTION IS SEEKING, AND WE HAVE  
2 SEVERAL THEORIES OR SEVERAL ROADS BY WHICH YOU CAN  
3 GET THERE. THIS CHART ILLUSTRATES THE ROADS BY  
4 WHICH YOU CAN GET TO FIRST-DEGREE MURDER.

5 THERE IS SOMETHING CALLED MURDER WHILE  
6 LYING IN WAIT; AND ONCE AGAIN, THIS IS ANOTHER  
7 OVERVIEW CHART. I'M SHOWING YOU A SERIES OF  
8 OVERVIEW CHARTS, GETTING DOWN INTO FINER AND FINER  
9 DETAIL AS TO WHAT THE LAW IS IN THIS CASE. I WILL

10 BE EXPLAINING TO YOU, BY USE OF DIFFERENT CHARTS,  
11 JUST WHAT EACH OF THESE TERMS REFER TO.  
12 THERE'S SOMETHING CALLED MURDER WHILE  
13 LYING IN WAIT. THAT IS ONE WAY OF GETTING TO  
14 FIRST-DEGREE MURDER.  
15 ANOTHER THEORY FOR GETTING TO  
16 FIRST-DEGREE MURDER IS PREMEDITATED AND DELIBERATE  
17 MURDER.  
18 AND THE THIRD THEORY, ONE I ALREADY  
19 DISCUSSED WITH YOU BRIEFLY, IS THAT THE MURDER WAS A  
20 NATURAL AND PROBABLE CONSEQUENCE OF CONSPIRACY TO  
21 COMMIT THE MURDER, AND YOU KNOW THAT IS BASED UPON  
22 THE THEORY AS I ALREADY DISCUSSED; THAT IF THE  
23 DEFENDANTS, IN FACT, CONSPIRED TO COMMIT MURDER, AND  
24 THAT CRIME WAS COMMITTED, THEY ARE GUILTY OF THAT  
25 CRIME AND OF THE FIRST-DEGREE MURDER OF THEIR  
26 PARENTS.  
27 MS. ABRAMSON: YOUR HONOR, WE WOULD OBJECT AT  
28 THIS POINT TO THAT DEFINITION.

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1 UNDER SWAIN I THINK THIS IS MISLEADING.  
2 THE COURT: YOU HAVE TO ADD ANOTHER ELEMENT  
3 TO THE CONSPIRACY.  
4 MS. ABRAMSON: WE'D LIKE TO BE HEARD ON THE

5 THRUST OF THE ARGUMENT, GIVEN THE SWAIN CASE, YOUR  
6 HONOR.

7 THE COURT: OVERRULED. WITH THE  
8 UNDERSTANDING, AGAIN, THAT ARGUMENTS OF THE LAWYERS,  
9 BOTH AS TO THE FACTS AND AS TO THE LAW, ARE JUST  
10 THEIR INTERPRETATIONS. AS FAR AS THE LAW IS  
11 CONCERNED, I'LL GIVE YOU THE FINAL VERSION AS TO ALL  
12 LEGAL RULES.

13 I'LL PERMIT THE ARGUMENT TO CONTINUE.

14 BEAR IN MIND, THIS IS JUST AN  
15 INTERPRETATION AS PROVIDED BY MR. CONN.

16 MR. CONN: ONE OF THE THINGS THAT I WILL  
17 POINT OUT TO YOU NOW, ALTHOUGH IT IS CONTAINED ON  
18 OTHER CHARTS, IS THIS: IN ORDER TO GET TO  
19 FIRST-DEGREE MURDER, YOU HAVE TO HAVE EXPRESS  
20 MALICE. OKAY. CAN'T BE BASED UPON IMPLIED MALICE.  
21 REMEMBER, I TOLD YOU THERE ARE TWO KINDS OF MALICE:  
22 EXPRESS MALICE AND IMPLIED MALICE. ONE, EXPRESS  
23 MALICE, IS WHERE YOU INTEND TO KILL. YOU FIRED THAT  
24 RIFLE OUT THE WINDOW. YOU KNOW YOU'RE GOING TO HIT  
25 SOMEONE. YOU DON'T HAVE TO HIT SOMEONE AND INTEND  
26 TO KILL THEM. THAT'S EXPRESS MALICE.

27

28

1 IMPLIED MALICE IS WHEN YOU FIRE YOUR GUN  
2 OUT THE WINDOW WITH YOUR EYES CLOSED. YOU'RE NOT SURE  
3 IF YOU'RE GOING TO HIT THEM, OR YOU REALLY DON'T CARE,  
4 BUT YOU KNOW IF YOU HIT THEM YOU'LL KILL THEM. THAT'S  
5 IMPLIED MALICE.

6 FOR EACH OF THESE THEORIES, IT MUST BE  
7 NECESSARY TO SHOW THAT THE DEFENDANT'S STATE OF MIND HAD  
8 EXPRESS MALICE; THAT IS, IF MURDER WHILE LYING IN WAIT  
9 IS COMMITTED, IT WAS WITH EXPRESS MALICE; THAT THE  
10 PREMEDITATED AND DELIBERATE MURDER WAS WITH EXPRESS  
11 MALICE; THAT IS, INTENT TO KILL.

12 AND ALSO IN REGARD TO THAT INTENT THEORY,  
13 LIABILITY, IT MUST BE SHOWN THAT AT THE TIME OF THE  
14 CONSPIRACY YOU INTENDED TO KILL. YOU HAD THAT STATE OF  
15 EXPRESS MALICE IN YOUR MIND AT THE TIME THAT YOU ENTERED  
16 INTO THAT CONSPIRACY.

17 NOW, I WOULD LIKE TO BREAK DOWN THESE  
18 THEORIES FOR YOU, AND I WILL START FIRST WITH DELIBERATE  
19 AND PREMEDITATED MURDER.

20 WHAT IS MEANT BY DELIBERATE AND  
21 PREMEDITATED MURDER?

22 WELL, YOU WILL RECEIVE A JURY INSTRUCTION  
23 WHICH TELLS YOU EACH OF THE ELEMENTS OF THIS OFFENSE,  
24 AND IT EXPLAINS EACH OF THESE CONCEPTS TO YOU.

25 THAT INSTRUCTION SAYS THAT ALL MURDER WHICH  
26 IS PERPETRATED BY ANY KIND OF WILLFUL, DELIBERATE AND  
27 PREMEDITATED KILLING, WITH EXPRESS MALICE AFORETHOUGHT,  
28 IS MURDER OF THE FIRST DEGREE.



1           NOW, LET ME GO BACK TO THE EXAMPLE OF  
2 SOMEONE FIRING OUT A WINDOW, YOU SEE. WHEN I SAY THAT  
3 THAT'S MURDER, AND IT'S MURDER BASED UPON TWO DIFFERENT  
4 THEORIES, EXPRESS MALICE OR IMPLIED MALICE, THAT DOESN'T  
5 AUTOMATICALLY MAKE IT A MURDER IN THE FIRST DEGREE.

6           YOU CAN THINK OF MURDER IN THE SECOND  
7 DEGREE AS KIND OF PLAIN OLD MURDER. THAT'S ONE WAY OF  
8 LOOKING AT IT. PLAIN OLD MURDER.

9           IN ORDER TO GET TO FIRST-DEGREE MURDER, YOU  
10 HAVE TO SHOW SOMETHING MORE. YOU HAVE TO SHOW THAT YOU  
11 CAN TAKE ONE OF THOSE ROADS TO GET TO THAT HIGHER LEVEL  
12 OF MURDER.

13          SO, IF ALL WE KNOW IS YOU'RE FIRING OUT A  
14 WINDOW AND YOU INTEND TO HIT PEOPLE -- AND YOU INTEND TO  
15 HIT PEOPLE AND YOU KILL THEM -- AND YOU INTEND TO KILL  
16 THEM, THAT'S NOT ENOUGH FOR FIRST-DEGREE MURDER. IT'S  
17 EXPRESS MALICE, IT'S MURDER, BUT IT'S NOT NECESSARILY  
18 FIRST-DEGREE MURDER. YOU NEED TO KNOW MORE.

19          THE SAME THING WHERE IMPLIED MALICE IS  
20 SHOWN. IMPLIED MALICE CANNOT BE THE BASIS FOR  
21 FIRST-DEGREE MURDER. AND SO YOU DO NOT HAVE  
22 FIRST-DEGREE MURDER BASED UPON AN IMPLIED MALICE THEORY.

23          BUT HERE, TURNING TO PREMEDITATED AND  
24 DELIBERATE MURDER.

25          ALL MURDER PERPETRATED BY A DELIBERATE,

26 PREMEDITATED AND WILLFUL ACT IS MURDER IN THE  
27 FIRST-DEGREE. IT CONTAINS ALL OF THOSE CONCEPTS. LET  
28 ME EXPLORE THOSE WITH YOU.

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1 A WILLFUL KILLING SIMPLY MEANS AN  
2 INTENTIONAL KILLING. WELL, CERTAINLY FIRING OUT A  
3 WINDOW, AS I SAID, IS A WILLFUL KILLING.

4 LET'S TAKE NO. 4. LET'S JUMP TO NO. 4 FOR  
5 A SECOND, INTENT TO KILL.

6 I TOLD YOU THAT IF YOU FIRE OUT A WINDOW  
7 AND YOU INTEND TO KILL SOMEONE, THAT'S A -- THAT IS AN  
8 EXAMPLE OF EXPRESS MALICE AFORETHOUGHT.

9 SO, FIRING OUT A WINDOW, YOU SEE, INTENDING  
10 TO KILL SOMEONE AND KILLING SOMEONE, DOES IN FACT  
11 SATISFY THESE REQUIREMENTS OF NO. 1 AND NO. 4.

12 BUT THE PROBLEM WITH FIRING OUT THE WINDOW  
13 IS THAT THE OTHER ADDITIONAL ITEMS, TWO AND THREE, ARE  
14 NOT NECESSARILY PRESENT. THAT IS WHAT DISTINGUISHES  
15 FIRING OUT THE WINDOW FROM FIRST-DEGREE MURDER, ALTHOUGH  
16 THIS MAY BE PRESENT IN THAT SITUATION.

17 PREMEDITATED MURDER MEANS YOU CONSIDERED IT  
18 BEFOREHAND. SO YOU WOULD HAVE TO SHOW THAT A PERSON  
19 CONSIDERED HIS ACTION BEFOREHAND.

20 SECONDLY, DELIBERATE MEANS CAREFUL THOUGHT  
21 AND WEIGHING OF CONSIDERATIONS FOR AND AGAINST THE

22 PROPOSED COURSE OF ACTION.

23 SO, YOU SEE THAT FIRST-DEGREE MURDER, BASED  
24 UPON THE THEORY OF PREMEDITATION AND DELIBERATION, IS  
25 BASED UPON THE NOTION OF EVALUATING, OF CONSIDERING, OF  
26 USING YOUR JUDGMENT. WHAT IT REALLY COMES DOWN TO IS  
27 THE NOTION OF "SHOULD I OR SHOULDN'T I?" YOU SEE,  
28 BECAUSE THE LAW PUNISHES THOSE WHO ENGAGE IN THAT MENTAL

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1 PROCESS, "SHOULD I OR SHOULDN'T I", MORE HARSHLY THAN  
2 SIMPLY THE PERSON WHO FIRED OUT THAT WINDOW WITHOUT EVEN  
3 THINKING, YOU SEE. THAT'S WHAT DISTINGUISHES  
4 FIRST-DEGREE MURDER FROM SECOND DEGREE MURDER.

5 SO NOW, CAN YOU HAVE A SITUATION WHERE THE  
6 PERSON IS FIRING OUT A WINDOW, AND IT IS FIRST-DEGREE  
7 MURDER?

8 WELL, OF COURSE, PROVIDED THAT BEFORE HE  
9 STARTED FIRING AT THOSE PEOPLE, HE WENT THROUGH THIS  
10 BALANCING ACT, AND HE SAID: "SHOULD I OR SHOULDN'T I?"  
11 AND HE THOUGHT ABOUT IT, AND SAID: "ON THE ONE HAND, I  
12 DON'T WANT TO KILL ANYONE. BUT ON THE OTHER HAND, WHO  
13 CARES. I THINK I WILL. I AM GOING TO DO IT."

14 ONCE HE ENGAGED IN THAT BALANCING ACT, AND  
15 ONCE HE FIRES THAT RIFLE OUT THE WINDOW, THEN IT IS A  
16 FIRST-DEGREE MURDER, YOU SEE; WHEREAS, THE PERSON WHO  
17 JUST FIRES OUT THE WINDOW WITHOUT THINKING INTENDS TO

18 KILL, BUT WITHOUT ENGAGING IN THAT BALANCING ACT, IS  
19 RESPONSIBLE ONLY FOR SECOND-DEGREE MURDER.  
20 SO THAT'S AN EXAMPLE OF THE DIFFERENCE  
21 BETWEEN FIRST-DEGREE MURDER, PREMEDITATED MURDER, THAT  
22 IS, AND SECOND-DEGREE MURDER, BASED UPON THE THEORY OF  
23 EXPRESS MALICE. AND YOU ALREADY KNOW THE THEORY OF  
24 SECOND-DEGREE MURDER BASED ON IMPLIED MALICE, WHICH IS  
25 THE PERSON SHOOTING OUT THE WINDOW WITH HIS EYES CLOSED.  
26 OKAY.  
27 SO PREMEDITATION AND DELIBERATION, HOW MUCH  
28 THOUGHT IS REQUIRED HERE? YOU SEE, THAT'S THE KEY. HOW

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1 MUCH THOUGHT IS REQUIRED HERE? HOW MUCH THOUGHT MUST  
2 YOU GIVE INTO SHOOTING SOMEONE BEFORE YOU ACTUALLY DO  
3 IT, THAT YOU CAN SAY THIS IS A FIRST-DEGREE,  
4 PREMEDITATED AND DELIBERATE MURDER?

5 IT CAN BE A VERY, VERY SHORT PERIOD OF  
6 TIME, YOU SEE, BECAUSE THE KEY UNDER THE LAW IS NOT THE  
7 LENGTH OF TIME. THE LAW DOESN'T CARE ABOUT THE TIME;  
8 WHETHER IT'S FIVE MINUTES, OR ONE MINUTE, OR TWENTY  
9 SECONDS. THE LAW DOESN'T CARE ABOUT THAT.

10 WHAT THE LAW CARES ABOUT IS DID THIS PERSON  
11 CONDUCT THAT BALANCING TEST; BECAUSE IF THAT PERSON  
12 THOUGHT ABOUT IT, WEIGHED AND CONSIDERED HIS ACTIONS AND  
13 SAID: "YOU KNOW, I'M GOING TO DO IT," THAT'S

14 FIRST-DEGREE MURDER.

15 AND LISTEN VERY CAREFULLY TO THE  
16 INSTRUCTIONS THAT THE JUDGE WILL GIVE YOU IN THIS  
17 REGARD, BECAUSE THIS IS A KEY ELEMENT TO FIRST-DEGREE,  
18 PREMEDITATED MURDER IN THIS CASE.

19 "IF YOU FIND THAT THE KILLING WAS  
20 PRECEDED AND ACCOMPANIED BY A CLEAR,  
21 DELIBERATE INTENT ON THE PART OF THE  
22 DEFENDANT TO KILL, WHICH WAS THE RESULT OF  
23 DELIBERATION AND PREMEDITATION, SO THAT IT  
24 MUST HAVE BEEN FORMED UPON PRE-EXISTING  
25 REFLECTION AND NOT UNDER A SUDDEN HEAT OF  
26 PASSION, OR OTHER CONDITION PRECLUDING THE  
27 IDEA OF DELIBERATION, IT IS MURDER OF THE  
28 FIRST-DEGREE.

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1 "THE LAW DOES NOT UNDERTAKE TO  
2 MEASURE IN UNITS OF TIME THE LENGTH OF THE  
3 PERIOD DURING WHICH THE THOUGHT MUST BE  
4 PONDERED BEFORE IT CAN RIPEN INTO AN  
5 INTENT TO KILL WHICH IS TRULY DELIBERATE  
6 AND PREMEDITATED. THE TIME WILL VARY WITH  
7 DIFFERENT INDIVIDUALS AND UNDER VARYING  
8 CIRCUMSTANCES. THE TRUE TEST IS NOT THE  
9 DURATION OF TIME, BUT RATHER THE EXTENT OF

10 REFLECTION. A COLD, CALCULATED JUDGMENT  
11 AND DECISION MAY BE ARRIVED AT IN A SHORT  
12 PERIOD OF TIME, BUT A MERE UNCONSIDERED  
13 AND RASH IMPULSE, EVEN THOUGH IT INCLUDE  
14 AN INTENT TO KILL, IS NOT SUCH  
15 DELIBERATION AND PREMEDITATION AS WILL FIX  
16 AN UNLAWFUL KILLING AS MURDER IN THE  
17 FIRST-DEGREE.

18 "TO CONSTITUTE A DELIBERATE AND  
19 PREMEDITATED KILLING, THE SLAYER MUST  
20 WEIGH AND CONSIDER THE QUESTION OF KILLING  
21 AND THE REASONS FOR AND AGAINST SUCH A  
22 CHOICE, AND, HAVING IN MIND THE  
23 CONSEQUENCES, HE DECIDES TO AND DOES  
24 KILL."

25 SO YOU SEE, WHEN YOU THINK ABOUT IT, WHEN  
26 YOU WEIGH IT IN YOUR MIND AND YOU SAY: "I'M GOING TO DO  
27 IT," THAT IS ENOUGH.

28 SO LET ME GIVE YOU AN EXAMPLE. WHAT IS THE

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1 MINIMUM AMOUNT OF TIME THAT YOU CAN CONSIDER IN WHICH  
2 YOU CAN HAVE A PREMEDITATED ACT, A PREMEDITATED AND  
3 DELIBERATE ACT? WELL, CONSIDER THIS:

4 A PERSON WALKS DOWN THE STREET, AND WALKING  
5 DOWN THE STREET DECIDES TO JAYWALK; CROSSES THE STREET,

6 RIGHT IN THE MIDDLE OF THE STREET.

7 NOW, DID THAT PERSON PREMEDITATE AND

8 DELIBERATE UPON THAT ACT BEFORE HE DID IT? WELL, IT

9 DEPENDS UPON THE SITUATION. MUST WE PROVE THAT IN ORDER

10 FOR THAT TO BE A PREMEDITATED AND DELIBERATE ACT, THAT

11 THE PERSON THOUGHT ABOUT IT A WEEK BEFORE? NO. A DAY

12 BEFORE? NO. A MINUTE BEFORE? NOT NECESSARILY.

13 IF THE PERSON WAS WALKING DOWN THE STREET,

14 NOT PARTICULARLY INTENDING TO CROSS THE STREET, AND THEN

15 SUDDENLY DECIDED TO JAYWALK, THE ISSUE BECOMES DID HE

16 JUST JAYWALK WITHOUT CONSIDERING HIS ACTIONS, OR DID HE

17 JAYWALK AFTER PONDERING THE RIGHTNESS OR THE

18 WRONGFULNESS OF HIS ACTIONS? THAT IS THE KEY.

19 IF HE JUST CROSSED THE STREET

20 ABSENT-MINDEDLY AND JAYWALKED, THEN IT'S NOT A

21 PREMEDITATED AND DELIBERATE ACT. BUT IF HE STOPPED AND

22 SAID: "WAIT A MINUTE. I KNOW I'M NOT SUPPOSED TO

23 JAYWALK. SHOULD I DO IT, OR SHOULDN'T I DO IT?"

24 AND HE THOUGHT ABOUT IT, AND HE LOOKED TO

25 SEE IF THERE WERE ANY POLICE AT THE CORNER, AND HE

26 LOOKED OVER THERE, AND HE DIDN'T SEE ANY POLICE OVER AT

27 THE CORNER, AND HE SAYS: "YOU KNOW, I AM NOT SUPPOSED

28 TO JAYWALK, BUT IT'S A MINOR CRIME, AND WHO CARES.

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1 OKAY. I'LL JAYWALK." AND HE JAYWALKS.

2            THAT IS A PREMEDITATED AND DELIBERATE ACT,  
3    YOU SEE. SO THE NOTION OF PREMEDITATION AND  
4    DELIBERATION DOES NOT MEAN A LONG PERIOD OF TIME. IT  
5    CAN BE LIKE THAT, YOU SEE. DEPENDING UPON WHETHER THE  
6    PERSON GAVE THOUGHT AND WEIGHING OF THE CONSIDERATION,  
7    CONSIDERED IT BEFOREHAND, AND THEN WENT AHEAD AND DID  
8    IT, YOU SEE.

9            SO A PREMEDITATED MURDER CAN BE VERY QUICK,  
10    DEPENDING UPON THE CIRCUMSTANCES.

11           NOW, IT'S VERY IMPORTANT THAT AS YOU  
12    DISCUSS THIS CASE YOU USE THE LANGUAGE OF THE LAW,  
13    BECAUSE SOMETIMES PEOPLE USE SYNONYMS WHICH SOUND CLOSE,  
14    AND IT'S REASONABLE. WE ALL SPEAK IN TERMS OF SYNONYMS,  
15    AND WE ALL USE LANGUAGE SOMEWHAT INACCURATELY AT TIMES.  
16    BUT WHEN YOU DECIDE THIS CASE, YOU DECIDE THIS CASE AS A  
17    JUDGE, AND IT'S VERY IMPORTANT THAT YOU USE THE LANGUAGE  
18    ACCURATELY.

19           THIS IS OF PARTICULAR CONCERN WHEN YOU TALK  
20    ABOUT THE NOTION OF PREMEDITATED MURDER, YOU SEE,  
21    BECAUSE PREMEDITATED MURDER, SOMETIMES PEOPLE SAY: "OH,  
22    I KNOW WHAT PREMEDITATED MURDER IS. IT'S PLANNED  
23    MURDER," YOU SEE. PEOPLE SAY THAT.

24           STOP PEOPLE ON THE STREET, "WHAT IS  
25    PREMEDITATED MURDER?"

26           "IT'S PLANNED MURDER."

27           AND THEY'RE KIND OF RIGHT. PLANNING OFTEN  
28    DOES GET INVOLVED IN PREMEDITATION, YOU SEE. BUT



1 PREMEDITATION AND PLANNING ARE NOT SYNONYMOUS, AND  
2 YOU'VE GOT TO REMEMBER THAT WHEN YOU GO BACK INTO THE  
3 JURY ROOM AND YOU START TALKING ABOUT THIS CASE. TALK  
4 ABOUT A PLAN.

5 YOU CAN VERY WELL TALK ABOUT A PLAN. JUST  
6 AS I SAID, YOU CAN TALK ABOUT, AS I SAID, THE NOTION OF  
7 WHETHER OR NOT JOSE MENENDEZ WAS ABUSING HIS SONS.  
8 THESE WERE ALL VALID ISSUES THAT YOU SHOULD DISCUSS, BUT  
9 IN THE END, GET BACK TO THE LANGUAGE OF THE LAW, AND  
10 DECIDE THE CASE BASED UPON THE LANGUAGE OF THE LAW AND  
11 NOT BASED UPON LAYMAN'S LANGUAGE.

12 AND PLANNING IS A PARTICULAR ISSUE IN THIS  
13 CASE, BECAUSE PLANNING, WHAT DOES THE WORD "PLANNING"  
14 MEAN? PLANNING MEANS -- WELL, SINCE IT'S A LAY TERM, I  
15 DON'T HAVE A LEGAL DEFINITION FOR IT. IT'S A LAY TERM.  
16 YOU CAN TELL ME WHAT PLANNING MEANS.

17 PLANNING CAN MEAN A LONG, DRAWN-OUT PLAN.  
18 IT COULD MEAN A WRITTEN PLAN. IT COULD MEAN SOMETHING  
19 TO DO WITH A COURSE OF ACTION, HOW WELL A PARTICULAR  
20 COURSE OF ACTION IS THOUGHT OUT IN ADVANCE, YOU SEE.

21 BUT IT'S VERY IMPORTANT FOR YOU TO  
22 UNDERSTAND, WHEN YOU DISCUSS THE CONCEPT OF PREMEDITATED  
23 AND DELIBERATE MURDER, THAT THE DEFENDANTS ARE NOT  
24 CHARGED WITH A PLANNED MURDER, YOU SEE. YOU MAY VERY  
25 WELL FIND THAT THIS WAS INDEED A PLANNED MURDER, BUT  
26 THEY ARE NOT CHARGED WITH A PLANNED MURDER. YOUR

27 DECISION AS TO WHETHER OR NOT THE DEFENDANTS ARE GUILTY  
28 OF A PREMEDITATED AND DELIBERATE MURDER SHOULD -- DOES

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1 NOT COME DOWN TO WHETHER OR NOT THERE WAS A PLAN, OR  
2 WHETHER IT WAS GOOD PLAN OR A BAD PLAN.

3 IT DOESN'T MATTER IF THERE IT WAS A PLAN OR  
4 NOT. THERE CAN BE NO PLAN WHATSOEVER, AND IT COULD  
5 STILL BE A PREMEDITATED AND DELIBERATE MURDER. IT'S  
6 VERY IMPORTANT FOR YOU TO UNDERSTAND THAT, YOU SEE.

7 SO, FOR EXAMPLE, LET'S TAKE THE CONFESSION  
8 TO CIGNARELLI, OKAY. THIS IS ANOTHER NOTION THAT I AM  
9 TELLING YOU NOW HAS A PARTICULAR APPLICATION IN REGARD  
10 TO THIS CONCEPT.

11 WHAT IT WAS THAT CRAIG CIGNARELLI SAID? HE  
12 SAID THAT HE WENT OVER AND HE SPOKE WITH THE DEFENDANT  
13 AT HIS HOME, AND IT WAS THERE THAT THE DEFENDANT GAVE  
14 HIM A WALK-THROUGH OF THE CRIME, AND HE SAID: "THIS IS  
15 HOW IT HAPPENED," AND HE GAVE HIM ALL THE DETAILS.

16 "AND WE RAN INTO THE ROOM -- WE RUSHED INTO  
17 THE ROOM, AND I WAS ON ONE SIDE AND LYLE MENENDEZ WAS ON  
18 THE OTHER SIDE."

19 BUT THE IMPORTANT PART OF THAT CONFESSION,  
20 ONE OF THE IMPORTANT PARTS OF THAT CONFESSION, WAS THE  
21 FACT OF HOW THE MURDER CAME ABOUT. HE SAID:

22 "WE WERE AT THE MOVIES, AND WE LEFT

23 THE MOVIES. WE CAME BACK TO THE HOUSE,  
24 AND AFTER WE CAME BACK TO THE HOUSE, I  
25 WENT IN TO GET MY IDENTIFICATION TO GO  
26 OUT, AND AT THAT POINT LYLE MENENDEZ  
27 HANDED ME THE GUNS -- HANDED ME A GUN. HE  
28 WAS STANDING THERE WITH TWO GUNS, AND I

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1 TOOK ONE, AND LYLE MENENDEZ SAID, 'LET'S  
2 DO IT.' AND WE WENT INSIDE AND WE SHOT  
3 OUR PARENTS TO DEATH."

4 NOW, YOU SEE, LADIES AND GENTLEMEN, THE  
5 ISSUE THERE IS THIS: WAS THAT A PLANNED MURDER?

6 THE DEFENDANTS ARE NOT CHARGED WITH A  
7 PLANNED MURDER. THE DEFENDANTS ARE CHARGED WITH A  
8 PREMEDITATED MURDER.

9 IF YOU FIND THAT THE DEFENDANTS SHOT THEIR  
10 PARENTS TO DEATH AFTER ENGAGING IN A CONSPIRACY TO  
11 COMMIT MURDER; THAT IS, THAT THEY THOUGHT ABOUT IT, THEY  
12 INTENDED TO DO IT WITH EXPRESS MALICE, AND THEY DECIDED  
13 THAT THEY WERE GOING TO KILL THEIR PARENTS, IT DOESN'T  
14 MATTER AFTER THAT IF THERE WAS A SPECIFIC PLAN OR NOT.

15 IF THEY THOUGHT ABOUT IT AND THEY DECIDED  
16 TO KILL THEIR PARENTS, THEY COULD HAVE DECIDED ON THE  
17 SPUR OF THE MOMENT. THEY COULD HAVE BEEN DEBATING,  
18 "SHOULD WE OR SHOULDN'T WE? YES, LET'S DO IT," OR "WHEN

19 ARE WE GOING TO DO IT? I DON'T KNOW WHEN WE'RE GOING TO  
20 DO IT. I DON'T KNOW HOW WE'RE GOING TO DO IT."  
21 THEY COULD HAVE BEEN KICKING AROUND THIS  
22 IDEA FRIDAY. THEY COULD HAVE BEEN KICKING AROUND THIS  
23 IDEA SATURDAY. THEY COULD HAVE BEEN KICKING AROUND THIS  
24 IDEA SUNDAY, YOU SEE.  
25 BUT WHAT CRAIG CIGNARELLI DESCRIBED IN  
26 HIS -- IN THE STATEMENT MADE TO HIM BY ERIK MENENDEZ IS  
27 MORE THAN SUFFICIENT FOR A FINDING OF A PREMEDITATED  
28 MURDER; BECAUSE IF ERIK AND LYLE MENENDEZ AT THAT POINT,

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1 WITH GUNS IN THEIR HANDS, SAID: "WE THOUGHT ABOUT IT,"  
2 OR THOUGHT IT TO THEMSELVES, THEY DON'T HAVE TO  
3 CONSCIOUSLY SAY THIS. "WE THOUGHT ABOUT IT. SHOULD WE  
4 OR SHOULDN'T WE? WE DECIDE YES, WE'RE GOING TO DO IT.  
5 WE WEIGHED AND CONSIDERED. YES, LET'S DO IT."  
6 THEY COULD HAVE MADE THE DECISION RIGHT  
7 THEN, RIGHT AT THAT POINT. "LET'S DO IT."  
8 MS. ABRAMSON: EXCUSE ME, YOUR HONOR. COULD WE  
9 APPROACH FOR A SECOND? I DON'T MEAN TO INTERRUPT  
10 COUNSEL, BUT --  
11 THE COURT: BUT YOU DO.  
12 MS. ABRAMSON: I THINK IT'S NECESSARY, AND I WILL  
13 TELL COUNSEL WHY IN A MOMENT.  
14 THE COURT: ALL RIGHT, WE'LL LET YOU APPROACH.

15

16 (THE FOLLOWING PAGE, 50914,

17 WAS HELD OUT OF THE PRESENCE

18 OF THE JURY AND ORDERED SEALED BY THE

19 COURT:)

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

4

5 MR. GESSLER: THIS PART I DON'T WANT TO BE  
6 SEALED.

7 YOUR HONOR, I AM INTERPOSING AN OBJECTION  
8 AT THIS POINT, BECAUSE I AM NOT SURE WHERE MR. CONN IS  
9 GOING, BUT WE HAD A HINT OF IT BEFORE, AND WE OBJECTED.

10 THERE IS NO -- LET'S SAY AUTOMATIC  
11 FIRST-DEGREE MURDER IF A MURDER OCCURS AFTER A  
12 CONSPIRACY WAS ENTERED. WHAT SWAIN SAYS IS THAT IS  
13 CONSPIRACY TO MURDER, NOT DIVIDED INTO DEGREES, AS THE  
14 CRIME OF CONSPIRACY. BUT AS WE KNOW, IN SWAIN ITSELF,  
15 THE FINDING FOR MURDER WAS SECOND DEGREE.

16 MS. ABRAMSON: ON THE IMPLIED MALICE.

17 MR. GESSLER: AND THE FINDING OF THE CONSPIRACY  
18 WAS FIRST-DEGREE.

19 THE COURT: LET ME ASK THE PEOPLE:

20 IS IT YOUR POSITION YOU ARE ARGUING  
21 LIABILITY IN COUNTS 1 AND 2 ON THE THEORY OF  
22 CONSPIRACY, OR THEY CONSPIRED TO COMMIT SOMETHING OTHER  
23 THAN A FIRST-DEGREE MURDER?

24 MR. CONN: NO.

25 THE COURT: BECAUSE THE WAY YOU'RE DOING IT, IF  
26 YOU ARGUE IT ANY OTHER WAY, YOU DO CREATE SOME  
27 AMBIGUITY, AND WHAT YOU'RE SAYING IS CREATING  
28 CONFLICTING INSTRUCTIONS, BECAUSE -- AND IT ALSO CREATES

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1 CONFLICT IN WHAT YOUR THEORY IS, QUITE FRANKLY.

2 MR. CONN: SO YOU'RE SAYING THAT IF THEY CONSPIRE

3 TO COMMIT FIRST-DEGREE MURDER, BASED UPON THEORY ONE OR  
4 TWO -- I AM SORRY. I DIDN'T FOLLOW THE COURT.

5 MS. ABRAMSON: THEN THEY HAVE TO HAVE COMMITTED  
6 FIRST-DEGREE. YOU CAN'T HAVE THEM COMMIT A SECOND AND  
7 THEN BOOT IT UP TO A FIRST BECAUSE SOMETIME PREVIOUSLY  
8 THEY AGREED TO A FIRST.

9 THE COURT: THE THEORY OF LIABILITY FOR COUNTS 1  
10 AND 2 IS THAT THEY CONSPIRED TO COMMIT FIRST-DEGREE  
11 MURDER, OR THAT THEY AIDED AND ABETTED, OR THAT THEY'RE  
12 THE PRINCIPAL, BUT NOT THAT THEY CONSPIRED TO COMMIT  
13 MURDER, AND BY CONSPIRING TO COMMIT MURDER, WHICH CAN BE  
14 SECOND-DEGREE WITHOUT MALICE, THAT THEY SUDDENLY HAVE A  
15 MISDEMEANOR IN COUNTS 1 AND 2.

16 SO YOU DO HAVE TO STAY AWAY FROM THAT.

17 MR. CONN: ALL RIGHT. I WILL DO THAT.

18 MS. ABRAMSON: AND THE MURDER ITSELF MUST BE A  
19 FIRST.

20 MR. CONN: YES.

21 MR. GESSLER: IN FACT, CONSPIRE TO COMMIT MURDER  
22 OF WHATEVER DEGREE. EVEN IF I CONSPIRE TO COMMIT MURDER  
23 OF THE SECOND-DEGREE, 30 MINUTES LATER OR A DAY LATER,  
24 NOW THERE IS A KILLING, A MURDER, DOESN'T MEAN THAT THAT  
25 IS THE NATURAL AND PROBABLE CONSEQUENCE OF MY CONSPIRACY  
26 TO COMMIT MURDER AUTOMATICALLY. IT MAY BE, BUT IT MAY  
27 NOT BE.

28 THAT'S WHAT I FEEL WAS GETTING DANGEROUSLY



1 CLOSE.

2 THE COURT: YES, ESPECIALLY WHEN THE PEOPLE HAVE  
3 OTHER THEORIES THAT YOU'RE PUSHING HERE. THERE IS NO  
4 NEED TO GO INTO THAT.

5 (THE FOLLOWING PROCEEDINGS WERE  
6 HELD IN OPEN COURT IN THE PRESENCE  
7 OF THE JURY:)

8

9 THE COURT: AT THIS TIME WE'LL TAKE A RECESS.

10 DON'T DISCUSS THE MATTER. DON'T FORM ANY  
11 FINAL OPINIONS. WE WILL TAKE A RECESS, AND START UP  
12 AGAIN AT 3:30.

13 (A RECESS WAS TAKEN FROM  
14 3:15 P.M. UNTIL 3:30 P.M.)

15

16 THE COURT: OKAY. WE'RE ALL SET HERE, AND WE  
17 WILL NOW RESUME WITH THE TRIAL.

18 WE WILL HAVE THE JURY OUT.

19 (THE JURY ENTERS THE COURTROOM  
20 AND THE FOLLOWING PROCEEDINGS  
21 WERE HELD:)

22

23 THE COURT: OKAY. THE JURY IS BACK, AND WE WILL  
24 CONTINUE WITH THE ARGUMENT, GOING UNTIL AROUND 4:30.

25 I TRIED TO ADJUST THE AIR-CONDITIONING TO  
26 GET IT A LITTLE COOLER IN HERE. IT WAS A LITTLE WARMER  
27 EARLIER IN THE AFTERNOON. AS THINGS NORMALLY GO, IT'LL

28 PROBABLY GET A LITTLE TOO COLD. SO WE WILL JUST WAIT

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1 AND SEE HOW WE WILL HAVE TO DEAL WITH THAT ONE.

2 SO, WE WILL NOW CONTINUE WITH THE ARGUMENT.

3 MR. CONN: WE WERE SPEAKING ABOUT PREMEDITATION  
4 AND DELIBERATION, AND THE ELEMENTS THAT WILL CONSTITUTE  
5 PREMEDITATED AND DELIBERATE MURDER. AND I SPOKE ABOUT  
6 PREMEDITATION, AND HOW QUICKLY PREMEDITATION AND  
7 DELIBERATION CAN OCCUR.

8 LET ME GIVE YOU ANOTHER EXAMPLE.

9 HAVE YOU EVER BEEN IN A SITUATION WHERE YOU  
10 RAN THROUGH A YELLOW LIGHT; AND YOU KNOW THAT -- WELL,  
11 YOU MAY NOT GET INTO THAT INTERSECTION BEFORE IT TURNS  
12 RED, AND YOU MAY NOT GET THROUGH THE INTERSECTION.

13 AND YOU EVALUATED YOUR SITUATION AND YOU  
14 DECIDED: "WELL, I'M LITTLE LATE FOR WORK. I KNOW IT'S  
15 SAFE. THERE'S NO ONE AROUND. THERE'S REALLY NO CARS  
16 GOING THROUGH THE INTERSECTION. SHOULD I PUSH IT A  
17 LITTLE BIT?"

18 AND MAYBE MANY OF YOU HAVE BEEN IN THAT  
19 SITUATION, WHERE YOU HAVE EVALUATED A PROPOSED COURSE OF  
20 ACTION, FOR AND AGAINST.

21 THAT'S ALL IT TAKES. ANY TIME YOU  
22 EVALUATE, THE PROCESS OF EVALUATION IS ENOUGH TO  
23 CONSTITUTE THE STATE OF MIND THAT THE LAW ELEVATES TO A

24 HIGHER DEGREE OF MURDER, AND CALLS THAT FIRST-DEGREE  
25 MURDER.  
26 AND WITH THAT IN MIND, LET ME BRING YOUR  
27 ATTENTION BACK TO A CHART THAT YOU ALREADY SAW, ONE THAT  
28 I PRESENTED TO YOU IN OPENING STATEMENT WHEN I SAID THAT

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1 ONE OF THE PIECES OF EVIDENCE THAT WE WERE GOING TO BE  
2 PRESENTING TO YOU IN THIS CASE IS THE STATEMENTS OF THE  
3 DEFENDANT ON A TAPE-RECORDING, AND NOW WE KNOW THE DATE  
4 OF THAT TAPE-RECORDING AS DECEMBER THE 11TH, 1989; A  
5 SESSION BETWEEN DR. OZIEL AND ERIK MENENDEZ AND LYLE  
6 MENENDEZ, WHEN ERIK AND LYLE MENENDEZ, BEFORE THEY HAD A  
7 MOTIVATION TO COME UP WITH THE "ABUSE EXCUSE," SAT DOWN  
8 IN A CONVERSATION WITH DR. OZIEL, AND THEY TALKED ABOUT  
9 THIS CRIME.

10 AND WHAT DID THEY SAY BACK THEN, BEFORE  
11 THEY WERE ARRESTED, BEFORE THEY HAD A REASON TO MAKE  
12 ALLEGATIONS AGAINST THEIR PARENTS, BEFORE THEY HAD A  
13 REASON TO SAY: "I THOUGHT MY FATHER AND MY MOTHER WERE  
14 GOING TO KILL ME"?

15 IN THAT CONVERSATION WITH DR. OZIEL, THEY  
16 MAKE IT VERY CLEAR THAT THIS WAS A CRIME THAT THEY  
17 PREMEDITATED AND DELIBERATED. AND NO ABUSE IS  
18 MENTIONED. NO FEAR OF ATTACK BY THEIR PARENTS.

19 AND THE WORDS OF LYLE MENENDEZ IN THAT

20 TAPE -- AND THAT TAPE IS IN EVIDENCE AND YOU WILL BE  
21 ABLE TO HEAR IT AND READ THE TRANSCRIPT ONCE AGAIN.

22 DO YOU REMEMBER LYLE MENENDEZ SAYING:

23 "THERE WAS NO WAY I WAS GOING TO  
24 MAKE A DECISION TO KILL MY MOTHER WITHOUT  
25 ERIK'S CONSENT. I DIDN'T EVEN WANT TO  
26 INFLUENCE HIM IN THAT ISSUE. I JUST LET  
27 HIM SLEEP ON IT FOR A COUPLE OF DAYS."

28 WELL, THIS PHRASE, LADIES AND GENTLEMEN:

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1 "I JUST LET HIM SLEEP ON IT FOR A COUPLE OF DAYS," IS  
2 THE ABSOLUTE PROOF POSITIVE OF PREMEDITATION.  
3 WHEN YOU SLEEP ON SOMETHING FOR A COUPLE OF  
4 DAYS, THAT IS ABSOLUTE PREMEDITATION. IF YOU CAN  
5 PREMEDITATE JUST BY LOOKING UP AND DOWN THE BLOCK AND  
6 CONSIDERING WHETHER OR NOT YOU SHOULD CROSS THE STREET  
7 AND JAYWALK BECAUSE THERE ARE NO POLICE AROUND -- WHEN  
8 YOU SLEEP ON SOMETHING FOR A COUPLE OF DAYS, WE ALL KNOW  
9 WHAT HE MEANS HERE.  
10 HE THOUGHT IT OVER. HE WEIGHED AND  
11 CONSIDERED. HE WANTED ERIK MENENDEZ TO WEIGH AND  
12 CONSIDER IT. THIS IS ABSOLUTELY INESCAPABLE  
13 PREMEDITATION AND DELIBERATION. AND THERE IS ABSOLUTELY  
14 NO WAY AROUND THIS. THIS IS THE PROSECUTOR'S DREAM  
15 STATEMENT RIGHT HERE. "I JUST LET HIM SLEEP ON IT FOR A

16 COUPLE OF DAYS," BECAUSE THAT SAYS IT ALL.  
17 THAT SAYS IT ALL. THAT IS FIRST-DEGREE,  
18 PREMEDITATED MURDER. NO WAY OUT OF THAT PROPOSITION.  
19 THE CASE IS PROVEN BY THIS STATEMENT RIGHT HERE, BECAUSE  
20 GO BACK TO THE ELEMENTS.  
21 WAS THIS KILLING OF THE PARENTS  
22 INTENTIONAL? WELL, YES. LYLE MAKES IT VERY -- LYLE  
23 MENENDEZ MAKES IT VERY CLEAR IN THAT STATEMENT THAT IT  
24 WAS.  
25 WAS THERE INTENT TO KILL? YES. HE'S  
26 TALKING ABOUT: "I AM GOING TO KILL MY MOTHER. I AM  
27 GOING TO THINK ABOUT IT. I WANTED MY BROTHER, ERIK  
28 MENENDEZ, TO THINK ABOUT IT."

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1 SO OBVIOUSLY THERE WAS EXPRESS MALICE  
2 AFORETHOUGHT. THAT IS INTENT TO KILL BEFORE THEY WENT  
3 INTO THAT ROOM.  
4 WAS IT PREMEDITATED, DID HE CONSIDER IT  
5 BEFOREHAND? HE'S SAYING YES, HE DID CONSIDER IT  
6 BEFOREHAND. AND YOU KNOW WHAT PARTICULAR DAYS HE'S  
7 TALKING ABOUT. HE IS TALKING ABOUT FRIDAY WHEN HE  
8 PURCHASED THE GUNS IN SAN DIEGO, UP UNTIL SUNDAY. SO  
9 FOR THOSE TWO DAYS, THAT'S EXACTLY WHAT LYLE MENENDEZ IS  
10 TALKING ABOUT HERE.  
11 ONCE THEY HAD THE GUNS IN HAND, EVERYONE

12 KNEW -- EVERYONE, I MEAN ERIK AND LYLE -- EVERYONE KNEW  
13 THAT THIS WAS A SERIOUS DEAL. THIS WAS A SERIOUS  
14 PROPOSITION. ARE THEY GOING TO DO IT OR NOT? AND  
15 THAT'S EXACTLY WHAT HE IS ADMITTING HERE. THEY HAD TWO  
16 DAYS TO THINK ABOUT IT.

17 WAS THERE A CAREFUL THOUGHT AND WEIGHING OF  
18 CONSIDERATIONS FOR AND AGAINST THE PROPOSED COURSE OF  
19 ACTION? WELL, OF COURSE.

20 IF YOU HAVE TWO DAYS TO THINK ABOUT IT,  
21 LADIES AND GENTLEMEN, OF COURSE YOU'RE GOING TO  
22 CONSIDER. AND IF YOU CAN MAKE THAT DECISION AND IT  
23 CONSTITUTES PREMEDITATION IN THE SECOND IT TAKES YOU TO  
24 JAYWALK OR THE SECOND IT TAKES YOU TO RUN THE LIGHT,  
25 WHEN YOU HAVE TWO DAYS TO THINK ABOUT IT. OBVIOUSLY  
26 THIS WAS PREMEDITATION. OBVIOUSLY THIS WAS A  
27 PREMEDITATED MURDER.

28 NOW, THEY HAVE TO -- YOU WILL HEAR THE

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1 DEFENSE ATTORNEYS ARGUE THAT YOU SHOULD DISTRUST WHAT  
2 LYLE MENENDEZ IS SAYING IN THIS STATEMENT. THAT'S THE  
3 ONLY WAY THEY CAN GET OUT OF THIS, BECAUSE IF THIS IS  
4 TRUE -- IF THIS IS TRUE, THAT'S ABSOLUTELY PREMEDITATED  
5 MURDER. NO TWO WAYS ABOUT IT.

6 SO THEIR ONLY RECOURSE IS TO SAY: "OH,  
7 DR. OZIEL WAS PUTTING WORDS IN OUR MOUTH, AND WE WERE

8 JUST TELLING HIM WHATEVER HE WANTED TO HEAR," WHICH IS A  
9 PREPOSTEROUS ALLEGATION. I WILL GET MORE INTO THE  
10 TRUTHFULNESS OF THE STATEMENT LATER, BUT YOU HAVE TO  
11 RECOGNIZE THAT THIS IS AN ABSOLUTELY CLEAR CASE OF  
12 PREMEDITATED MURDER.

13 ALL RIGHT.

14 NOW, LET ME TURN TO THE -- A SECOND THEORY  
15 FOR FIRST-DEGREE MURDER IN THIS CASE, AND THAT IS LYING  
16 IN WAIT.

17 NOW, AS I SAID, WHEN YOU JUST KILL SOMEONE,  
18 WHEN YOU MURDER SOMEONE WITH EXPRESS OR IMPLIED MALICE,  
19 THAT'S JUST PLAIN OLD MURDER, OR SECOND-DEGREE MURDER.  
20 YOU NEED SOMETHING MORE TO ELEVATE IT TO FIRST-DEGREE  
21 MURDER.

22 ONE WAY THAT YOU ELEVATE IT IS, AS I JUST  
23 INDICATED, IF YOU PREMEDITATE AND DELIBERATE. THEN THE  
24 LAW SAYS HERE WE ARE DEALING WITH A PERSON WHO WEIGHED  
25 AND CONSIDERED AND DECIDED TO DO IT ANYWAY, SO WE WILL  
26 PUT HIM ON THAT HIGHER LEVEL THAT WE CALL FIRST-DEGREE  
27 MURDER, BECAUSE HE CONSIDERED HIS ACTION.

28 BUT THERE IS ANOTHER WAY OF GETTING TO THAT

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1 LEVEL, AND ANOTHER WAY YOU GET TO THAT HIGHER LEVEL OF  
2 MURDER, WHAT WE CALL FIRST-DEGREE MURDER BY LYING IN  
3 WAIT.

4           NOW, THE TERM "LYING IN WAIT" APPLIES TO  
5 TWO DIFFERENT THINGS. LYING IN WAIT IS A ROAD TO  
6 FIRST-DEGREE MURDER, BUT LYING IN WAIT IS ALSO A SPECIAL  
7 CIRCUMSTANCE.

8           REMEMBER, THERE ARE SPECIAL CIRCUMSTANCES,  
9 A SPECIAL FINDING THAT THE JURY IS ASKED TO MAKE IF THEY  
10 FIND A DEFENDANT GUILTY OF MURDER IN THE FIRST-DEGREE.

11          SO IF YOU FIND THE DEFENDANTS GUILTY OF  
12 MURDER IN THE FIRST-DEGREE, SUCH AS ON A THEORY OF  
13 PREMEDITATION, YOU WILL ALSO BE REQUIRED TO MAKE A  
14 SPECIAL FINDING, WAS THERE LYING IN WAIT IN THIS CASE?

15          SO, LYING IN WAIT CAN PROVIDE A BASIS FOR  
16 GETTING NOT ONLY TO FIRST-DEGREE MURDER, BUT ALSO TO GET  
17 TO A SPECIAL CIRCUMSTANCE, TO FIND A SPECIAL  
18 CIRCUMSTANCE TRUE.

19          SO WHAT IS LYING IN WAIT? IT SHOULD BE  
20 CALLED MURDER WHILE LYING IN WAIT.

21          LYING IN WAIT IS AN AMBUSH-TYPE OF A  
22 SITUATION ESSENTIALLY, AND THAT IS THAT IF YOU'RE  
23 HANGING AROUND WAITING TO KILL SOMEONE, AND YOU KILL HIM  
24 RIGHT AFTER HANGING AROUND WAITING TO KILL HIM, THE LAW  
25 SAYS, WELL, THAT'S THE EQUIVALENT OF PREMEDITATION IN  
26 MURDER. WE ARE NOT GOING TO REQUIRE THE JURY TO DECIDE  
27 THAT THERE IS PREMEDITATION AND DELIBERATION, BECAUSE  
28 THAT'S THE EQUIVALENT OF PREMEDITATION AND DELIBERATION.



1           SO, THESE ARE THE SPECIFIC ELEMENTS.

2           NUMBER ONE, THERE MUST BE WAITING AND  
3   WATCHING FOR AN OPPORTUNE TIME TO ACT.

4           OKAY. SO FOR EXAMPLE IF YOU'RE -- IF YOU  
5   WANT TO KILL SOMEONE AND YOU WAIT FOR THE TIME TO  
6   STRIKE, AND YOU EVALUATE YOUR SITUATION WITH THE INTENT  
7   OF STRIKING OUT AGAINST THEM.

8           NUMBER TWO, THERE MUST BE A CONCEALMENT BY  
9   AMBUSH OR BY SOME OTHER SECRET DESIGN TO TAKE BY  
10   SURPRISE.

11          SO, ONE WAY OF SHOWING THIS IS THAT IT WAS  
12   AN AMBUSH SITUATION.

13          AND IF YOU LOOK AT THE POSITION OF THE  
14   BODIES OF JOSE AND KITTY MENENDEZ IN THIS CASE, LADIES  
15   AND GENTLEMEN, I THINK YOU CAN REASONABLY CONCLUDE THAT  
16   KITTY AND JOSE MENENDEZ WERE AMBUSHED. THEY WERE TAKEN  
17   BY SURPRISE. THEY WERE CAUGHT UNAWARES. THAT THE  
18   DEFENDANTS CAME AT THEM SUDDENLY AND CAUGHT THEM AT  
19   THEIR MOST VULNERABLE MOMENT.

20          AND THEN THERE MUST BE A DURATION. THE  
21   DURATION OF LYING IN WAIT MUST BE SUCH THAT IT SHOWS  
22   STATE OF MIND THAT IS THE EQUIVALENT OF PREMEDITATION  
23   AND DELIBERATION.

24          IN OTHER WORDS, BECAUSE THEY ARE  
25   EXCUSING -- THE LAW EXCUSES THE REQUIREMENTS FOR  
26   PREMEDITATION AND DELIBERATION IN THIS TYPE OF A  
27   SITUATION. THE LAW EXCUSES IT ONLY WHERE THERE IS  
28   SUFFICIENT TIME BY WHICH A JURY CAN CONCLUDE THAT THIS

1 WAS THE FUNCTIONAL EQUIVALENT OF PREMEDITATION AND  
2 DELIBERATION.

3 THERE WAS ENOUGH TIME FOR THE PERSON TO  
4 PREMEDITATE AND DELIBERATE, AND BY HIS ACTIONS; THAT IS,  
5 BY CONCEALING HIMSELF IN SOME WAY, BY AMBUSH OR SOME  
6 OTHER SECRET DESIGN, AND BY WAITING AND WATCHING FOR AN  
7 OPPORTUNE TIME TO STRIKE, THIS PERSON WAS TAKING THE  
8 VICTIM BY SURPRISE, TAKING THE PERSON UNAWARES.

9 THE LAW SAYS THAT PHYSICAL CONCEALMENT IS  
10 NOT REQUIRED. THE VICTIM MAY BE AWARE OF THE PRESENCE  
11 OF THE PERSON, BUT IT'S A SECRET DESIGN TO SUDDENLY  
12 STRIKE AT THE VICTIM BY SURPRISE.

13 SO I WOULD SUBMIT THAT THE KILLING OF KITTY  
14 AND JOSE MENENDEZ IN THIS CASE WAS A KILLING WHICH TOOK  
15 PLACE WHILE KITTY AND JOSE MENENDEZ WERE IN A  
16 PARTICULARLY VULNERABLE POSITION.

17 THEY WERE RELAXING AT HOME AT NIGHT. IT  
18 WAS SUNDAY NIGHT, LATE IN THE EVENING, SOMETIME PAST  
19 10:00 O'CLOCK, WHEN THE DEFENDANTS IN THIS CASE SUDDENLY  
20 BURST INTO THE ROOM, TOOK THEM BY SURPRISE, AND KILLED  
21 THEM. AND I WOULD SUBMIT THAT THEY TOOK THEM BY  
22 SURPRISE AS THE VICTIMS IN THIS CASE WERE SITTING ON THE  
23 SOFA, RELAXING.

24 IF YOU FIND THAT THE DEFENDANTS, PRIOR TO  
25 BURSTING INTO THAT ROOM, WERE WATCHING AND WAITING FOR

26 AN OPPORTUNE TIME TO -- THAT THEY CONCEALED THEIR  
27 PURPOSE, THEIR TRUE PURPOSE UNTIL SUCH TIME AS THEY  
28 BURST INTO THAT ROOM, AMBUSHED THEIR PARENTS AND TOOK

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1 THEM BY SURPRISE, AND THERE WAS A PASSAGE OF TIME FOR  
2 LYING IN WAIT TO TAKE THEIR PARENTS BY SURPRISE, YOU  
3 SHOULD FIND THAT THIS WAS A KILLING BY MEANS OF LYING IN  
4 WAIT, INDEPENDENTLY OF MAKING A DETERMINATION AS TO  
5 WHETHER THEY ACTUALLY PREMEDITATED AND DELIBERATED THE  
6 MURDER OF THEIR PARENTS.

7 BUT AGAIN, AS I SAID, IT'S NOT NECESSARY --  
8 IT'S NOT NECESSARY TO EVEN RELY UPON THAT THEORY,  
9 BECAUSE WE HAVE PREMEDITATED AND DELIBERATE MURDER SHOWN  
10 IN MANY OTHER WAYS; SUCH AS BY THE STATEMENTS OF LYLE  
11 MENENDEZ THAT HE LET HIS BROTHER, ERIK MENENDEZ, THINK  
12 ABOUT IT FOR A COUPLE OF DAYS.

13 NOW, WE ALSO HAVE SECOND-DEGREE MURDER.  
14 AND AS I HAVE INDICATED A COUPLE OF TIMES ALREADY, THE  
15 PROSECUTION IS NOT RELYING UPON SECOND-DEGREE MURDER IN  
16 THIS CASE. WE ASK YOU NOT TO FIND SECOND-DEGREE MURDER.

17 BUT I DO WANT TO, ONCE AGAIN, JUST ACQUAINT  
18 YOU WITH THESE CONCEPTS. YOU SHOULD BE FAMILILAR WITH  
19 THESE CONCEPTS. THEY ARE GOING TO COME TO YOU --  
20 DEFENSE COUNSEL, I AM SURE, ARE GOING TO BE ARGUING THAT  
21 THE KILLINGS IN THIS CASE WERE SOMETHING LESS THAN

22 FIRST-DEGREE MURDER. THEY WILL ARGUE THAT IT'S  
23 SECOND-DEGREE MURDER AS TO KITTY MENENDEZ, AND THEY WILL  
24 ARGUE, I AM SURE, THAT IT'S A VOLUNTARY MANSLAUGHTER AS  
25 TO JOSE MENENDEZ, BECAUSE THAT IS EVEN A THEORETICAL  
26 OPTION AS TO HIM, EVEN THOUGH WE ASK YOU TO REJECT EACH  
27 OF THOSE OPTIONS.  
28           THESE ARE THE TYPES OF SECOND-DEGREE

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1 MURDER. AND YOU WILL NOTICE THAT THIS TRACKS  
2 IDENTICALLY WHAT I TOLD YOU ABOUT MALICE, BECAUSE -- YOU  
3 REMEMBER I SAID, THINK BACK TO THE MAN SHOOTING OUT THE  
4 WINDOW. THAT IS MALICE. AND I SAID THAT IF THAT PERSON  
5 SHOOTS OUT THE WINDOW, THAT IS MURDER, BECAUSE HE IS  
6 KILLING WITH MALICE.

7           AND SO WHAT YOU HAVE HERE IS SECOND-DEGREE  
8 MURDER, OR YOU MIGHT CALL IT PLAIN OLD MURDER, WHICH IS  
9 BASED UPON BOTH OF THOSE THEORIES; THAT IS, EXPRESS  
10 MALICE. THE THEORY OF SECOND-DEGREE MURDER IS SIMPLY  
11 EXPRESS MALICE, WHAT I TOLD YOU PREVIOUSLY. THE  
12 INTENTION UNLAWFULLY TO KILL A HUMAN BEING.

13           BUT HERE THERE IS INSUFFICIENT EVIDENCE OF  
14 PREMEDITATION AND DELIBERATION, YOU SEE. THAT'S THE  
15 REASON WHY YOU CAN'T GET UP TO THAT HIGHER LEVEL.

16           AND IF YOU CAN'T GET UP TO THAT HIGHER  
17 LEVEL, IF YOU CAN'T FIND PREMEDITATION OR DELIBERATION,

18 SUCH AS AN EXAMPLE, SAY A PERSON SHOOTS OUT HIS WINDOW  
19 AND IT'S A SPONTANEOUS ACT. HE DIDN'T THINK ABOUT IT  
20 BEFOREHAND, HE DIDN'T GO THROUGH THAT PROCESS THAT I  
21 DESCRIBED TO YOU OF WEIGHING AND CONSIDERING HIS  
22 ACTIONS.

23 YOU WILL RECALL THAT I SPOKE ABOUT THE  
24 CONCEPT OF PREMEDITATION AND DELIBERATION INVOLVES  
25 CONSIDERING BEFOREHAND; CAREFUL THOUGHT AND WEIGHING OF  
26 CONSEQUENCES FOR AND AGAINST THE PROPOSED COURSE OF  
27 ACTION, AND CONSIDERING BEFOREHAND.

28 IF THE MAN AT THE WINDOW WITH THE RIFLE

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1 JUST SUDDENLY PICKS IT UP AND FIRES OUT THE WINDOW,  
2 INTENDING TO KILL, BUT NOT EVEN WEIGHING HIS ACTIONS OR  
3 THINKING ABOUT IT, THAT COULD THEORETICALLY BE A SECOND  
4 DEGREE MURDER.

5 BUT BEAR IN MIND THAT IT ONLY TAKES A  
6 MOMENT OF REFLECTION, A MOMENT OF THOUGHT, A MOMENT OF  
7 "SHOULD I OR SHOULDN'T I," TO TRANSPOSE HIS ACTIONS INTO  
8 FIRST-DEGREE MURDER.

9 AND THEN THE IMPLIED MALICE THEORY OF  
10 SECOND-DEGREE MURDER.

11 THERE IS NO INTENT TO KILL NECESSARILY IN  
12 THIS SITUATION WHERE YOU DO AN INTENTIONAL ACT,  
13 DANGEROUS TO HUMAN LIFE, DELIBERATELY PERFORMED WITH THE

14 KNOWLEDGE OF THE DANGER TO HUMAN LIFE.

15           ONCE AGAIN, THE SITUATION OF SHOOTING OUT A  
16 WINDOW WITH YOUR EYES CLOSED IS A PERFECT EXAMPLE OF  
17 SECOND DEGREE MURDER BASED UPON AN IMPLIED MALICE  
18 THEORY.

19           AS I INDICATED, WE ARE NOT ASKING YOU IN  
20 THIS CASE TO FIND THE DEFENDANT GUILTY OF SECOND-DEGREE  
21 MURDER.

22           AND THEN YOU WILL EVEN HEAR AS TO JOSE  
23 MENENDEZ, THAT ONE OF THE THEORETICAL -- AND I  
24 UNDERSCORE THE WORD "THEORETICAL".

25           BEAR IN MIND THAT WHEN YOU ARE GIVEN -- YOU  
26 ARE TOLD THAT THESE ARE LESSER INCLUDED, THAT DOESN'T  
27 MEAN THAT YOU SHOULD NECESSARILY FIND FOR THEM, OR LEAN  
28 THAT WAY OR ANYTHING. IT JUST MEANS THAT THEY ARE

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1 THEORETICAL POSSIBILITIES.

2           SO BECAUSE VOLUNTARY MANSLAUGHTER IS A  
3 THEORETICAL POSSIBILITY AS TO THE KILLING OF JOSE  
4 MENENDEZ, YOU WILL BE INSTRUCTED IN REGARD TO THE NOTION  
5 OF HEAT OF PASSION.

6           AND JUST BRIEFLY LET ME TELL WHAT HEAT OF  
7 PASSION IS. HEAT OF PASSION IS THE THEORY OF A KILLING  
8 WHICH TAKES PLACE WHILE A PERSON IS IN SUCH AN EXCITED  
9 STATE THAT THERE IS AN ACTION RESULTING FROM THAT

10 EXCITED STATE, RATHER THAN BASED UPON REFLECTION AND  
11 DELIBERATION.

12 NOW, THAT IS, AS YOU KNOW, WHAT ERIK  
13 MENENDEZ IS GOING FOR IN THIS CASE. WE KNOW WHAT HIS  
14 ROLE IS IN THIS CASE, BUT I ASK YOU TO REJECT HIS  
15 EXPLANATION OF THE EVENTS OF AUGUST THE 20TH, WHICH HE  
16 DEvised IN ORDER TO GET THIS THEORY APPLIED TO HIM. AND  
17 I WILL TELL YOU SEVERAL REASONS WHY IT DOESN'T APPLY TO  
18 THIS CASE.

19 ONE OF THE REASONS IS BECAUSE, AS I WILL  
20 ARGUE TO YOU FURTHER WHEN I GET INTO THE DETAILS OF THE  
21 CRIME, DEFENDANT DID NOT ACT UNDER THE INFLUENCE OF  
22 PASSION.

23 ERIK MENENDEZ AND LYLE MENENDEZ KILLED  
24 THEIR PARENTS, WE INTEND TO SHOW, AS PART OF A  
25 PRE-EXISTING DECISION AND INTENT TO KILL.

26 AND ONCE AGAIN, IF THAT'S -- IT IS SHOWN IN  
27 SEVERAL WAYS. BUT ONE OF THE WAYS IT'S SHOWN IS RIGHT  
28 HERE, LYLE MENENDEZ TALKING ABOUT THE DECISION TO KILL;

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1 LYLE MENENDEZ SAYING THAT HE, BASICALLY, IN THE TAPE  
2 WITH DR. OZIEL. THEY DECIDED THEY WERE GOING TO KILL  
3 THEIR PARENTS. THEY THOUGHT ABOUT IT FOR SEVERAL DAYS,  
4 AND HE LET HIS BROTHER, ERIK MENENDEZ, SLEEP ON IT FOR A  
5 COUPLE OF DAYS.

6 SO FOR THIS REASON ALONE IT'S A  
7 FIRST-DEGREE MURDER. IT'S NOT A HEAT OF PASSION. IT  
8 DOESN'T OCCUR AS ERIK MENENDEZ WAS CLAIMING, AND LYLE  
9 MENENDEZ BASICALLY SAYS AS MUCH RIGHT HERE.

10 SO I ASK YOU TO REJECT THE THEORY OF  
11 VOLUNTARY MANSLAUGHTER, HEAT OF PASSION. FIRST OF ALL,  
12 BECAUSE IT'S NOT A TRUE STORY.

13 THE PARENTS WERE KILLED BECAUSE THAT WAS  
14 THE PLAN, TO KILL THE PARENTS. BUT THERE ARE OTHER  
15 REASONS WHY I ASK YOU TO REJECT THAT THEORY. I ASK YOU  
16 TO REJECT THAT THEORY BECAUSE THERE WAS INADEQUATE  
17 PROVOCATION TO CAUSE A HEAT OF PASSION, AND HERE IS THE  
18 KEY.

19 FOR HEAT OF PASSION TO APPLY, IT'S BASED  
20 UPON THE ORDINARY, REASONABLE MAN STANDARD. IN OTHER  
21 WORDS, EACH PERSON IS NOT PRE-SET THEIR OWN STANDARD  
22 UNDER THE LAW. YOU CAN'T JUST SAY: "I WAS IN A HEAT OF  
23 PASSION, AND IN THAT HEAT OF PASSION I KILLED SOMEONE.  
24 SO GIVE ME THE HEAT OF PASSION INSTRUCTION, OR GIVE ME A  
25 HEAT OF PASSION VERDICT." NO.

26 THE LAW SAYS THAT A CRIME CAN BE REDUCED --  
27 A KILLING CAN BE REDUCED TO VOLUNTARY MANSLAUGHTER BASED  
28 UPON A HEAT OF PASSION WHERE THERE IS OBJECTIVE

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1 CIRCUMSTANCES, SUCH THAT THE ORDINARY, REASONABLE MAN



2 WOULD HAVE BEEN AROUSED TO PASSION, YOU SEE.

3 SO THIS WAY EACH INDIVIDUAL DOES NOT SET

4 HIS OWN STANDARD. YOU ARE GOVERNED BY THE STANDARD

5 WHICH APPLIES TO ALL PEOPLE. HERE IS WHAT IT SAYS.

6 THE HEAT OF PASSION WILL REDUCE -- LET ME

7 START WITH THE FIRST PARAGRAPH.

8 "TO REDUCE AN INTENTIONAL FELONIOUS

9 HOMICIDE FROM THE OFFENSE OF MURDER TO

10 MANSLAUGHTER UPON THE GROUND OF SUDDEN

11 QUARREL OR HEAT OF PASSION, THE

12 PROVOCATION MUST BE OF SUCH CHARACTER AND

13 DEGREE AS NATURALLY WOULD EXCITE AND

14 AROUSE SUCH PASSION, AND THE ASSAILANT

15 MUST ACT UNDER THE INFLUENCE OF THAT

16 SUDDEN QUARREL OR HEAT OF PASSION.

17 "THE HEAT OF PASSION WHICH WILL

18 REDUCE A HOMICIDE TO MANSLAUGHTER MUST BE

19 SUCH A PASSION AS NATURALLY WOULD BE

20 AROUSED IN THE MIND OF AN ORDINARILY

21 REASONABLE PERSON IN THE SAME

22 CIRCUMSTANCES. A DEFENDANT IS NOT

23 PERMITTED TO SET UP HIS OWN STANDARD OF

24 CONDUCT AND TO JUSTIFY OR EXCUSE HIMSELF

25 BECAUSE HIS PASSIONS WERE AROUSED, UNLESS

26 THE CIRCUMSTANCES IN WHICH THE DEFENDANT

27 WAS PLACED, AND THE FACTS THAT CONFRONTED

28 HIM, WERE SUCH AS ALSO WOULD HAVE AROUSED

1 THE PASSION OF AN ORDINARILY REASONABLE  
2 PERSON FACED WITH THE SAME SITUATION.

3 "LEGALLY ADEQUATE PROVOCATION MAY  
4 OCCUR IN A SHORT OR OVER A CONSIDERABLE  
5 PERIOD OF TIME.

6 "THE QUESTION TO BE ANSWERED IS  
7 WHETHER OR NOT, AT THE TIME OF THE  
8 KILLING, THE REASON OF THE ACCUSED WAS  
9 OBSCURED OR DISTURBED BY PASSION TO SUCH  
10 AN EXTENT AS WOULD CAUSE THE ORDINARILY  
11 REASONABLE PERSON OF AVERAGE DISPOSITION  
12 TO ACT RASHLY AND WITHOUT REFLECTION AND  
13 DELIBERATION, AND FROM SUCH PASSION RATHER  
14 THAN JUDGMENT.

15 "IF THERE WAS PROVOCATION, BUT OF A  
16 NATURE NOT NORMALLY SUFFICIENT TO AROUSE  
17 PASSION, OR IF SUFFICIENT TIME ELAPSED  
18 BETWEEN THE PROVOCATION AND THE FATAL  
19 BLOW, FOR PASSION TO SUBSIDE AND REASON TO  
20 RETURN, AND IF AN UNLAWFUL KILLING OF A  
21 HUMAN BEING FOLLOWED SUCH PROVOCATION AND  
22 HAD ALL OF THE ELEMENTS OF MURDER, AS I  
23 HAVE DEFINED IT, THE MERE FACT OF SLIGHT  
24 OR REMOTE PROVOCATION WILL NOT REDUCE THE  
25 DEFENSE TO MANSLAUGHTER."

26 SO WHAT THIS INSTRUCTION TELLS US IS THAT

27 THE PROVOCATION MUST BE SUCH THAT WOULD CAUSE THE  
28 ORDINARY REASONABLE PERSON IN THE SAME SITUATION TO

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1 RESPOND IN A PASSIONATE STATE.

2 AND I WILL GO THROUGH THE FACTS, AND I WILL  
3 ARGUE AT THE CONCLUSION OF ALL THE FACTS THAT THESE --  
4 THIS CIRCUMSTANCE, EVEN AS DESCRIBED BY ERIK MENENDEZ,  
5 WAS NOT SUCH THAT WOULD CAUSE THE ORDINARY REASONABLE  
6 PERSON IN THAT SAME SITUATION TO RESPOND IN THIS  
7 IMPASSIONED STATE IN WHICH THE DEFENDANT SAID HE RUSHED  
8 INSIDE THE HOUSE TO BLOW BOTH OF HIS PARENTS AWAY.

9 THAT IS THE SECOND REASON FOR REJECTING  
10 HEAT OF PASSION.

11 THE THIRD REASON IS THIS:

12 THE LAW FURTHER PROVIDES THAT EVEN IF A  
13 PERSON WAS AROUSED, EVEN IF THE ORDINARILY REASONABLE  
14 MAN WAS AROUSED TO THIS PASSIONATE STATE, YOU SHOULD NOT  
15 REDUCE THE KILLING TO A VOLUNTARY MANSLAUGHTER BASED  
16 UPON A PASSIONATE STATE, IF THE ORDINARY REASONABLE MAN  
17 HAD SUFFICIENT TIME TO -- FOR REASON TO RETURN, YOU SEE,  
18 AND TO ACT AS A RESULT OF REFLECTION RATHER THAN AS A  
19 RESULT OF PASSION.

20 YOU SEE, IT DOESN'T APPLY WHERE THERE IS A  
21 COOLING PERIOD. THE LAW SAYS -- THE LAW READS AS  
22 FOLLOWS:

23 "TO REDUCE A KILLING UPON A SUDDEN  
24 QUARREL OR HEAT OF PASSION FROM MURDER TO  
25 MANSLAUGHTER, THE KILLING MUST HAVE  
26 OCCURRED WHILE THE SLAYER WAS ACTING UNDER  
27 THE DIRECT AND IMMEDIATE INFLUENCE OF SUCH  
28 QUARREL OR HEAT OF PASSION. WHERE THE

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1 INFLUENCE OF THE SUDDEN QUARREL OR HEAT OF  
2 PASSION HAS CEASED TO OBSCURE THE MIND OF  
3 THE ACCUSED AND SUFFICIENT TIME HAS  
4 ELAPSED FOR ANGRY PASSION TO END, AND FOR  
5 REASON TO CONTROL HIS CONDUCT, IT WILL NO  
6 LONGER REDUCE AN INTENTIONAL KILLING TO  
7 MANSLAUGHTER.

8 "THE QUESTION AS TO WHETHER THE  
9 COOLING PERIOD HAS ELAPSED AND REASON HAS  
10 RETURNED IS NOT MEASURED BY THE STANDARD  
11 OF THE ACCUSED, BUT THE DURATION OF THE  
12 COOLING PERIOD IS THE TIME IT WOULD TAKE  
13 THE AVERAGE OR ORDINARILY REASONABLE  
14 PERSON TO HAVE COOLED HIS HEAT OF PASSION,  
15 AND FOR THAT PERSON'S REASON TO HAVE  
16 RETURNED."

17 SO LADIES AND GENTLEMEN, AS I WILL ARGUE --  
18 AND I WILL ARGUE THIS CASE MORE FULLY LATER IN THE

19 TRIAL -- EVEN IF YOU WERE TO TAKE THAT ROAD DOWN THAT  
20 ERIK MENENDEZ WANTS YOU TO GO WITH HIM, WHICH I WILL  
21 SHOW YOU IS A PACK OF LIES, AND YOU SHOULDN'T GO DOWN  
22 THAT ROAD.  
23 BUT EVEN IF YOU WERE TO TAKE THAT ROAD AND  
24 GO DOWN THAT ROAD WITH HIM, HE DESCRIBED A SITUATION IN  
25 WHICH HE AND HIS BROTHER, LYLE MENENDEZ, LEFT THE HOUSE  
26 AFTER GOING UP TO HIS ROOM, GETTING HIS GUN, COMING  
27 DOWNSTAIRS, GOING OUT TO THE CAR. HE OPENED UP HIS CAR.  
28 HE SCRAMBLED AROUND FOR HIS SHOTGUN SHELLS. HE UNLOADED

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1 HIS GUN, RELOADED HIS GUN WITH ADDITIONAL AMMUNITION.  
2 AND AT THAT POINT, LADIES AND GENTLEMEN,  
3 THERE WAS NO THREAT WHATSOEVER TO HIM. HE AND HIS  
4 BROTHER WERE STANDING OUTSIDE THAT HOUSE, AND THEY HAD  
5 LOADED GUNS, AND THEY HAD A CAR WITH GAS IN IT, AND KEYS  
6 IN THEIR POCKET, AND THEY COULD HAVE DRIVEN AWAY.  
7 AND AT THAT POINT, LADIES AND GENTLEMEN, I  
8 WOULD SUBMIT TO YOU THAT EVEN IF THEIR STORY WERE TRUE,  
9 THE ORDINARY REASONABLE MAN OF AVERAGE DISPOSITION WOULD  
10 HAVE SUFFICIENTLY COOLED TO SAY: "WHAT AM I DOING? WHY  
11 AM I DOING THIS? AM I REALLY GOING TO GO INSIDE THIS  
12 HOUSE AND SHOOT MY PARENTS AWAY, BLOW MY PARENTS AWAY?"  
13 I WOULD SUBMIT TO YOU, LADIES AND  
14 GENTLEMEN, THAT THE HEAT OF PASSION DOESN'T APPLY TO

15 THAT SITUATION, BECAUSE THERE WAS A REASONABLE -- THERE  
16 WAS A SUFFICIENT COOLING PERIOD; THAT THE ORDINARY  
17 REASONABLE MAN OF AVERAGE DISPOSITION WOULD NOT HAVE  
18 BEEN IN SUCH A PASSIONATE STATE AT THAT POINT IN TIME.

19 SO THERE ARE SEVERAL REASONS WHY IT DOESN'T  
20 APPLY. BECAUSE IF YOU ACCEPT THE STORY OF THE  
21 DEFENDANT, SUFFICIENT TIME HAS ELAPSED. IF YOU ACCEPT  
22 THE STORY OF THE DEFENDANT, THERE WASN'T EVEN ADEQUATE  
23 PROVOCATION.

24 WHAT DID JOSE MENENDEZ TELL HIM? "GO TO  
25 YOUR ROOM." ISN'T THAT WHAT HE SAID? "GO TO YOUR  
26 ROOM."

27 AND BASED UPON THAT, THEY SAID: "WELL, OUR  
28 PARENTS ARE GOING TO KILL US."

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1 DOES THAT MAKE ANY SENSE TO YOU? THEY  
2 THOUGHT THEIR PARENTS WERE GOING TO KILL THEM BECAUSE  
3 JOSE MENENDEZ SAID, "GO TO YOUR ROOM"?

4 IS THAT PROVOCATION THAT WOULD CAUSE THE  
5 ORDINARY REASONABLE MAN OF AVERAGE DISPOSITION TO ACT  
6 WITHOUT DELIBERATION AND REFLECTION? NO. ERIK MENENDEZ  
7 IS SETTING UP HIS OWN STANDARD OF CONDUCT HERE, WHICH  
8 THE LAW SAYS YOU CANNOT DO.

9 SO THE ORDINARY REASONABLE MAN WOULD NOT  
10 FIND ADEQUATE PROVOCATION TO BE IN THIS HIGHLY

11 PASSIONATE, EMOTIONAL STATE CLAIMED BY ERIK MENENDEZ,  
12 AND THE ORDINARY REASONABLE MAN WOULD HAVE COOLED OFF BY  
13 THE TIME HE GOT OUT TO HIS CAR AND HAD A LOADED GUN, AND  
14 HIS BROTHER HAD A LOADED GUN, AND THERE WAS A CAR THERE.  
15 THEY COULD HAVE DRIVEN AWAY. THERE WAS NOTHING STOPPING  
16 THEM FROM DRIVING AWAY.

17 SO THE HEAT OF PASSION DOESN'T APPLY EVEN  
18 IF YOU GO DOWN THE ROAD HAND-IN-HAND WITH ERIK MENENDEZ.

19 BUT LADIES AND GENTLEMEN, I ASK YOU NOT TO  
20 GO DOWN THAT ROAD WITH HIM, BECAUSE IT'S A PHONY STORY  
21 WHICH NEVER TOOK PLACE, AND I WILL ELABORATE UPON THAT  
22 AS I GET INTO A DISCUSSION OF THE FACTS.

23 THEN THERE IS COUNT 3. COUNT 3 ALLEGES  
24 THAT THERE WAS A CONSPIRACY TO COMMIT MURDER, AND SO IT  
25 IS IMPORTANT FOR YOU TO UNDERSTAND THE LAW OF  
26 CONSPIRACY.

27 A CONSPIRACY IS AN AGREEMENT ENTERED INTO  
28 BETWEEN TWO OR MORE PERSONS, WITH A SPECIFIC INTENT TO

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1 AGREE TO COMMIT THE OFFENSE; IN THIS CASE, OF MURDER,  
2 AND WITH A FURTHER SPECIFIC INTENT TO COMMIT SUCH  
3 OFFENSE, AND WITH A SPECIFIC INTENT TO KILL  
4 UNLAWFULLY -- IN OTHER WORDS, EXPRESS MALICE -- FOLLOWED  
5 BY AN OVERT ACT COMMITTED IN THIS STATE BY ONE OR MORE  
6 OF THE PARTIES FOR THE PURPOSE OF ACCOMPLISHING THE

7 OBJECT OF THE AGREEMENT. CONSPIRACY IS A CRIME.

8 SO HERE WE ARE DEALING WITH A SEPARATE AND  
9 INDEPENDENT CRIME. IN ADDITION TO THE CRIMES OF MURDER  
10 AS ALLEGED IN COUNTS 1 AND 2, WE HAVE THE CRIME OF  
11 CONSPIRACY TO COMMIT MURDER. THE ESSENTIAL ELEMENTS I  
12 HAVE OUTLINED HERE ON THE CHART, AND THEY'RE THE  
13 ELEMENTS THAT I JUST EXPRESSED TO YOU.

14 NO. 1. IT'S AN AGREEMENT, FIRST OF ALL.  
15 TWO PEOPLE, AS APPLIED TO THE FACTS OF THIS CASE, AGREED  
16 TO COMMIT MURDER.

17 SECONDLY, THERE WAS A SPECIFIC INTENT TO  
18 COMMIT MURDER, TO KILL UNLAWFULLY. EXPRESS MALICE.

19 AND IT IS FOLLOWED UP BY AN OVERT ACT  
20 COMMITTED IN FURTHERANCE OF THE OBJECT OF THE  
21 CONSPIRACY. SO THIS IS WHAT THAT MEANS.

22 SUPPOSE TWO PEOPLE SIT DOWN AND THEY TALK  
23 ABOUT COMMITTING A CRIME. IS IT A CRIME JUST TO ENGAGE  
24 IN TALK? CAN THAT MERE TALK CONSTITUTE THE CRIME? NO.  
25 THE MERE TALK ALONE CANNOT CONSTITUTE THE CRIME, BECAUSE  
26 SOMETHING ADDITIONAL IS REQUIRED, AND THAT IS WHAT WE  
27 CALL AN OVERT ACT.

28 SO THE LAW DOESN'T PUNISH JUST

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1 CONVERSATIONS, EVEN WHEN THOSE CONVERSATIONS ARE  
2 CONVERSATIONS INVOLVING ACTUAL INTENT AND AGREEMENT TO



3 KILL.

4 SO IF YOU AND I SIT DOWN AND WE SAY:

5 "LET'S KILL JOHN DOE," AND WE ACTUALLY AGREE, THE FIRST  
6 ELEMENT IS SHOWN. WE AGREE THAT WE ARE GOING TO KILL  
7 THAT PERSON.

8 BUT WE MUST ALSO AGREE FURTHER THAT WE ARE  
9 GOING TO KILL HIM, AND WE'RE GOING TO KILL HIM  
10 UNLAWFULLY. THERE IS EXPRESS MALICE. WE SPECIFICALLY  
11 INTEND TO FOLLOW THROUGH WITH THIS AGREEMENT, AND WE  
12 INTEND TO KILL UNLAWFULLY.

13 EVEN WITH THAT AGREEMENT, IT IS STILL NOT A  
14 CRIME. ONE OR MORE OF US HAS TO COMMIT AN OVERT ACT;  
15 THAT IS, SOME ACTION THAT IS DONE TO FACILITATE OR TO  
16 FURTHER THE OBJECT OF THE CONSPIRACY. ONE OF US HAS TO  
17 GET UP, GO OUTSIDE, AND DO SOMETHING, AND ONCE THAT IS  
18 DONE, THEN THE CONSPIRACY IS COMPLETE. THEN A CRIME HAS  
19 BEEN COMPLETED, YOU SEE.

20 NOW, IT'S NOT NECESSARY THAT WE ACTUALLY  
21 COMMIT THE CRIME. IF YOU AND I ENTER INTO THIS  
22 AGREEMENT AND WE REALLY INTEND TO KILL SOMEONE, AND I GO  
23 OUT AND BUY A GUN, THAT IS CONSPIRACY TO COMMIT MURDER,  
24 EVEN IF WE NEVER GET AROUND TO COMMITTING THE MURDER.  
25 YOU SEE, IT'S STILL THE CRIME OF CONSPIRACY TO COMMIT  
26 MURDER.

27 SO, IN THIS CASE, AS IN ALL CASES, WHAT THE  
28 PROSECUTION HAS TO DO IN ORDER TO PROVE THE CRIME IS WE

1 HAVE TO ALLEGE SPECIFIC OVERT ACTS, SO THAT THE JURY CAN  
2 MAKE A FINDING AS TO WHETHER OR NOT THEY AGREE THAT  
3 OVERT ACTS WERE COMMITTED TO FURTHER THE OBJECT OF THE  
4 CONSPIRACY.

5 AND SO IN THIS CASE THE PROSECUTION HAS  
6 ALLEGED THREE SPECIFIC OVERT ACTS.

7 NOW, YOU HAVE HEARD FROM THE VARIOUS EVENTS  
8 OF THAT PARTICULAR WEEK THAT THERE ARE A NUMBER OF  
9 THINGS THAT MIGHT HAVE BEEN ALLEGED BY THE PROSECUTION.  
10 HERE WE FOCUS ON JUST THREE SPECIFIC THINGS, AND ANY ONE  
11 OF THEM IS SUFFICIENT TO CONSTITUTE AN OVERT ACT WHICH  
12 WILL COMPLETE THE CRIME OF CONSPIRACY.

13 SO WE HAVE JUST CHOSEN THREE. THESE ARE  
14 THE SPECIFIC OVERT ACTS THAT WERE ALLEGED IN THE  
15 INDICTMENT.

16 "OVERT ACTS COMMITTED BY THE  
17 DEFENDANTS IN THIS CASE IN FURTHERANCE OF  
18 A CONSPIRACY TO COMMIT MURDER:

19 "NO. 1, THAT THE DEFENDANTS  
20 PURCHASED SHOTGUNS IN SAN DIEGO ON AUGUST  
21 THE 18TH.

22 "NO. 2. THAT THE DEFENDANTS  
23 ACQUIRED AMMUNITION ON OR BEFORE AUGUST  
24 THE 20TH.

25 "AND NO. 3. THAT LYLE MENENDEZ  
26 CONTACTED PERRY BERMAN BY PHONE ON AUGUST  
27 THE 20TH TO ARRANGE A MEETING LATER THAT

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1 NOW, IF YOU FIND THAT ERIK AND LYLE  
2 MENENDEZ AGREED TO COMMIT A MURDER, AND THEY DID IT WITH  
3 THAT EXPRESS MALICE IN THEIR MINDS; THAT IS, THAT THEY  
4 WANTED TO KILL, THEY INTENDED TO KILL, AND WE ALSO ASK  
5 YOU TO FIND THAT IT WAS -- THEY WANTED TO COMMIT A  
6 FIRST-DEGREE MURDER; THAT IS, THAT THEY WANTED TO KILL  
7 AND MURDER IN THE FIRST-DEGREE AS A RESULT OF  
8 PREMEDITATION AND DELIBERATION.

9 THESE ARE THE OVERT ACTS THAT WILL COMPLETE  
10 THAT CONSPIRACY. ANY ONE OF THESE. IF YOU ALL AGREE  
11 THAT THE DEFENDANTS PURCHASED SHOTGUNS IN SAN DIEGO ON  
12 AUGUST THE 18TH, THAT IS AN OVERT ACT THAT HAS BEEN  
13 PROVEN BY THE PROSECUTION, AND WILL COMPLETE THE CRIME  
14 OF CONSPIRACY.

15 AND SO I ASK YOU, HOW COULD YOU NOT FIND  
16 THAT TO BE TRUE?

17 ERIK MENENDEZ ON THIS WITNESS STAND SAID  
18 THAT ON AUGUST THE 18TH OF 1989, HE AND HIS BROTHER WENT  
19 DOWN TO SAN DIEGO, AND THEY PURCHASED SHOTGUNS ON THAT  
20 SPECIFIC DATE. SO THAT IS NOT EVEN IN DISPUTE IN THIS  
21 CASE.

22 SO I WOULD SUBMIT THAT THE OVERT ACTS, IF  
23 WE JUST -- WE CAN EVEN PUT ASIDE -- WELL, NONE OF THE

24 OVERT ACTS -- WELL, PERHAPS THREE IS IN DISPUTE, BUT  
25 LET'S JUST FOCUS ON NO. 1 RIGHT HERE.  
26 NO. 1 IS NOT EVEN IN DISPUTE IN THIS CASE.  
27 THERE IS NO DISPUTE THAT ERIK AND LYLE MENENDEZ  
28 PURCHASED SHOTGUNS IN SAN DIEGO ON THE 18TH. SO A

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1 FINDING OF AN OVERT ACT IN THIS CASE SHOULD NOT BE AN  
2 OBSTACLE TO THIS JURY, AND I DON'T SEE HOW THE DEFENSE  
3 WILL EVEN STAND BEFORE YOU AND SAY THAT THE OVERT ACTS  
4 WERE NOT SHOWN IN THIS CASE. CLEARLY THEY WERE. THE  
5 OVERT ACTS WERE DEFINITELY AND POSITIVELY PROVEN IN THIS  
6 CASE.

7 THE DEFENDANTS WILL ALLEGE THEIR STATE OF  
8 MINDS, THE DEFENDANTS' STATE OF MINDS AT THE TIME THEY  
9 DROVE TO SAN DIEGO.

10 YOU KNOW WHAT THEIR DEFENSE WAS. THE  
11 DEFENSE WAS: "WE WERE JUST DRIVING DOWN THERE FOR  
12 SELF-PROTECTION. WE WANTED TO HAVE GUNS JUST IN CASE."

13 THAT'S WHAT THEY ARE GOING TO ARGUE.  
14 THAT'S WHAT THE DEFENSE IS GOING TO ARGUE. BUT THEY ARE  
15 NOT GOING TO ARGUE THAT THE OVERT ACT DID NOT OCCUR IN  
16 THIS CASE.

17 SO I WOULD SUBMIT THIS IS ABSOLUTELY  
18 PROVEN.

19 NO. 3 HERE IS ABSOLUTELY PROVEN. IT IS NOT

20 SUBJECT TO ANY DISPUTE IN THIS CASE. THERE WAS AN OVERT  
21 ACT. THE QUESTION IS WHAT WERE THE DEFENDANTS' STATE OF  
22 MINDS AT THE TIME THEY DROVE TO SAN DIEGO. THAT'S THE  
23 ONLY ISSUE THAT THEY ARE GOING TO DISPUTE HERE.

24 LET ME JUST BRIEFLY TOUCH ON ANOTHER COUPLE  
25 OF INSTRUCTIONS, AND THEN I AM GOING TO TURN MY FOCUS TO  
26 A DISCUSSION OF THE FACTS IN THIS CASE.

27 I WOULD LIKE TO JUST BRIEFLY TOUCH UPON THE  
28 PROSECUTION'S BURDEN IN THIS CASE.

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1 YOU WILL BE INSTRUCTED IN THIS CASE THAT  
2 THE PROSECUTION HAS THE BURDEN OF PROOF. WE ARE  
3 ALLEGING FIRST-DEGREE MURDER, SPECIAL CIRCUMSTANCES, AND  
4 CONSPIRACY TO COMMIT MURDER.

5 NOW, TO WHAT EXTENT DO WE HAVE TO CONVINCE  
6 YOU OF THIS? TO WHAT EXTENT MUST YOU BE SATISFIED IN  
7 YOUR MIND THAT THIS HAS BEEN PROVEN?

8 AND TO ESTABLISH THAT WE LOOK TO THE  
9 INSTRUCTION THAT DEALS WITH THE PROSECUTION'S BURDEN OF  
10 PROOF.

11 "A DEFENDANT IN A CRIMINAL ACTION  
12 IS PRESUMED TO BE INNOCENT UNTIL THE  
13 CONTRARY IS PROVED, AND IN A CASE OF A  
14 REASONABLE DOUBT WHETHER HIS GUILT IS  
15 SATISFACTORILY SHOWN, HE IS ENTITLED TO A

16 VERDICT OF NOT GUILTY.  
17 "THIS PRESUMPTION PLACES UPON THE  
18 PEOPLE THE BURDEN OF PROVING HIM GUILTY  
19 BEYOND A REASONABLE DOUBT. REASONABLE  
20 DOUBT IS DEFINED AS FOLLOWS: IT IS NOT A  
21 MERE POSSIBLE DOUBT, BECAUSE EVERYTHING  
22 RELATING TO HUMAN AFFAIRS IS OPEN TO SOME  
23 POSSIBLE OR IMAGINARY DOUBT. IT IS THAT  
24 STATE OF THE CASE WHICH, AFTER THE ENTIRE  
25 COMPARISON AND CONSIDERATION OF ALL THE  
26 EVIDENCE, LEAVES THE MINDS OF THE JURORS  
27 IN THAT CONDITION THAT THEY CANNOT SAY  
28 THEY FEEL AN ABIDING CONVICTION OF THE

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1 TRUTH OF THE CHARGE."  
2 LADIES AND GENTLEMEN, I WILL NOW TURN TO A  
3 DISCUSSION OF THE FACTS WHICH SUPPORTS OUR POSITION IN  
4 THIS CASE THAT THE DEFENDANTS ARE GUILTY OF FIRST-DEGREE  
5 MURDER AND NOTHING LESS; THAT THE SPECIAL CIRCUMSTANCES  
6 HAVE BEEN PROVEN TO BE TRUE, AND THAT THEY ARE GUILTY OF  
7 THE CRIME OF CONSPIRACY TO COMMIT MURDER. AND THAT ANY  
8 DOUBT THAT YOU MAY HAVE AS TO THEIR GUILT OF THOSE  
9 CHARGES IS NOT A REASONABLE DOUBT BASED UPON ALL OF THE  
10 EVIDENCE BEING PRESENTED TO YOU, BECAUSE WE PROVED OUR  
11 CASE TO YOU BASED ON A COMBINATION OF CIRCUMSTANCIAL

12 EVIDENCE AND DIRECT EVIDENCE, WHICH ALLOWS ONLY FOR ONE  
13 REASONABLE INTERPRETATION, AND THAT IS THAT THE  
14 DEFENDANTS IN THIS CASE PLANNED TO KILL THEIR PARENTS,  
15 AND CARRIED OUT THE KILLING PURSUANT TO THAT PLAN.

16 YOU WILL BE INSTRUCTED IN REGARD TO WHAT IS  
17 MEANT BY CIRCUMSTANCIAL EVIDENCE AND DIRECT EVIDENCE,  
18 AND I WOULD LIKE TO BRIEFLY REFER TO THAT.

19 "DIRECT EVIDENCE IS EVIDENCE WHICH  
20 DIRECTLY PROVES A FACT, WITHOUT THE  
21 NECESSITY OF AN INFERENCE. IT IS EVIDENCE  
22 WHICH, BY ITSELF, IF FOUND TO BE TRUE,  
23 ESTABLISHES THAT FACT."

24 SO IN OTHER WORDS, IF YOU WANT TO KNOW IF  
25 IT'S RAINING OUTSIDE, AND YOU LOOK OUTSIDE AND YOU SEE  
26 WITH YOUR OWN EYES THE RAIN COMING DOWN, YOU CAN THEN  
27 TESTIFY AS A WITNESS. YOU HAVE DIRECT EVIDENCE OF THAT  
28 FACT, THAT IT WAS, IN FACT, RAINING.

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1 CIRCUMSTANCIAL EVIDENCE IS EVIDENCE WHICH,  
2 IF FOUND TO BE TRUE, PROVES THE FACT FROM WHICH AN  
3 INFERENCE OF THE EXISTENCE OF ANOTHER FACT MAY BE DRAWN.

4 SO IN OTHER WORDS, IF YOU SEE A PERSON WHO  
5 WALKED IN FROM OUTSIDE, IF YOU'RE STANDING THERE ON THE  
6 FIRST FLOOR, AND THAT PERSON IS COVERED IN RAIN, AND HE  
7 HAS AN UMBRELLA AND HE IS SHAKING IT, AND IF THE WATER

8 IS COMING OFF THE UMBRELLA, YOU CAN REASONABLY CONCLUDE  
9 THAT IT'S RAINING OUTSIDE.

10 THAT IS CIRCUMSTANCIAL EVIDENCE OF THE FACT  
11 THAT IT IS RAINING OUTSIDE. BEAR IN MIND,  
12 CIRCUMSTANCIAL EVIDENCE AND DIRECT EVIDENCE, ACCORDING  
13 TO THE LAW, ARE EQUALLY ACCEPTABLE MEANS OF PROOF. THE  
14 LAW DOESN'T SAY THAT ONE IS BETTER THAN THE OTHER.  
15 SOMETIMES YOU HEAR ON TELEVISION AND SOME OF THE T.V.  
16 PROGRAMS USE PHRASES LIKE "MERE CIRCUMSTANCIAL EVIDENCE.  
17 THE PROSECUTION HAS MERE CIRCUMSTANCIAL EVIDENCE."

18 WELL, CIRCUMSTANCIAL EVIDENCE DOESN'T MEAN  
19 WEAK EVIDENCE. IF YOU ARE STANDING DOWNSTAIRS -- IF YOU  
20 WERE STANDING DOWNSTAIRS THIS MORNING AND YOU SAW PEOPLE  
21 COMING IN ONE AFTER ANOTHER, SHAKING OFF THEIR  
22 UMBRELLAS, THAT IS PRETTY SOLID EVIDENCE THAT IT'S  
23 RAINING OUTSIDE.

24 CIRCUMSTANCIAL EVIDENCE IS NOT WEAK  
25 EVIDENCE. IT'S EXTREMELY STRONG. IT COULD BE JUST AS  
26 GOOD, IF NOT BETTER THAN DIRECT EVIDENCE. THE PROBLEM  
27 WITH DIRECT EVIDENCE SOMETIMES DEPENDS UPON THE  
28 CREDIBILITY OF THE PERSON.

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1 YOU MIGHT HAVE A PERSON WHO TAKES THE  
2 WITNESS STAND AND SAYS: "I WAS THERE AND I SAW THIS,"  
3 BUT THAT PERSON COULD BE LYING OR MISTAKEN.



4           BUT YET THAT'S DIRECT EVIDENCE, YOU SEE.

5   YET YOU MAY DECIDE: "I DON'T BELIEVE THIS PERSON. I

6   DON'T BELIEVE ANYTHING HE'S SAYING."

7           DIRECT EVIDENCE IS NOT STRONGER THAN

8   CIRCUMSTANCIAL EVIDENCE. THAT'S PARTICULARLY IMPORTANT

9   IN THIS CASE WHEN YOU EVALUATE THE CREDIBILITY OF ERIK

10   MENENDEZ. REMEMBER WHEN HE WAS ON THE WITNESS STAND,

11   SEVERAL TIMES HE WOULD SAY: "YOU WEREN'T THERE,

12   MR. CONN." YOU SEE? WHAT HE IS SUGGESTING IS HE HAS

13   DIRECT EVIDENCE OF THIS, YOU SEE, AND SO HE'S SOMEHOW

14   MORE RELIABLE, BECAUSE HE WAS SAYING HE WAS THERE AND

15   THIS TOOK PLACE.

16           "YOU WEREN'T THERE, MR. CONN," YOU SEE.

17   BUT CREDIBILITY EVIDENCE DOESN'T NECESSARILY MEAN

18   TRUTHFUL EVIDENCE.

19           SO THE PROSECUTION IN THIS CASE CAN PROVE

20   THIS CASE ENTIRELY THROUGH THE CIRCUMSTANCIAL EVIDENCE.

21   IT DOESN'T MATTER IF WE HAD A WITNESS WHO WAS THERE

22   WATCHING JOSE MENENDEZ GET SHOT TO DEATH, OR WATCHING

23   KITTY MENENDEZ GET SHOT TO DEATH. WE DON'T NEED DIRECT

24   EVIDENCE. WE DON'T NEED EYEWITNESSES.

25           STATE OF MIND, A PERSON'S STATE OF MIND IS

26   INFERRED FROM ALL OF THE CIRCUMSTANCES OF THE CRIME.

27   YOU CAN FIND PREMEDITATION AND DELIBERATION, JUST LIKE

28   ANYTHING ELSE, THROUGH CIRCUMSTANCIAL EVIDENCE.

1 IF A PERSON GOES DOWN TO SHOP FOR SHOTGUNS  
2 IN SAN DIEGO TWO DAYS BEFORE HE PLANS AND COMMITS A  
3 KILLING, AND COVERS UP AND CONCEALS THE CRIME, AND  
4 DESTROYS EVIDENCE AND FABRICATES EVIDENCE, AND INHERITS  
5 MONEY, YOU CAN CONCLUDE, BASED UPON THAT, THAT'S VERY  
6 STRONG CIRCUMSTANCIAL EVIDENCE OF AN INTENTION TO KILL,  
7 OF A PLAN TO KILL. WE DON'T NEED DIRECT EVIDENCE.  
8 CIRCUMSTANCIAL EVIDENCE IS GOOD ENOUGH, AND BETTER THAN  
9 DIRECT EVIDENCE IN SOME CASES.

10 THAT GIVES YOU A BRIEF OVERVIEW OF THE  
11 LAW. I WILL DISCUSS THE FACTS OF THE CASE NOW. I AM  
12 GOING TO DISCUSS THE WITNESSES THAT I CALLED, THE  
13 WITNESSES THAT THE DEFENSE CALLED, AND THE WITNESSES  
14 THAT WE CALLED IN REBUTTAL TO EACH OTHER.

15 BUT AS I DISCUSS THOSE WITNESSES, I WILL  
16 FROM TIME TO TIME BE COMING BACK TO THE LAW, BECAUSE I  
17 AM GOING TO WANT TO SHOW YOU HOW, THROUGHOUT THE CASE  
18 THAT I PRESENTED TO YOU, WE HAVE PROVEN PREMEDITATION.  
19 WE HAVE EVIDENCE WHICH ESTABLISHES PREMEDITATION AND  
20 DELIBERATION. WE HAVE EVIDENCE WHICH PROVES THAT THIS  
21 IS A FIRST-DEGREE MURDER, AND THAT YOU SHOULD REJECT THE  
22 DEFENSE OF THE DEFENDANTS.

23 HERE IS A LIST OF CHARACTERS THAT I THINK  
24 YOU'RE FAMILIAR WITH BY THIS TIME. I AM SURE NOT ALL OF  
25 THE NAMES ARE GOING TO JUMP OUT AT YOU. IT'S BEEN A  
26 LONG TRIAL, AND IT'LL TAKE SOME TIME TO GO THROUGH EACH  
27 OF THESE PERSONS, BUT I WILL REFRESH YOUR RECOLLECTION  
28 AS TO WHAT THEY TESTIFIED TO DURING THIS TRIAL.

1           THESE ARE ALL THE WITNESSES THAT WE CALLED  
2 DURING THE COURSE OF OUR CASE, AND I WILL START WITH  
3 DETECTIVE ZOELLER.

4           I BELIEVE YOU WILL FIND THIS LIST TO BE  
5 ACCURATE IN TERMS OF THE SEQUENCE OF THE WITNESSES AS  
6 WELL, STARTING WITH DETECTIVE ZOELLER ON THE UPPER LEFT  
7 AND ENDING UP WITH DR. ROGER MC CARTHY ON THE RIGHT.

8           WE STARTED OUT WITH DETECTIVE ZOELLER, AND  
9 DETECTIVE ZOELLER TESTIFIED, FIRST OF ALL, TO THE CRIME  
10 SCENE IN THIS CASE, BECAUSE HE WAS THE INVESTIGATING  
11 OFFICER WHO RESPONDED TO THE CRIME SCENE, AND HE HAS  
12 BEEN THE LEAD INVESTIGATOR ON THIS CASE SINCE AUGUST THE  
13 20TH OF 1989.

14          HE TESTIFIED THAT FOLLOWING A 911 CALL THAT  
15 WAS PLACED BY LYLE MENENDEZ TO THE POLICE STATION,  
16 DETECTIVE ZOELLER WAS AWAKENED AT HIS HOME 13 MINUTES  
17 LATER, AND HE LEFT HIS HOME AT THAT TIME TO RESPOND TO  
18 722 NORTH ELM WITH HIS PARTNER, TOM LINEHAN.

19          AFTER ARRIVING AT THE CRIME SCENE, HE WENT  
20 INTO THE CRIME SCENE, AND HE MADE THE OBSERVATIONS THAT  
21 HE MADE AT THE TIME. AND THESE ARE THE KEY OBSERVATIONS  
22 THAT HE MADE AT THE TIME WHICH HAVE SOME BEARING UPON  
23 THE CRITICAL FACTS IN THIS CASE:

24          HE TESTIFIED THAT THE LIGHTS TO THE DEN  
25 WHERE THE KILLING TOOK PLACE WERE OUT, BUT THE LIGHTS TO

26 THE FOYER WERE ON.

27 AND YOU CAN SEE WHY THAT IS SIGNIFICANT

28 NOW. THE LIGHTS TO THE FOYER WERE ON. I EVEN ASKED

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1 ERIK MENENDEZ, BECAUSE THE ISSUE THERE IS WHETHER HE WAS  
2 ABLE TO SEE WHAT HE WAS DOING AS HE WAS SHOOTING HIS  
3 PARENTS TO DEATH.

4 I SAID, "ISN'T IT TRUE THAT THE LIGHTS WERE  
5 ON WHEN YOU ENTERED INTO THAT ROOM, AND IT FLOODED --  
6 THE LIGHTS FLOODED THE DEN?"

7 AND ERIK MENENDEZ SAID: "YES. I DIDN'T  
8 THINK ABOUT IT BEFORE, BUT I GUESS THAT'S RIGHT."

9 AND WE KNOW THAT THAT'S RIGHT, BECAUSE  
10 DETECTIVE ZOELLER SAID WHEN HE ARRIVED, THE LIGHTS TO  
11 THE FOYER WERE ON.

12 DETECTIVE ZOELLER ALSO SAID THAT THE  
13 TELEVISION WAS ON, AND THE SOUND OF THE TELEVISION WAS  
14 LOUD.

15 A VERY IMPORTANT FACT WAS THE FACT THAT NO  
16 SHOTGUN SHELLS WERE FOUND ON THE FLOOR, INDICATING THAT  
17 SOMEONE HAD CAREFULLY RETRIEVED ALL OF THE SHOTGUN  
18 SHELLS. EVERY SINGLE SHOTGUN SHELL WAS PICKED UP IN  
19 THIS CASE.

20 THAT TELLS YOU A LOT ABOUT THE DEFENDANTS  
21 AND THEIR STATE OF MIND AT THE TIME IMMEDIATELY

22 FOLLOWING THE COMMISSION OF THE CRIME. THE CONCEALMENT  
23 AND DESTRUCTION OF EVIDENCE. THAT TELLS YOU THEIR  
24 MENTAL STATE; THAT THEY WERE ABLE TO THINK ABOUT WHAT  
25 THEY WERE DOING, AND THAT THEY WERE HIDING AND  
26 CONCEALING THEIR IDENTITY WITHIN MOMENTS OF KILLING  
27 THEIR PARENTS.

28 ANOTHER CRITICAL FACT IS THAT NO WEAPONS

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1 WERE FOUND INSIDE THAT ROOM. SO YOU KNOW THAT KITTY AND  
2 JOSE MENENDEZ WERE NOT ARMED, AND POSED NO DANGER TO THE  
3 DEFENDANTS. THERE WERE NO WEAPONS INSIDE THAT ROOM.

4 THE ONLY WEAPONS IN THE HOUSE, DETECTIVE  
5 ZOELLER SAID, WERE TWO .22 CALIBER RIFLES THAT WERE  
6 FOUND IN THE CLOSET OF KITTY MENENDEZ. THESE RIFLES  
7 WERE BOTH UNLOADED.

8 SO THERE WAS NO THREAT TO THE DEFENDANTS  
9 WHATSOEVER.

10 DETECTIVE ZOELLER SAID THAT HE DID NOT  
11 SEIZE THE WEAPONS BECAUSE THEY HAD NO CONNECTION TO THE  
12 IMMEDIATE CRIME SCENE. HE IS NOT GOING TO GO AROUND THE  
13 HOUSE COLLECTING VARIOUS PIECES OF EVIDENCE THAT DOESN'T  
14 APPEAR TO HAVE ANY BEARING UPON THE SHOOTING, AND THOSE  
15 TWO RIFLES UP IN KITTY MENENDEZ' CLOSET HAD NO APPARENT  
16 BEARING UPON THIS SHOOTING. AND INDEED, LADIES AND  
17 GENTLEMEN, I WOULD SUBMIT, THEY HAVE NOTHING TO DO WITH

18 THIS CASE.

19 VERY IMPORTANT FACT. THE SHUTTERS TO THE  
20 DEN WERE OPEN, AS INDICATED IN THE PHOTOGRAPHS OF THE  
21 DEN. AND I DON'T HAVE A PHOTOGRAPH HERE, BUT YOU CAN  
22 SEE WHEN YOU LOOK AT A PHOTOGRAPH TAKEN FROM OUTSIDE THE  
23 DEN, LOOKING INTO THE DEN, THE SHUTTERS ARE OPEN. YOU  
24 CAN SEE INSIDE THE DEN. YOU CAN SEE THAT LITTLE CARD  
25 TABLE, YOU KNOW, THAT'S ON THE SIDE OF THE ROOM, AND YOU  
26 CAN SEE THE BOOK SHELVES AND SO FORTH AS YOU'RE LOOKING  
27 AT THIS PHOTOGRAPH TAKEN FROM OUTSIDE THE ROOM.

28 WHY IS THAT IMPORTANT? HERE'S WHY THAT'S

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1 IMPORTANT.

2 BECAUSE THE STORY OF THE DEFENDANTS, WHICH  
3 I WILL ANALYZE IN DETAIL LATER, IS THAT ERIK AND LYLE  
4 MENENDEZ WERE IN THIS PASSIONATE STATE, AND THEY RAN AND  
5 GOT THEIR GUNS, AND FELT THAT THEY HAD TO SHOOT THEIR  
6 PARENTS TO DEATH IN SUCH A HORRIBLE AND BRUTAL WAY.

7 LYLE MENENDEZ PRESUMABLY AT THAT TIME WENT  
8 TO THE GUESTHOUSE. ISN'T THAT WHERE HIS SHOTGUN WAS AT  
9 THAT TIME?

10 WE KNOW WHAT ERIK DID. HE TOLD US WHAT HE  
11 DID. BUT THE LAST WE HEARD ABOUT THE SHOTGUN OF LYLE  
12 MENENDEZ, PRESUMABLY THAT WAS OVER IN HIS GUESTHOUSE.

13 SO EVEN THOUGH ERIK MENENDEZ WAS NOT

14 PERMITTED TO SPECULATE AND SAY WHAT HE THOUGHT LYLE  
15 MENENDEZ DID DURING THAT PERIOD OF TIME, LYLE MENENDEZ  
16 AGAIN -- AND I AM JUST PLAYING INTO THE DEFENSE CLAIM OF  
17 WHAT HAPPENED ON AUGUST THE 20TH OF 1989, I AM NOT  
18 SAYING THAT YOU SHOULD BELIEVE THIS REALLY TOOK PLACE.

19 BUT JUST GOING DOWN THAT ROAD WITH THEM A  
20 LITTLE BIT, AND ANALYZING THE STORY THAT THEY WANT YOU  
21 TO BELIEVE IS A TRUE STORY, WHAT HAPPENED?

22 AS ERIK MENENDEZ WENT UP TO HIS ROOM TO GET  
23 HIS SHOTGUN, LYLE MENENDEZ PRESUMABLY WENT OUT THROUGH  
24 THE LIVING ROOM. THE ROOM THAT IS -- I'LL SHOW YOU WITH  
25 THE DIAGRAM TOMORROW -- HE RAN OUT TO THE GUESTHOUSE,  
26 WENT ALONG BETWEEN THE POOL AND THE TENNIS COURTS, GOT  
27 TO THE GUESTHOUSE, GOT HIS SHOTGUN, CAME BACK FROM THE  
28 GUESTHOUSE WITH HIS SHOTGUN. PERHAPS I SHOULD USE THAT

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1 DIAGRAM NOW -- AND RAN OUT TO MEET HIS BROTHER AT THE  
2 CAR.

3 IF THE DEFENDANTS WERE HERE AT THE ENTRY,  
4 LYLE MENENDEZ, I BELIEVE, ACCORDING TO ERIK MENENDEZ,  
5 WAS SOMEWHERE AROUND HERE. ERIK MENENDEZ WAS AT THE TOP  
6 OF THE STAIRS ON THE SECOND FLOOR.

7 LYLE MENENDEZ RAN UP TO THE SECOND FLOOR,  
8 SPOKE TO HIS BROTHER, ERIK. ERIK THEN WENT TO HIS  
9 BEDROOM TO GET HIS GUN. LYLE MENENDEZ RAN DOWN THE

10 STAIRS AND WENT TO GET HIS GUN.

11 LYLE MENENDEZ MUST HAVE GONE THROUGH THE  
12 LIVING ROOM HERE ALONG THIS PATHWAY TO THE GUESTHOUSE.  
13 HE WENT UP TO THE GUESTHOUSE TO THE SECOND FLOOR. FROM  
14 THE SECOND FLOOR HE RETRIEVED HIS SHOTGUN, CAME BACK  
15 DOWN, RAN ALONG THE POOL AND THE TENNIS COURT, CAME THIS  
16 WAY, AND TO GET TO THE FRONT HERE, HE MUST HAVE GONE  
17 ALONG THIS ROUTE HERE, YOU SEE, AND THAT IS A GATE. YOU  
18 KNOW THIS LITTLE GATE OVER HERE AT THE END.

19 AND HE WENT THROUGH THE GATE, GOT OUT TO  
20 THE FRONT AND MET ERIK MENENDEZ OUT THERE, WHO HAD NOW  
21 FINISHED, OR WAS IN THE PROCESS OF UNLOADING AND  
22 RELOADING HIS GUN.

23 THAT IS THE ROUTE -- THE ONLY ROUTE THAT  
24 LYLE MENENDEZ MUST HAVE TAKEN THAT DAY.

25 WELL, THE INTERESTING THING ABOUT THAT IS  
26 THAT HERE ARE THE SHUTTERS TO THE DEN, AND THE SHUTTERS  
27 ARE OPEN. YOU CAN SEE THROUGH THE SHUTTERS. AND THIS  
28 IS WHERE DETECTIVE ZOELLER'S OBSERVATION IS IMPORTANT,

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1 AND YOU CAN EVEN SEE IT IN THE PHOTOGRAPHS YOURSELF.

2 IF THE SHUTTERS ARE OPEN, YOU CAN LOOK  
3 THROUGH. YOU CAN SEE WHAT'S GOING ON INSIDE THE ROOM.

4 SO LYLE MENENDEZ HAD PLENTY OF OPPORTUNITY  
5 TO LOOK THROUGH THE SHUTTERS TO SEE HIS PARENTS, SEE



6 WHAT HIS PARENTS WERE DOING, YOU SEE. WHY WOULD LYLE  
7 MENENDEZ BELIEVE THAT "IT'S HAPPENING NOW"? HIS PARENTS  
8 ARE LOADING GUNS INSIDE THE DEN.

9 DID LYLE MENENDEZ TAKE THE TIME AND THE  
10 TROUBLE -- IF HE CARED ABOUT WHETHER OR NOT HE SHOT HIS  
11 PARENTS TO DEATH -- DID HE TAKE THE TIME AND TROUBLE TO  
12 EVEN LOOK THROUGH THE SHUTTERS AND SEE IF HIS PARENTS  
13 WERE LOADING GUNS?

14 NO. APPARENTLY NOT, LADIES AND GENTLEMEN.

15 I WOULD SUBMIT ONE OF THE REASONS WHY HE  
16 DID NOT WAS BECAUSE LYLE MENENDEZ, JUST LIKE ERIK  
17 MENENDEZ, WANTED TO KILL THEIR PARENTS. THEY WANTED TO  
18 SHOOT THEIR PARENTS TO DEATH. ANYONE WHO WAS REALLY IN  
19 THAT SITUATION, IF THAT SITUATION REALLY OCCURRED, WOULD  
20 HAVE TAKEN THE TIME AND THE TROUBLE TO LOOK THROUGH THE  
21 SHUTTERS, AND WOULD HAVE SEEN THAT THE MOTHER AND FATHER  
22 WERE JUST SITTING THERE WATCHING TELEVISION. THERE WAS  
23 NO DANGER.

24 AND I SUBMIT TO YOU, LADIES AND GENTLEMEN,  
25 THAT THIS SITUATION NEVER EVEN OCCURRED.

26 SO DETECTIVE ZOELLER TESTIFIED TO THE  
27 OBSERVATIONS OF THE CRIME SCENE. HE ALSO TESTIFIED  
28 TO -- LAID A FOUNDATION FOR THE PHYSICAL EXHIBITS THAT

1 YOU SAW HERE IN COURT, WHICH WERE SIGNIFICANT.

2           YOU SAW THE VIDEOTAPE OF THE CRIME SCENE  
3   THAT WAS MADE THAT NIGHT, WHICH INCLUDED THE DEN WHERE  
4   THE BLOODY BODIES OF KITTY AND JOSE MENENDEZ WERE LYING  
5   IN THE POSITION IN WHICH THEY WERE FOUND.

6           YOU SAW PHOTOGRAPHS -- NUMEROUS PHOTOGRAPHS  
7   OF THE CRIME SCENE. DETECTIVE ZOELLER TESTIFIED THAT IS  
8   THE WAY THE HOME APPEARED THAT NIGHT, AND THESE  
9   PHOTOGRAPHS ARE ACCURATE DEPICTIONS OF WHAT I OBSERVED  
10  THAT NIGHT.

11          AND THEN HE TESTIFIED IN REGARD TO THE  
12  RECOVERY OF PHYSICAL EVIDENCE; SUCH AS THE PELLETS AND  
13  WADDING THAT WAS FOUND AND RECOVERED FROM THE DEN.

14          AND THEN, OF COURSE, HE LAID A FOUNDATION  
15  FOR ALL OF THE DIAGRAMS THAT WE HAVE HERE IN COURT, THE  
16  FIRST FLOOR AND THE SECOND FLOOR IN THE MENENDEZ ESTATE.

17          HE ALSO TESTIFIED IN REGARD TO THE BEHAVIOR  
18  OF THE DEFENDANTS THAT NIGHT. YOU WILL RECALL THAT HE  
19  SAID THAT HE STAYED AT THE CRIME SCENE, HE DID NOT  
20  INTERVIEW THE DEFENDANTS. THE DEFENDANTS WENT TO THE  
21  POLICE STATION -- WERE TRANSPORTED TO THE POLICE STATION  
22  WHERE THEY COULD BE INTERVIEWED BY ANOTHER DETECTIVE,  
23  WHO YOU NOW KNOW WAS DETECTIVE EDMONDS.

24          BUT HE STAYED AT THE CRIME SCENE TO CONDUCT  
25  HIS INVESTIGATION, AND THEN DESCRIBED HOW THE DEFENDANTS  
26  CAME BACK THE NEXT MORNING. DO YOU REMEMBER? IT WAS AT  
27  5:30 THE NEXT MORNING. ERIK AND LYLE MENENDEZ CAME BACK  
28  TO THE RESIDENCE. THEY WANTED TO GO INTO THE DEN, AND

1 THEY SAID THEY WANTED TO RECOVER THEIR TENNIS GEAR.  
2 THEY SAID THEY WANTED TO RECOVER TENNIS GEAR FROM THE  
3 DEN, AND HE TOLD THEM THEY COULDN'T GET IN AT THAT TIME.  
4 HE TOLD THEM TO COME BACK AT ABOUT 8:30, WHICH THEY DID,  
5 AND THEN TURNED THE HOUSE OVER TO THEM ABOUT THAT TIME,  
6 OR SHORTLY AFTERWARDS.

7 DETECTIVE ZOELLER ALSO TESTIFIED TO  
8 ATTENDING THE AUTOPSY THAT WAS CONDUCTED BY THE LOS  
9 ANGELES CORONER'S OFFICE.

10 THE COURT: OKAY. LET'S TAKE OUR BREAK AT THIS  
11 POINT, SINCE YOU'RE GOING ON TO A NEW SUBJECT. AND WE  
12 WILL RESUME TOMORROW AT 8:30.

13 DON'T DISCUSS THIS CASE WITH ANYONE. DON'T  
14 FORM ANY FINAL OPINIONS ABOUT IT. DON'T PERMIT YOURSELF  
15 TO BE EXPOSED TO ANYTHING ABOUT THIS CASE OUTSIDE THE  
16 COURTROOM, AND WE WILL SEE YOU ALL BACK HERE TOMORROW AT  
17 8:30.

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

21

22 THE COURT: I WILL ASK THAT COUNSEL REMAIN TO  
23 TALK ABOUT A COUPLE OF EXHIBITS.

24 FIRST OF ALL, THERE WAS A LIST OF EXHIBITS  
25 PROVIDED TO ME BY, I THINK, THE PROSECUTION. I ASSUME  
26 THE DEFENSE HAS SEEN IT AS WELL.

27 MY QUESTION IS HE WHETHER OR NOT THERE HAS  
28 BEEN AN AGREEMENT AS TO THIS BEING THE LIST OF EXHIBITS,

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1 OR YOU HAVEN'T HAD A CHANCE TO REVIEW IT YET.

2 MS. TOWERY: NO, WE HAVEN'T HAD A CHANCE TO  
3 REVIEW IT YET.

4 THE COURT: WE WILL TALK ABOUT IT AFTER YOU DO  
5 THAT.

6 (JURY EXITS THE COURTROOM AND  
7 THE FOLLOWING PROCEEDINGS  
8 WERE HELD:)

9

10 THE COURT: ALSO REGARDING THE DECEMBER 11TH  
11 TAPE, THOSE FEW DISPUTES THAT WERE UNRESOLVED. I STILL  
12 HAVE MR. LEVIN'S TAPE-RECORDER. I WILL GIVE IT BACK TO  
13 YOU.

14 MR. LEVIN: THERE IS A CHARGE, YOUR HONOR.

15 THE COURT: IT REALLY WASN'T A GREAT TAPE  
16 RECORDER.

17 AND COUNSEL CAN FIND THE PORTION OF THE  
18 TAPE THAT YOU STILL WANT TO LITIGATE. WE WILL AT LEAST  
19 DISCUSS IT. I'LL BE HAPPY TO LISTEN TO IT.

20 MS. TOWERY: I THINK THERE WERE ONLY -- I AM  
21 SORRY. I THINK THERE WERE ONLY TWO PORTIONS THAT WE HAD  
22 LEFT THAT WERE UNRESOLVED, AND THEY'RE VERY CLOSE

23 TOGETHER ON THE TAPE, YOUR HONOR.  
24 THE COURT: OKAY. WELL, I WILL JUST GIVE IT TO  
25 YOU, AND YOU CAN FIND IT FOR ME.  
26 MS. TOWERY: I'M SORRY?  
27 THE COURT: I WILL GIVE IT TO YOU, AND YOU CAN  
28 FIND FOR ME.

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1 MS. TOWERY: I HAVE IT. I'VE CUED IT UP FOR THE  
2 ONE ON PAGE 21.  
3 THE COURT: OKAY.  
4 MS. TOWERY: WHERE WE HAD THE -- WHERE THE COURT  
5 THOUGHT THAT PERHAPS ERIK MENENDEZ WAS SAYING "BLOOD ON  
6 THE BATHROOM."  
7 THE COURT: YES.  
8 MS. TOWERY: AND WE HAD SUBMITTED THAT IT WAS  
9 "BLOOD ON THE BED," AND THE PROSECUTION INDICATED  
10 "UNINTELLIGIBLE."  
11 I LISTENED TO THAT AGAIN, YOUR HONOR, AND I  
12 THINK IT DOES SAY "BLOOD ON THE BED," AND THEN  
13 THEREAFTER ARE UNINTELLIGIBLE WORDS.  
14 AND THEN THE NEXT PART OF THE TRANSCRIPT  
15 THAT WAS IN DISPUTE IS AT PAGE 22, LINE 20.  
16 THE PROSECUTION'S VERSION IS THAT ERIK  
17 MENENDEZ SAYS: "I JUST NEVER GAVE IT A CHANCE."  
18 AND THE DEFENSE VERSION WAS: "I GUESS THAT

19 I WAS NEVER GIVEN A CHANCE."  
20 AGAIN, IN LISTENING TO IT, AGAIN I THINK  
21 THE DEFENSE VERSION IS CORRECT. I HAVE IT CUED UP.  
22 THE COURT: OKAY.  
23 MS. TOWERY: TO THE -- TO PAGE 21. IF THE COURT  
24 CAN FAST-FORWARD IT. I DON'T HAVE AN EXTRA TAPE. I  
25 GAVE THE COURT MY OTHER TAPE.  
26 THE COURT: I GAVE THE TAPE BACK TO YOU.  
27 MS. ABRAMSON: AND YOU CAN CUE IT UP AGAIN.  
28 MS. TOWERY: ARE YOU SURE YOU GAVE ME BACK THE

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1 OTHER TAPE?  
2 THE COURT: I GAVE IT TO THE CLERK, AND SHE GAVE  
3 IT BACK TO YOU.  
4 MS. TOWERY: I MUST HAVE MISPLACED IT.  
5 THE COURT: I ONLY HAVE THE EXHIBIT IN COURT, THE  
6 ORIGINAL EXHIBIT.  
7 MS. TOWERY: RIGHT NOW I ONLY HAVE ONE TAPE. I  
8 CUED IT UP TO PAGE 21, BUT IT'S PRETTY EASY TO FAST  
9 FORWARD IT.  
10 THE COURT: WE WILL DO IT HERE WHEN WE GET A  
11 LITTLE TIME TO DO IT, AND WE CAN ALL LISTEN AT THE SAME  
12 TIME.  
13 THERE IS ONE OTHER EXHIBIT HERE YOU WERE  
14 REDACTING?

15 MS. ABRAMSON: YES. THESE ARE TWO PAGES, PAGE 19  
16 AND PAGE 16 FROM TWO DIFFERENT TABLETS OF DR. WILSON.  
17 19 IS FROM 11-18-95, AND I TAKE IT THAT'S HIS  
18 HANDWRITING. IT WAS HIS HANDWRITING.  
19 AND 16 IS FROM 12-9-95.  
20 MY POSITION WAS THAT NEITHER PAGE HAD TO BE  
21 REDACTED. BUT IF THE COURT RULES IT SHOULD BE REDACTED,  
22 PEOPLE ARE TRYING TO GET THEIR CAKE AND EAT IT HERE WITH  
23 THE ONE ON PAGE 16. THEY WANT TO LEAVE THE PART THAT  
24 DR. DIETZ THOUGHT WAS SIGNIFICANT: FRIDAY, SUNNY DAY,  
25 NEW DAY, AND THEN CUT OUT THE REST OF THAT PART,  
26 INCLUDING THIS DESCRIPTION BY MR. MENENDEZ OF THAT  
27 FRIDAY MORNING, WHERE HE SAYS SPECIFICALLY. "DAD AT  
28 WORK." SO --

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1 THE COURT: I DON'T RECALL THAT EVER BEING RAISED  
2 IN THE EXAMINATION OF DR. WILSON. THE ONLY PART THAT  
3 WAS RAISED HAD TO DO WITH THE DRIVER'S LICENSE.  
4 MS. ABRAMSON: SO IF THAT'S -- I WOULD INDICATE  
5 THAT WE CAN'T HAVE THEIR CAKE AND EAT IT. IF THEY'RE  
6 GOING TO REDACT, THEY HAVE TO TAKE OUT EVERYTHING BUT  
7 THE LITTLE PARAGRAPH.  
8 MS. NAJERA: THAT'S FINE.  
9 MS. ABRAMSON: ON THE BOTTOM.  
10 THE COURT: OKAY. AS I UNDERSTAND IT, ON BOTH OF

11 THOSE PAGES THAT WAS ALL THAT WAS BROUGHT OUT. SO IT  
12 SEEMS TO ME THAT THOSE WOULD BE THE ONLY PORTIONS THAT  
13 ARE RECEIVED.

14 MS. ABRAMSON: OKAY.

15 THE COURT: OKAY. WE'LL BE IN RECESS UNTIL  
16 TOMORROW AT 8:30.

17 MR. LEVIN: WE HAVE ONE MORE THING, YOUR HONOR.

18 I BELIEVE WHEN WE DID THE EXHIBITS WE HAD  
19 NOT YET MARKED THE CALENDAR, EXHIBIT 441, AND I AM  
20 MOVING THAT INTO EVIDENCE.

21 THE COURT: THERE WAS NO OBJECTION TO IT BEING  
22 RECEIVED; IS THAT RIGHT, MR. CONN?

23 IT'LL BE RECEIVED.

24 MS. NAJERA: I BEG YOUR PARDON, YOUR HONOR?

25 THE COURT: THE CALENDAR, THE F.A.A. CALENDAR.

26 MS. NAJERA: OKAY.

27 MS. TOWERY: YOUR HONOR, ONE MORE EXHIBIT. I  
28 DON'T KNOW WHAT WE DID ABOUT 440. WAS THAT RECEIVED AS

-14577

1 WELL? THAT'S THE CONTRACT WITH "HARD COPY."

2 THE COURT: I THINK YOU WERE GOING TO LOOK AT THE  
3 CONTRACT AND REDACT IT. WE WILL TALK ABOUT IT TOMORROW.

4 MS. NAJERA: OKAY. I DID THAT.

5 THE COURT: WE WILL BE IN RECESS UNTIL TOMORROW.

6 (AT 4:40 P.M. PROCEEDINGS WERE



7 ADJOURNED UNTIL 8:30 A.M. THE  
8 FOLLOWING DAY.)  
9

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 TUESDAY, FEBRUARY 20, 1996  
14 VOLUME 299

15  
16  
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18  
19  
20  
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22  
23

APPEARANCES:  
21 (SEE APPEARANCE PAGE)

24  
25  
26  
27  
28

1 APPEARANCES:

2  
3 FOR THE PEOPLE: GIL GARCETTI  
4 DISTRICT ATTORNEY  
5 BY: DAVID CONN, DEPUTY  
6 AND  
7 CAROL NAJERA, DEPUTY  
8 18000 CRIMINAL COURTS BLDG.  
9 210 WEST TEMPLE STREET  
10 LOS ANGELES, CA 90012

11  
12 FOR THE DEFENDANT  
13 JOSEPH LYLE MENENDEZ: MICHAEL P. JUDGE,  
14 PUBLIC DEFENDER  
15 BY: CHARLES GESSLER, DEPUTY  
16 AND  
17 TERRI TOWERY, DEPUTY  
18 210 WEST TEMPLE  
19 LOS ANGELES, CA 90012

20  
21 FOR THE DEFENDANT  
22 ERIK GALEN MENENDEZ: LESLIE ABRAMSON  
23 ATTORNEY AT LAW  
24 4929 WILSHIRE BOULEVARD  
25 SUITE 940  
26 LOS ANGELES, CA 90010  
27  
28 BARRY LEVIN, ESQ.  
11661 SAN VICENTE BOULEVARD

19 LOS ANGELES, CA 90049

20

21

22

MARY LU MURPHY

CSR NO. 5178

23

MARILYN FADALE,

CSR NO. 4547

24

OFFICIAL REPORTERS

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1 INDEX FOR VOLUME 299 PAGES 50771 THROUGH 50959

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DAY	DATE	SESSION	PAGE	VOL.
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3

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TUESDAY, FEBRUARY 20, 1996	P.M.	50851	299
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5

6

PROCEEDINGS

7

8 RULING RE:

INVOLUNTARY MANSLAUGHTER

9 INSTRUCTION

50851 299

10 OPENING ARGUMENT BY THE PEOPLE 50858 299

11

12 CHRONOLOGICAL INDEX OF WITNESSES

13

WITNESSES: DIRECT CROSS REDIRECT RECROSS VOL.

14 (NONE THIS VOLUME.)

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LEGEND:  
27 A = MS. ABRAMSON      C = MR. CONN  
G = MR. GESSLER      L = MR. LEVIN  
28 N = MS. NAJERA      T = MS. TOWERY

1            EXHIBITS INDEX

2 EXHIBITS:            MARKED   RECEIVED   VOL.

3 441- FAILURE ANALYSIS  
CALENDAR            50958      299

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