

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

88DA0269

THE PEOPLE OF THE STATE OF CALIFORNIA, )  
)  
PLAINTIFF-RESPONDENT, )  
)  
VS. )  
)  
JOE HUNT, AKA JOSEPH HUNT, )  
AKA JOSEPH HENRY GAMSKY, )  
)  
DEFENDANT-APPELLANT. )

---

SUPERIOR COURT  
NO. A-090435

OCT 09 1987

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY  
HONORABLE LAURENCE J. RITTENBAND, JUDGE PRESIDING  
REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: JOHN K. VAN DE KAMP  
STATE ATTORNEY GENERAL  
3580 WILSHIRE BOULEVARD  
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LOS ANGELES, CALIFORNIA 90010

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

VOLUME 99 OF 101  
(PAGES 15119 TO 15271, INCLUSIVE)

COPY

ROSEMARIE GOODBODY, CSR NO. 932  
SALLY YERGER, CSR NO. 2008  
OFFICIAL REPORTERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WEST C

HON. LAURENCE J. RITTENBAND, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 ) PLAINTIFF, )  
 )  
 ) VS. )  
 )  
 ) JOSEPH HUNT, )  
 )  
 ) DEFENDANT. )

NO. A-090435

REPORTERS' DAILY TRANSCRIPT

THURSDAY, MAY 28, 1987

VOLUME 99

PAGES 15119 TO 15271, INCL.

APPEARANCES:

FOR THE PLAINTIFF: IRA REINER, DISTRICT ATTORNEY  
BY: FREDERICK N. WAPNER, DEPUTY  
1725 MAIN STREET  
SANTA MONICA, CALIFORNIA 90401

FOR THE DEFENDANT: ARTHUR H. BARENS, ESQ.  
10209 SANTA MONICA BOULEVARD  
LOS ANGELES, CALIFORNIA 90067

AND

RICHARD C. CHIER, ESQ.  
10920 WILSHIRE BOULEVARD  
LOS ANGELES, CALIFORNIA 90024

ROSEMARIE GOODBODY, CSR NO. 932  
SALLY YERGER, CSR NO. 2008  
OFFICIAL REPORTERS

COPY

1 THURSDAY, MAY 28, 1987 VOLUME 99 PAGES 15119 - 15271

2 A.M. 15119

3 P.M. 15187

4 -----  
5 CHRONOLOGICAL INDEX OF WITNESSES

6  
7 REBUTTAL WITNESS: DIRECT CROSS REDIRECT RECROSS  
8 HALL, LINDA KATHLEEN 15142 15146-C 15149 15150-C  
9

10  
11  
12  
13  
14 EXHIBITS FOR VOLUME 99

15  
16 DEFENDANT'S EXHIBITS: IN  
EVIDENCE

17 P-1 MR. SWARTOUT'S WRITING RE IDENTIFICATION 15127

18 P-3 BLACK & WHITE PHOTOGRAPHS OF DEFENDANT 15127

19  
20 P-C LETTER FROM HARVARD SCHOOL DATED 15127  
JANUARY 7, 1977

21 P-D PHOTOGRAPH OF DEFENDANT AT A 15127  
22 WATER CARNIVAL

23  
24  
25  
26  
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14  
15  
16  
17  
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(PAGES 15119 THROUGH 15122 WERE ORDERED  
SEALED BY THE COURT AND ARE NOT INCLUDED  
IN THE TRANSCRIPT.)

3-1  
1 SANTA MONICA, CALIFORNIA; THURSDAY, MAY 28, 1987; 10:15 A.M.

2 DEPARTMENT C HON. LAURENCE J. RITTENBAND, JUDGE

3 (APPEARANCES AS NOTED ON TITLE PAGE.)

4  
5 (THE FOLLOWING PROCEEDINGS WERE HELD  
6 IN OPEN COURT IN THE HEARING AND  
7 PRESENCE OF THE JURY:)

8 MR. BARENS: YOUR HONOR, I BELIEVE MR. WAPNER WISHED  
9 TO APPROACH BRIEFLY.

10 THE COURT: ALL RIGHT. GOOD MORNING, LADIES AND  
11 GENTLEMEN.

12 (THE FOLLOWING PROCEEDINGS WERE HELD  
13 AT THE BENCH OUTSIDE THE HEARING OF  
14 THE JURY:)

15 THE COURT: THAT MOTION FOR ADDITIONAL TIME IS DENIED.  
16 YOU WERE GOING TO PREPARE YOUR JURY INSTRUCTIONS AND HAVE  
17 THEM READY FOR ME TODAY.

18 MR. CHIER: YOU DIDN'T READ THE MOTION, YOUR HONOR.

19 THE COURT: I DON'T HAVE TO READ IT. YOU TOLD ME THAT  
20 YESTERDAY, THE FACT YOU HAVE TO SEE A DOCTOR AND STUFF OF  
21 THAT KIND.

22 MR. BARENS: YOUR HONOR, WE ARE HERE, AS I HAVE JUST  
23 TOLD MR. WAPNER, THE DECISION WAS MADE THIS MORNING BY THE  
24 DEFENSE THAT WE WOULD CALL NO FURTHER WITNESSES AND I BELIEVE  
25 MR. WAPNER NEEDS TO SPEAK TO THAT.

26 MR. WAPNER: YES, YOUR HONOR, I TALKED TO DETECTIVE  
27 ZOELLER YESTERDAY AFTERNOCN AND THIS MORNING AND HE JUST  
28 THIS MORNING TALKED TO A WITNESS AND JUST WHEN I CAME INTO

1 COURT THIS MORNING, HE TOLD ME ABOUT THIS WITNESS THAT I  
2 THINK I WOULD LIKE TO CALL IN REBUTTAL. SHE IS IN BEVERLY  
3 HILLS AND, AS I UNDERSTAND, HE IS SPEAKING WITH HER ON THE  
4 PHONE NOW.

5 I THOUGHT WE HAD THIS 45-MINUTE WITNESS THIS MORNING  
6 AND I WAS GOING TO TELL HER TO BE HERE AT 11:00. I HAVE  
7 CALLED TO TELL HER TO BE HERE AS SOON AS POSSIBLE BUT I  
8 ASSUME WITH THE TRAFFIC AND ALLOWING ME MAYBE FIVE MINUTES  
9 TO TALK TO HER WHEN SHE GETS HERE, THAT SHE CAN'T BE HERE  
10 BEFORE MAYBE QUARTER OF OR 11:00 AT THE EARLIEST.

11 MR. BARENS: COULD WE ASK WHO THIS IS?

12 THE COURT: WHO IS YOUR WITNESS?

13 MR. WAPNER: IT IS KATHY HALL, WHO WAS --

14 THE COURT: THAT IS THE ONE THAT WAS A FRIEND OF THIS  
15 LINGERING DOUBT WITNESS, WALLER?

16 MR. WAPNER: RIGHT, RIGHT.

17 MR. BARENS: YES, YOUR HONOR.

18 WHAT I MIGHT SUGGEST YOUR HONOR, SO AS NOT  
19 TO INCONVENIENCE ANYBODY, WHAT WE COULD DO, IF MR. WAPNER  
20 THINKS SHE IS GOING TO BE HERE AT 11:00, IS TO GO INTO  
21 CHAMBERS AND START THE JURY INSTRUCTIONS AND TELL THE JURY  
22 TO TAKE A RECESS UNTIL 11:00.

23 THE COURT: YES.

24 MR. BARENS: YOU KNOW WHAT I MEAN.

25 THE COURT: AND EXCUSE THEM UNTIL 11:00?

26 MR. BARENS: DO YOU WANT TO DO THAT?

27 MR. WAPNER: THAT IS FINE.

28 THE COURT: I WILL TELL THE JURY IT HAD BEEN ANTICIPATED

1 HAVING ANOTHER WITNESS FOR THE DEFENSE BUT THERE WON'T BE  
2 ANY; IS THAT RIGHT?

3 MR. BARENS: OH, NO.

4 JUST SIMPLY SAY, YOUR HONOR, THAT THE DEFENSE  
5 IS RESTING AT THIS POINT BUT THERE IS REBUTTAL AND THE  
6 REBUTTAL WITNESS CAN'T BE HERE UNTIL 11:00.

7 THE COURT: ALL RIGHT. IN THE MEANTIME, WE WILL GO  
8 OVER THE JURY INSTRUCTIONS.

9 MR. BARENS: WE MIGHT AS WELL GET STARTED.

10 THE COURT: ALL RIGHT, FINE.

11 MR. WAPNER: YOUR HONOR, I THINK THE DEFENSE PROBABLY  
12 SHOULD FORMALLY REST.

13 THE COURT: WE ARE ON THE RECORD, YOU ARE GOING TO  
14 FORMALLY REST?

15 MR. BARENS: I REST, THE DEFENSE RESTS.

16 THE CLERK: ARE YOU GOING TO HAVE YOUR EXHIBITS IN  
17 EVIDENCE? ARE YOU GOING TO MAKE THAT MOTION?

18 MR. BARENS: YOUR HONOR, WE WOULD MOVE OUR EXHIBITS  
19 INTO EVIDENCE.

20 MR. WAPNER: WOULD YOU REFRESH MY RECOLLECTION AS TO  
21 WHAT DEFENDANT'S A IS?

22 B AND C ARE THE PHOTOGRAPHS OF JOE HUNT.

23 MR. CHIER: THE PHOTOGRAPHS AND NEWSPAPER PICTURE OF  
24 THE GUY, THERE IS A LETTER FROM HARVARD SCHOOL ABOUT  
25 THREATENING TO TERMINATE HIM.

26 THE COURT: THE PICTURES IN THE NEWSPAPER, THAT CLIPPING?

27 MR. WAPNER: I HAVE NO OBJECTION TO THE LETTER FROM  
28 HARVARD SCHOOL OR THE NEWSPAPER CLIPPINGS OR THE PICTURE

1 OF HIM WHEN HE WAS A BOY.

2 IS THERE SOMETHING BEFORE THAT, THOUGH?

3 MR. CHIER: THERE WAS THE ACCOUNTANCY PAPER.

4 THE COURT: DEFENDANT'S A WAS A STATEMENT OF SOME KIND.

5 DO YOU HAVE THE DEFENDANT'S EXHIBITS?

6 THE CLERK: THESE ARE THREE FROM YESTERDAY AND I DON'T --  
7 I HAVE TO GO THROUGH ALL OF THESE, YOUR HONOR.

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4- 1 MR. WAPNER: WELL, WE CAN'T FIND IT RIGHT NOW. MAY  
2 I --

3 THE COURT: A IS A STATEMENT. I DON'T KNOW WHAT KIND  
4 OF A STATEMENT IT WAS.

5 MR. WAPNER: MAY I JUST RESERVE ANY OBJECTION SO THAT  
6 WE DON'T TAKE UP ANY MORE JURY TIME WHILE WE TRY TO FIND IT?  
7 WHEN WE FIND IT I WILL ASK TO BE HEARD.

8 THE COURT: WHICH ONE DO YOU WANT TO BE HEARD ON?

9 MR. WAPNER: JUST THE FIRST ONE, WHICH IS A. I HAVE  
10 NO OBJECTION TO B, C OR D.

11 MR. BARENS: OKAY.

12 THE COURT: ALL RIGHT. THEY WILL BE RECEIVED.

13 MR. BARENS: THANK YOU.

14 THE COURT: A WILL BE RECEIVED PROVISIONALLY, COUNSEL.

15 (THE FOLLOWING PROCEEDINGS WERE HELD

16 IN OPEN COURT IN THE PRESENCE AND HEARING

17 OF THE JURY:)

18 THE COURT: WHILE WE WERE UP AT THE BENCH, THE DEFENDANT  
19 HAS INDICATED THAT HE RESTS HIS CASE. THERE WON'T BE ANY  
20 ADDITIONAL WITNESSES THAT THE DEFENDANT IS GOING TO CALL.

21 HOWEVER, THERE IS ONE POSSIBLE WITNESS THAT THE  
22 PROSECUTION IS GOING TO CALL IN REBUTTAL. THAT WITNESS WON'T  
23 BE HERE UNTIL ABOUT 11 O'CLOCK.

24 MR. WAPNER: I BELIEVE 11 O'CLOCK.

25 THE COURT: MEANTIME, WHAT COUNSEL AND THE COURT WILL  
26 DO IS TO GO INTO CHAMBERS AND START GOING OVER THE JURY  
27 INSTRUCTIONS WHICH I WILL GIVE YOU TOMORROW, AFTER ARGUMENT  
28 OF COUNSEL.

4- 1 SO, JUST TWIDDLE YOUR THUMBS AND MAYBE GO UP TO  
2 THE CAFETERIA AND HAVE A CUP OF COFFEE OR DO ANYTHING YOU  
3 WANT UNTIL 11 O'CLOCK. WE WILL THEN HAVE YOU BACK HERE.

4 (RECESS.)

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5- 1 (THE FOLLOWING PROCEEDINGS WERE HELD  
2 IN CHAMBERS, THE DEFENDANT AND ALL  
3 COUNSEL BEING PRESENT:)

4 MR. WAPNER: YOUR HONOR, IN ADDITION TO THOSE I PUT  
5 IN THAT STACK OF INSTRUCTIONS THAT I GAVE YOU, XEROXES FROM  
6 CALJIC, AND THEY ARE PRESENTLY BEING TYPED BY OUR SECRETARY  
7 ON THE PROPER FORMAT.

8 ALSO, I DRAFTED AND AM HAVING DRAFTED TWO OTHER  
9 SPECIAL INSTRUCTIONS THAT I AM GIVING TO COUNSEL AND I WILL  
10 GIVE YOU THE HANDWRITTEN FORMS OF THEM. THEY ARE VERY BRIEF  
11 AND THEY ARE DESIGNED TO TRY AND MAKE SOME DISTINCTION  
12 BETWEEN THE INSTRUCTIONS THAT WE GIVE.

13 (UNREPORTED COLLOQUY BETWEEN MR. BARENS  
14 AND MR. WAPNER.)

15 MR. WAPNER: IT IS DESIGNED TO CREATE SOME DIVISON  
16 BETWEEN THE INSTRUCTIONS THAT YOU GAVE REGARDING PROVING  
17 CRIMES BEYOND A REASONABLE DOUBT AND THE REGULAR PENALTY PHASE  
18 INSTRUCTIONS.

19 THE COURT: DO WE HAVE TO REPEAT THE JURY INSTRUCTIONS  
20 WHICH WERE GIVEN ON THE GUILT PHASE OF THE TRIAL?

21 I ASSUME THAT THE JURORS ARE ALL FAMILIAR WITH  
22 THEM AND THEY WILL HAVE COPIES OF THAT.

23 MR. WAPNER: YOUR HONOR, I ASKED THAT QUESTION OF PEOPLE  
24 IN MY OFFICE WHO HAVE DONE DEATH PENALTY CASES, I HAD THE  
25 SAME QUESTION MYSELF, AND I DIDN'T KNOW THE ANSWER AND THE  
26 ANSWER SEEMED TO BE YES AS TO THE INSTRUCTIONS THAT WERE  
27 RELEVANT TO THEIR DETERMINATION OF THE OTHER CRIMES. IF THEY  
28 ARE NOT REPEATED, THEN YOU HAVE TO, IT SEEMS TO ME, HAVE SOME

5- 1 INSTRUCTION THAT SAYS TO THEM THAT THE SAME RULES THAT YOU  
2 HAVE PREVIOUSLY BEEN GIVEN ARE STILL IN EFFECT AND YOU ARE  
3 TO BE GUIDED BY THOSE INSTRUCTIONS, EXCEPT WHERE THEY CONFLICT  
4 WITH THE ONES YOU ARE GIVING NOW.

5 MR. BARENS: THE DEFENSE, OUT OF AN ABUNDANCE OF CAUTION,  
6 SUBMITS THAT THEY SHOULD BE REITERATED.

7 THE COURT: WELL, THE TRIAL IS DIVIDED INTO TWO PARTS,  
8 THE GUILT PHASE AND THE PENALTY PHASE. ONE IS THE CONTINUATION  
9 OF THE OTHER.

10 MR. BARENS: I WILL SUBMIT THE MATTER.

11 THE COURT: I DON'T THINK WE HAVE TO GO THROUGH THE  
12 JURY INSTRUCTIONS AGAIN.

13 MR. CHIER: THE JURORS HAVE NOT GRADUATED FROM LAW  
14 SCHOOL, YOUR HONOR.

15 MR. BARENS: I WILL SUBMIT THE MATTER.

16 MR. WAPNER: YOUR HONOR, I AM LOOKING FOR A SECTION  
17 IN THE FOUR INSTRUCTIONS THAT ARE THE 8.84 SERIES.

18 THE COURT: YES, I AM LOOKING AT THEM MYSELF.

19 MR. WAPNER: THERE IS A STATEMENT THAT I CAN'T FIND  
20 RIGHT NOW IN ONE OF THOSE INSTRUCTIONS ABOUT DISREGARDING --  
21 HERE IT IS 8.84.1.

22 THE COURT: 8.84.1, YES.

23 MR. WAPNER: ON THE SECOND PAGE AND IN (K), WHICH TALKS  
24 ABOUT TAKING INTO CONSIDERATION ANY OTHER CIRCUMSTANCE WHICH  
25 EXTENUATES THE GRAVITY OF THE CRIME AND THEN AT THE VERY  
26 LAST SENTENCE IT SAYS "YOU MUST DISREGARD ANY JURY INSTRUCTION  
27 GIVEN TO YOU IN THE GUILT OR INNOCENCE PHASE OF THIS TRIAL  
28 WHICH CONFLICTS WITH THIS PRINCIPLE." AND THAT IS WHEN IT  
29 TALKS ABOUT SYMPATHY IN THAT SECTION.

1 THE COURT: YES. ON THE GUILT PHASE, THERE IS AN  
2 INSTRUCTION THAT THEY ARE NOT TO CONSIDER SYMPATHY WHICH THEY  
3 HAVE A RIGHT TO CONSIDER ON THE PENALTY PHASE. SO THEREFORE,  
4 I DON'T SEE WHY WE SHOULD GIVE ANY GUILT PHASE INSTRUCTIONS.

5 MR. WAPNER: WELL, CERTAINLY THE CRIMES THAT ARE  
6 ALLEGED AS AGGRAVATING CIRCUMSTANCES HAVE TO BE PROVEN BEYOND  
7 A REASONABLE DOUBT. NOW, IF THE COURT THINKS THAT IT IS  
8 ENOUGH TO JUST GIVE THEM AN INSTRUCTION THAT SAYS --

9 THE COURT: 8841, EVIDENCE HAS BEEN INTRODUCED FOR  
10 THE PURPOSE OF SHOWING THE DEFENDANT HAS BEEN CONVICTED --  
11 HE HAS NOT BEEN CONVICTED, REALLY.

12 MR. WAPNER: NO. IT IS THE NEXT ONE, 8842.

13 THE COURT: 884 --

14 MR. WAPNER: OR 8841.2.

15 THE COURT: HOWEVER, THE DEFENDANT HAS COMMITTED THE  
16 FOLLOWING CRIMINAL ACTS WHICH INVOLVED -- WELL, IT GOES  
17 ON. AND SO ON AND SO FORTH AND THEN YOU MUST CONSIDER ANY  
18 EVIDENCE -- MUST PROVE IT BEYOND A REASONABLE DOUBT.

19 THERE IS NOTHING IN ALL OF THESE CALJIC  
20 INSTRUCTIONS WHICH SAYS THAT YOU IN ANY WAY, HAVE TO REPEAT  
21 THE INSTRUCTIONS THAT YOU GAVE ON THE GUILT PHASE.

22 THIS IS ONE, CONTINUING TRIAL, DIVIDED UP.

23 MR. WAPNER: WELL, I --

24 THE COURT: WHO DID YOU ASK IN YOUR OFFICE?

25 MR. WAPNER: I TALKED TO STERLING NORRIS.

26 THE COURT: WHAT DID HE SAY?

27 MR. WAPNER: HE SAID THAT HE THOUGHT WE SHOULD GIVE  
28 THE INSTRUCTIONS AGAIN.

1 THE COURT: WHAT DOES HE BASE THAT ON?

2 MR. WAPNER: HIS EXPERIENCE IN TRYING SEVERAL OF THESE.  
3 I DIDN'T ASK HIM SPECIFICALLY, INSTRUCTION BY INSTRUCTION.  
4 IT WAS ERNIE NORRIS.

5 MR. CHIER: WELL, KELLY HAS TRIED A LOT, HASN'T HE?

6 MR. WAPNER: I DON'T KNOW. I DON'T KNOW HOW MANY DEATH  
7 PENALTY CASES ROGER KELLY HAS TRIED.

8 THE COURT: I AM READING THE NOTES NOW. THERE IS NOTHING  
9 IN ANY OF THESE INSTRUCTIONS WHICH EVEN REMOTELY INDICATES  
10 YOU HAVE GOT TO GO BACK TO THE BEGINNING AGAIN AND GIVE  
11 THEM THE SAME INSTRUCTIONS YOU HAVE ALREADY GIVEN THEM.

12 I WILL GIVE THEM GENERAL INSTRUCTIONS. I CAN  
13 GIVE THEM THE GENERAL INSTRUCTION THAT THEY BE GUIDED BY  
14 THE INSTRUCTIONS THEY RECEIVED -- WELL, SOME OF THEM WOULD  
15 BE INAPPLICABLE. IT WOULD BE DANGEROUS TO SAY THAT THEY  
16 MUST NOT CONSIDER SYMPATHY AND SO ON AND SO FORTH, WHICH  
17 YOU DO IN THE GUILT PHASE. SO I --

18 MR. WAPNER: WELL, I AM NOT SURE IF I EXACTLY FOLLOW  
19 THE COURT, EXCEPT THAT I THINK THAT RATHER THAN CONFUSE  
20 THE ISSUE BY GIVING THEM A DRAFTED INSTRUCTION SAYING YOU  
21 ARE TO CONSIDER THOSE GUILT PHASE INSTRUCTIONS BUT NOT OTHERS,  
22 THAT YOU JUST --

23 THE COURT: WHICH OF THEM ARE YOU GOING TO EXCEPT?  
24 YOU HAVE GOT TO EXCEPT SOME OF THE INSTRUCTIONS THAT YOU  
25 ALREADY GAVE THEM ON THE GUILT PHASE. A NUMBER OF THEM  
26 ARE HARDLY APPLICABLE.

27 MR. WAPNER: RIGHT.

28 THE COURT: ONCE GUILT HAS BEEN DEMONSTRATED AS IT

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1 HAS IN THIS PARTICULAR CASE, A LOT OF THOSE ARE ACADEMIC  
2 AS TO A PENALTY PHASE.

3 MR. WAPNER: OKAY. BUT AS FAR AS THE PROOF OF THE  
4 ADDITIONAL CRIMES BEYOND A REASONABLE DOUBT --

5 THE COURT: WELL, THAT IS ALL RIGHT. THEY ARE TAKEN  
6 CARE OF. THEY ARE TAKEN CARE OF IN THESE PENALTY TRIAL  
7 INSTRUCTIONS.

8 NOWHERE DOES IT EVER INDICATE THAT YOU HAVE  
9 TO GIVE THEM THE SAME INSTRUCTIONS THAT YOU GAVE THEM BEFORE.  
10 THESE ARE ALL REPETITIOUS, YOU KNOW.

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1 MR. BARENS: COULD I STEP TO THE DEFENSE TABLE FOR  
2 JUST A MOMENT TO GET A COPY OF SOMETHING? I WILL BE RIGHT  
3 BACK.

4 THE COURT: SURE.

5 (MR. BARENS EXITS CHAMBERS.)

6 THE COURT: YOU HAVE GOT 201.

7 "HOWEVER, A FINDING OF GUILT AS  
8 TO ANY CRIME MAY NOT BE BASED ON CIRCUMSTANTIAL  
9 EVIDENCE UNLESS THE PROVED CIRCUMSTANCES ..."

10 AND IT GOES ON, SO ON AND SO FORTH AND THAT  
11 IS THE GUILT PHASE.

12 MR. WAPNER: INSTEAD OF -- WELL, I DIDN'T HAVE A CHANCE  
13 TO MODIFY THESE. THE SAME RULES AS TO CIRCUMSTANTIAL EVIDENCE  
14 APPLY TO THE DETERMINATION OF PROOF BEYOND A REASONABLE  
15 DOUBT OF THOSE AGGRAVATING CIRCUMSTANCES.

16 (MR. BARENS REENTERS CHAMBERS.)

17 MR. WAPNER: AS APPLIED TO THEIR DETERMINATION OF THESE  
18 CRIMES THAT WERE ACTUALLY CHARGED CRIMES --

19 THE COURT: WELL, WHAT IS YOUR FEELING ABOUT IT?

20 MR. BARENS: WHAT IS THE QUESTION? I HAVE STEPPED  
21 OUT FOR A MOMENT.

22 THE COURT: WHAT IS YOUR FEELING ON STARTING IT ALL  
23 OVER AGAIN IN EFFECT AND REALLY JUST TAKING OUT THOSE  
24 INSTRUCTIONS WHICH WOULD BE INAPPLICABLE TO THE PENALTY  
25 PHASE?

26 MR. BARENS: WELL --

27 MR. CHIER: WE HAVE REQUESTED SOME INSTRUCTIONS THAT  
28 WE THOUGHT WERE APPROPRIATE.



1 MR. BARENS: THE INSTRUCTIONS THAT WE SEEK ARE IN THE  
2 SET FILED WITH THE COURT THIS MORNING.

3 TO AN EXTENT, THEY SPECIFICALLY ARE A REITERATION  
4 OF CERTAIN INSTRUCTIONS THAT WE FELT WERE APPLICABLE, THAT  
5 WE ARE ASKING TO BE REITERATED DURING THE PENALTY PHASE  
6 NOW, THAT WERE GIVEN PREVIOUSLY.

7 TO BE CANDID, YOUR HONOR, I DON'T KNOW THE  
8 ANSWER TO THE QUESTION, EITHER, THAT HAS BEEN POSED. AND  
9 I ASKED SOME LAWYERS MYSELF AND NOBODY COULD CITE ME TO  
10 A DEFINITIVE SECTION OR CASE THAT GAVE ME THE ANSWER.

11 THE COURT: THAT'S RIGHT.

12 MR. BARENS: SO I DON'T KNOW.

13 THE COURT: THERE IS NOTHING IN THE INSTRUCTIONS THEM-  
14 SELVES. YOU SEE, THOSE ARE DRAFTED AND THE CALJIC INSTRUCTIONS  
15 TALK ABOUT THE PENALTY PHASE AND THEN THERE ARE INTRODUCTORY  
16 ONES.

17 "THE DEFENDANT IN THIS CASE HAS  
18 BEEN FOUND GUILTY OF MURDER IN THE FIRST DEGREE.  
19 THE CHARGE THAT THE MURDER WAS COMMITTED UNDER  
20 SPECIAL CIRCUMSTANCES WAS SPECIFICALLY FOUND TO  
21 BE TRUE."

22 THEN THEY GO ON TO SAY THAT THE LAW OF THIS  
23 STATE AND THE PENALTY FOR THE DEFENDANT FOUND GUILTY OF  
24 MURDER -- AND SO ON AND SO FORTH.

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1 MR. CHIER: THE PEOPLE ATTEMPTED TO PROVE CERTAIN FACTORS  
2 IN AGGRAVATION WHICH AMOUNT TO CRIMES. THE JURY OUGHT TO  
3 HAVE SOME GUIDELINES.

4 THE COURT: THEY ARE. THEY ARE IN HERE ON THE PENALTY  
5 PHASE. HERE, WE HAVE GOT IT RIGHT HERE.

6 MR. CHIER: WELL, THE BURDEN -- THE STANDARD OF PROOF  
7 IS THERE BUT THAT IS NOT ALL THAT THEY NEED TO GUIDE THEM  
8 IN THEIR DELIBERATIONS. I SUBMIT IT.

9 THE COURT: I HAVE POINTED OUT HERE THE BEYOND A  
10 REASONABLE DOUBT.

11 MR. CHIER: RIGHT, THAT IS THE STANDARD OF PROOF.

12 MR. WAPNER: THAT IS THE STANDARD OF PROOF.

13 MR. CHIER: THAT IS THE DESTINATION BUT THERE ARE CERTAIN  
14 MILEPOSTS THEY HAVE TO PASS ON THEIR WAY THERE.

15 THE COURT: ALL RIGHT. NOW WHICH DO YOU WANT? WHICH  
16 DO YOU SAY SHOULD BE GIVEN TO THE JURY?

17 MR. WAPNER: WELL, THE ONES THAT I --

18 THE COURT: YOU WANT THEM REPEATED IN EFFECT, ISN'T  
19 THAT WHAT YOU WANT TO DO?

20 MR. WAPNER: IN EFFECT, YES.

21 THE COURT: WELL, WHY REPEAT INSTRUCTIONS THAT HAVE  
22 ALREADY BEEN GIVEN TO THEM?

23 MR. WAPNER: SO THAT THE JURY WILL KNOW WHAT RULES ARE  
24 TO GUIDE THEM IN MAKING A DETERMINATION AS TO THE PROOF OF  
25 THESE OTHER CRIMES.

26 THE COURT: WELL, THEY ARE THERE. YOU HAVE GOT AN  
27 INSTRUCTION OF THAT KIND HERE IN THE PENALTY PHASE OF IT.

28 MR. WAPNER: OKAY.

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1 THE COURT: IN OTHER WORDS, YOU HAVE GOT BEYOND A  
2 REASONABLE DOUBT. WHAT ELSE IS THERE?

3 MR. WAPNER: WELL FOR EXAMPLE, IF THERE IS CIRCUMSTANTIAL  
4 EVIDENCE PROOF AS TO SOME OF THOSE OTHER CRIMES, SHOULD THEY  
5 BE TOLD THAT THE SAME RULES THAT THEY USED TO EVALUATE  
6 CIRCUMSTANTIAL EVIDENCE IN THE GUILT PHASE APPLY IN THE  
7 PENALTY PHASE?

8 AND IF YOU DON'T TELL THEM THAT SPECIFICALLY BY  
9 GIVING THEM A NEW INSTRUCTION, THEN ARE YOU GOING TO MAKE  
10 SOME REFERENCE TO THE OTHER INSTRUCTIONS?

11 I MEAN MAYBE I PUT IN TOO MANY INSTRUCTIONS.  
12 I PUT IN THE CREDIBILITY OF WITNESSES INSTRUCTION THAT THEY  
13 ALSO HAD BEFORE. MAYBE THOSE INSTRUCTIONS DON'T HAVE TO BE  
14 GIVEN.

15 THE COURT: AT ANY RATE, IT IS CONCEDED THAT THERE IS  
16 NOTHING IN THE JURY INSTRUCTIONS ON THE PENALTY PHASE WHICH  
17 SAYS YOU HAVE GOT TO GIVE THEM THE INSTRUCTIONS WHICH HAD  
18 BEEN GIVEN ON THE GUILT PHASE; ISN'T THAT TRUE?

19 MR. WAPNER: I DON'T FIND ANY. WELL, TO TELL YOU THE  
20 TRUTH, WHAT I DID WAS I CONSULTED PEOPLE. I DIDN'T LOOK BUT  
21 I DON'T KNOW THAT THERE IS ANYTHING IN THE ANNOTATIONS THAT  
22 SAYS THAT.

23 THE COURT: THERE IS NOTHING WHATSOEVER IN THERE ABOUT  
24 BEING REQUIRED TO GIVE THEM INSTRUCTIONS RIGHT FROM THE  
25 BEGINNING AGAIN.

26 MR. WAPNER: THE ONLY THING THAT I WOULD SAY IS THAT  
27 BEFORE YOU MAKE A DETERMINATION ON THIS, YOU CAN DO WHAT I  
28 DID, WHICH IS CALL ONE OF YOUR COLLEAGUES.

1 THE COURT: I AM GOING TO CHECK. IT IS TOO BAD SOME  
2 OF THE JUDGES THAT HAD A LOT OF THEM AREN'T AROUND ANY MORE,  
3 LIKE JUDGE FITTS, AND A COUPLE OF OTHER JUDGES.

4 MR. BARENS: JUDGE LIGHT, YOUR HONOR?

5 THE COURT: ROTHMAN WOULD BE A GOOD MAN BUT JUDGE ROTHMAN  
6 IS IN CIVIL. JUDGE WEISBERG.

7 MR. BARENS: I THINK DAVE HOROWITZ DOWNTOWN, HE HAS  
8 SOME RECENT EXPERIENCE.

9 MR. WAPNER: OR JUDGE ALTMAN DOWNTOWN, YOUR HONOR.  
10 I AM SURE HE HAS HAD A FEW. I KNOW HE IS VERY KNOWLEDGEABLE.  
11 I THINK HE SITS IN DEPARTMENT 129.

12 THE COURT: YES, I WILL CALL HIM.

13 (PAUSE IN PROCEEDINGS WHILE COURT  
14 MAKES TELEPHONE CALLS.)

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8- 1 MR. WAPNER: YOUR HONOR, THE WITNESS HAS ARRIVED.

2 MR. BARENS: DO YOU WANT ME TO WORK WITH HER A FEW  
3 MINUTES, FRED?

4 MR. CHIER: DO YOU HAVE A STATEMENT THAT YOU GOT FROM  
5 HER OR WHATEVER?

6 MR. WAPNER: DETECTIVE ZOELLER JUST TALKED TO HER THIS  
7 MORNING FOR THE FIRST TIME. I DON'T THINK THERE IS ANY WRITTEN  
8 STATEMENT.

9 MR. CHIER: DO YOU HAVE NOTES?

10 MR. WAPNER: I DON'T KNOW.

11 MR. BARENS: ALL WE WOULD ASK IS, TO THE EXTENT THAT  
12 HE HAS INTERVIEW NOTES, IF WE COULD SEE THEM BEFORE HER  
13 TESTIMONY.

14 MR. WAPNER: OKAY.

15 THE COURT: ALL RIGHT. THAT LINE IS BUSY.

16 MR. BARENS: LET'S JUST DO THE OTHER STUFF AND WE'LL  
17 COME BACK TO THIS QUESTION.

18 THE COURT: OKAY. DO YOU WANT A FEW MINUTES WITH THE  
19 WITNESS?

20 MR. WAPNER: I DO.

21 THE COURT: ALL RIGHT. GO AHEAD.

22 MR. WAPNER: LET ME TALK TO THE WITNESS.

23 THE COURT: ALL RIGHT. MEANTIME, I WILL FIND OUT.

24 MR. WAPNER: THANK YOU.

25 MR. BARENS: YOUR HONOR, COULD I ACCESS THE WITNESS  
26 FOR A COUPLE OF MINUTES BEFORE MR. WAPNER, BECAUSE I HAVE  
27 NEVER -- I DON'T THINK THERE ARE ANY REPORTS TO ASSIST US  
28 ON THIS ONE.

1 THE COURT: ALL RIGHT. YOU HAVE NO OBJECTION, HAVE  
2 YOU?

3 MR. WAPNER: NO OBJECTION.

4 MR. BARENS: I WILL WAIT IN THE HALL. AND AFTER YOU  
5 HAVE FINISHED WITH THE WITNESS, I WILL SPEAK WITH HER.

6 MR. WAPNER: THANK YOU.

7 MR. BARENS: THANK YOU.

8 (RECESS.)  
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1 (THE FOLLOWING PROCEEDINGS WERE HELD  
2 IN OPEN COURT IN THE PRESENCE AND  
3 HEARING OF THE JURY:)

4 THE COURT: ALL RIGHT. YOU HAVE A WITNESS?

5 MR. WAPNER: KATHY HALL.

6

7

R E B U T T A L

8

9

10 LINDA KATHLEEN HALL,  
11 CALLED AS A WITNESS BY THE PEOPLE, WAS SWORN AND TESTIFIED  
12 AS FOLLOWS:

13 THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY  
14 YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT  
15 SHALL BE THE TRUTH --

16 THE WITNESS: I DO.

17 THE CLERK: -- THE WHOLE TRUTH AND NOTHING BUT THE  
18 TRUTH, SO HELP YOU GOD?

19 THE WITNESS: I DO.

20 THE CLERK: IF YOU WOULD BE SEATED THERE AT THE WITNESS  
21 STAND. AND PULL YOUR CHAIR UP TO THE MICROPHONE, PLEASE.

22 WILL YOU STATE YOUR NAME AND SPELL YOUR FIRST  
23 AND LAST NAME FOR THE RECORD, PLEASE.

24 THE WITNESS: MY FULL NAME IS LINDA KATHLEEN HALL.

25 THE CLERK: AND THE SPELLING OF YOUR FIRST AND SECOND  
26 NAMES?

27 THE WITNESS: L-I-N-D-A, KATHLEEN IS K-A-T-H-L-E-E-N.

28 THE CLERK: THANK YOU.

## DIRECT EXAMINATION

1  
2 BY MR. WAPNER:

3 Q MISS HALL, YOU GO BY KATHY?

4 A YES, I DO.

5 Q DID YOU EVER WORK AT 9401 WILSHIRE BOULEVARD?

6 A YES, I DID.

7 Q AND WHEN YOU WORKED AT THAT BUILDING, WAS THAT  
8 FOR A LAW FIRM?

9 A YES.

10 Q WHAT WAS THE NAME OF THE LAW FIRM?

11 A ERVIN, COHEN & JESSOP.

12 Q AND WHEN WERE YOU FIRST EMPLOYED BY ERVIN,  
13 COHEN & JESSOP?

14 A IN NOVEMBER OF 1981.

15 Q AND HOW LONG DID YOU WORK THERE?

16 A THROUGH MAY OF '85.

17 Q DURING THE COURSE OF YOUR EMPLOYMENT THERE,  
18 DID YOU COME TO KNOW SOMEONE NAMED LOUISE WALLER?

19 A NO, I DIDN'T.

20 Q DID YOU MEET LOUISE WALLER AT SOME POINT LATER?

21 A YES.

22 Q AND WHEN WAS IT THAT YOU MET LOUISE WALLER?

23 A WHEN SHE INTERVIEWED FOR A JOB POSITION AT  
24 MY NEW OFFICE IN JULY OF 1986.

25 Q SO WHERE WERE YOU WORKING IN JULY OF 1986?

26 A FOR THE FIRM OF BROWN & WOODS.

27 Q WHERE IS THAT LOCATED?

28 A WE ARE AT 450 NORTH ROXBURY IN BEVERLY HILLS.



1 Q WAS BROWN & WOODS EVER LOCATED AT THE 9401  
2 BUILDING?

3 A NO.

4 TWO OF THE PARTNERS HAD BEEN WITH COHEN, ERVIN  
5 & JESSOP AND THEY HAD LEFT TO START THEIR OWN FIRM.

6 Q DID YOU EVER WORK AT 9401 WILSHIRE IN THE MID  
7 1970'S?

8 A NO, I DIDN'T.

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1 Q ARE YOU ORIGINALLY FROM THE LOS ANGELES AREA?

2 A NO.

3 Q WHEN DID YOU FIRST COME TO LOS ANGELES?

4 A I MOVED HERE IN AUGUST, '75.

5 Q AND FOR THE FIRST PERIOD OF TIME THAT YOU WERE  
6 HERE, DID YOU HAVE A JOB?

7 A YES.

8 Q WHERE WERE YOU WORKING?

9 A I STARTED WORKING FOR MUNGER, TOLLES & RICKERHAUSER.  
10 THE COURT REPORTER: PLEASE SPELL THOSE NAMES.

11 THE WITNESS: MUNGER, M-U-N-G-E-R, TOLLES, T-O-L-L-E-S  
12 AND RICKERHAUSER, R-I-C-K-E-R-H-A-U-S-E-R, IN DOWNTOWN  
13 LOS ANGELES.

14 Q BY MR. WAPNER: AND YOU WORKED FOR THEM FROM AUGUST  
15 OF 1975 FOR HOW LONG?

16 A WELL, I STARTED IN SEPTEMBER. I WORKED THERE  
17 UNTIL JANUARY, 1979.

18 Q AND WAS THE ONLY TIME YOU WERE WORKING IN THE  
19 9401 WILSHIRE BUILDING WHEN YOU WORKED FOR ERVIN, COHEN &  
20 JESSOP FROM NOVEMBER OF '81 THROUGH MAY OF '85?

21 A RIGHT, YES.

22 Q DURING THE TIME THAT YOU WORKED FOR ERVIN, COHEN &  
23 JESSOP, DID YOU KNOW A MAN NAMED RON LEVIN?

24 A NO.

25 Q SHOWING YOU PEOPLE'S 6 FOR IDENTIFICATION, DO  
26 YOU KNOW THE PERSON IN THE PICTURE?

27 A NO.

28 Q IN JANUARY OF THIS YEAR, DID YOU HAVE A CONVERSATION

0-2  
1 WITH LOUISE WALLER ABOUT RON LEVIN?

2 A NO.

3 Q HOW LONG DID LOUISE WALLER WORK FOR THE LAW FIRM  
4 THAT YOU ARE NOW WORKING AT?

5 A SHE STARTED IN JULY, 1986 AND WORKED THROUGH  
6 FEBRUARY 13TH OF THIS YEAR.

7 Q AND WAS SHE LET GO BY THE FIRM?

8 A SHE QUIT VOLUNTARILY.

9 Q DID YOU HAVE A CONVERSATION WITH LOUISE WALLER  
10 AT ALL IN JANUARY OF THIS YEAR?

11 A I AM SURE I DID. IT WOULD HAVE BEEN WORK-RELATED.

12 Q AND WHAT IS YOUR JOB AT THE LAW FIRM?

13 A I AM OFFICE MANAGER.

14 Q WERE YOU THE OFFICE MANAGER DURING THE ENTIRE  
15 TIME LOUISE WALLER WORKED THERE?

16 A YES.

17 Q DID YOU READ ANYTHING ABOUT THIS CASE IN THE PAPERS?

18 A YES.

19 Q DID YOU EVER TALK TO LOUISE WALLER ABOUT THIS  
20 CASE?

21 A NO.

22 MR. WAPNER: NOTHING FURTHER.

23 THE COURT: MR. BARENS, ANY QUESTIONS?

24 MR. BARENS: MR. CHIER IS GOING TO DO THE CROSS-  
25 EXAMINATION. HE HAD THE WITNESS ON DIRECT, YOUR HONOR --  
26 THAT IS, THE RELATED WITNESS.  
27  
28

## CROSS-EXAMINATION

10- 1 BY MR. CHIER:

2 Q AS OFFICE MANAGER -- IS IT MS. OR MRS. HALL?

3 A MS.

4 Q MS. HALL, YOU ARE THE PERSON WHO INTERFACED BETWEEN  
5 MANAGEMENT AND THE SECRETARIAL STAFF, CORRECT?

6 A YES.

7 Q AND YOU WERE THE PERSON TO WHOM MANAGEMENT  
8 COMPLAINED ABOUT THE SECRETARIES?

9 A RIGHT.

10 Q AND THE PERSON TO WHOM SECRETARIES COMPLAINED  
11 ABOUT MANAGEMENT, CORRECT?

12 A RIGHT.

13 Q NOW, DURING THE PERIOD THAT MS. WALLER WORKED  
14 THERE, SHE COMPLAINED TO YOU A NUMBER OF TIMES ABOUT A  
15 SITUATION ONGOING IN THE OFFICE, DID YOU NOT?

16 A NO.

17 Q HAS SHE NOT --

18 THE COURT: HAVE YOU GOT ANY BASIS FOR THAT?

19 MR. CHIER: YES, YOUR HONOR.

20 THE COURT: ALL RIGHT. YOU CALL A WITNESS TO THAT EFFECT.

21 MR. CHIER: PARDON ME?

22 THE COURT: GO AHEAD.

23 Q BY MR. CHIER: AS A MATTER OF FACT, MS. HALL,  
24 THERE IS LITIGATION PENDING BETWEEN YOUR FIRM AND MS. WALLER,  
25 ISN'T THAT CORRECT?

26 A RIGHT.

27 Q THERE IS A WORKMENS COMPENSATION CLAIM PENDING?  
28

10-  
1 A YES.

2 Q AND THE BASIS OF THE CLAIM IS SEXUAL HARASSMENT,  
3 CORRECT?

4 A I --

5 THE COURT: YOU DON'T HAVE TO ANSWER THAT.

6 MR. CHIER: WHY NOT?

7 THE COURT: GO AHEAD. WHAT IS YOUR NEXT QUESTION.

8 Q BY MR. CHIER: ISN'T IT A FACT THAT MS. WALLER  
9 COMPLAINED TO YOU ON A NUMBER OF OCCASIONS ABOUT THE CONDUCT  
10 OF MR. BROWN?

11 MR. WAPNER: OBJECTION, RELEVANCE.

12 THE COURT: SUSTAINED.

13 MR. CHIER: COULD WE APPROACH?

14 THE COURT: WHAT DO YOU WANT TO DO, SHOW PREJUDICE?

15 MR. CHIER: GOES TO THE ISSUE OF BIAS.

16 THE COURT: ARE YOU PREJUDICED OR BIASED AGAINST  
17 MS. WALLER FOR ANY REASON?

18 THE WITNESS: NOT AT ALL.

19 THE COURT: GO AHEAD.

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1 Q BY MR. CHIER: THE FACT THAT SHE HAS THIS  
2 WORKMEN'S COMPENSATION CLAIM AGAINST YOUR FIRM IS NOT THE  
3 SUBJECT OF EITHER DISLIKE OR DISTASTE IN YOUR OFFICE?

4 A ABSOLUTELY NOT.

5 Q NOW, HOW MUCH WAS MRS. WALLER EARNING AT THE  
6 TIME THAT SHE LEFT THERE?

7 A \$2600 A MONTH.

8 Q AND SHE LEFT AND ADVISED YOU THAT SHE WAS LEAVING  
9 FOR REASONS ASCRIBABLE WHICH ARE BASED UPON THE LAWSUIT,  
10 RIGHT?

11 A NO.

12 Q SHE DIDN'T MENTION THAT?

13 A NO.

14 Q IS IT CORRECT THAT IMMEDIATELY PRIOR TO MRS.  
15 WALLER'S DEPARTURE FROM THE OFFICE, THAT YOU AND SHE DID  
16 NOT GET ALONG?

17 A WE DIDN'T HAVE ANYTHING TO SAY TO ONE ANOTHER  
18 OTHER THAN OFFICE RELATED MATTERS.

19 Q WELL, ISN'T IT CORRECT THAT YOU DIDN'T LIKE  
20 HER ESPECIALLY AND SHE DIDN'T LIKE YOU ESPECIALLY?

21 A MY JOB WAS TO GET THE WORK DONE AT THE OFFICE  
22 AND I WOULD GO TO HER ASKING FOR HELP WITH PROJECTS IN THE  
23 OFFICE WHEN OTHER SECRETARIES NEEDED HELP OR OTHER ATTORNEYS  
24 NEEDED HELP.

25 Q ISN'T IT CORRECT, MS. HALL, THAT YOU DIDN'T  
26 LIKE HER ESPECIALLY AND SHE DIDN'T LIKE YOU?

27 A NO.

28 Q THAT IS NOT CORRECT?

1 A NOT TO MY KNOWLEDGE.

2 Q WELL, WOULD YOU SAY THAT SHE LIKED YOU?

3 A WE DIDN'T TALK THAT MUCH. I DON'T KNOW IF  
4 SHE DID OR NOT.

5 Q WOULD YOU SAY THAT YOU LIKED HER?

6 A SHE WAS AN EMPLOYEE AND I DIDN'T MIND HAVING  
7 HER THERE.

8 Q DID YOU, IN YOUR OPINION, HAVE PROBLEMS WITH  
9 HER?

10 A THERE WERE A COUPLE OF PROBLEMS, YES.

11 Q DID YOU FIND HER TO BE A PRIMA DONNA, IN YOUR  
12 WORDS?

13 A YES.

14 Q AND DO YOU LIKE PRIMA DONNAS AS AN OFFICE MANAGER  
15 IN A LAW FIRM?

16 A YOU LEARN TO GET ALONG WITH THEM.

17 MR. CHIER: I HAVE NO FURTHER QUESTIONS.

18

19 REDIRECT EXAMINATION

20 BY MR. WAPNER:

21 Q WHAT WAS IT ABOUT HER THAT YOU THOUGHT MADE  
22 HER A PRIMA DONNA?

23 A AT TIMES WHEN WE WOULD ASK HER FOR HELP, SHE  
24 WOULD REFUSE TO HELP OUT EVEN THOUGH SHE DIDN'T HAVE ANYTHING  
25 ELSE TO DO.

26 MR. WAPNER: THANK YOU. I HAVE NOTHING FURTHER.

27

28

## 1 RECROSS-EXAMINATION

2 BY MR. CHIER:

3 Q WOULD SHE REFUSE TO HELP OUT OR TELL YOU SHE  
4 HAD ANOTHER PROJECT SHE WAS WORKING ON?5 A ON OCCASION, SHE WOULD FLAT TELL ME SHE  
6 WOULDN'T DO IT, EVEN THOUGH SHE DIDN'T HAVE ANYTHING ELSE  
7 TO DO.

8 Q AND HOW DID YOU KNOW THAT?

9 A SHE WOULD BE AWAY FROM HER DESK VISITING OTHER  
10 PEOPLE IN THE OFFICE.11 Q ARE YOU ALLOWED TO HAVE BREAKS IN THAT OFFICE,  
12 WHERE YOU MANAGE IT, IF SOMEBODY WANTS TO GET UP AND GET  
13 A CUP OF COFFEE?

14 A SURE.

15 MR. CHIER: I HAVEN'T ANYTHING FURTHER.

16 THE COURT: ANYTHING FURTHER?

17 MR. WAPNER: NOTHING.

18 THE COURT: THANK YOU VERY MUCH. YOU WILL BE EXCUSED.

19 MR. WAPNER: THE PEOPLE REST.

20 MR. CHIER: EXCUSE ME.

21 Q IS MR. BROWN A SENIOR PARTNER THERE, MS. HALL?

22 A CAN I --

23 THE COURT: YOU CAN ANSWER.

24 THE WITNESS: YES.

25 MR. CHIER: THANK YOU.

26 MR. WAPNER: PEOPLE REST.

27 THE COURT: ANY OTHER WITNESSES?

28 MR. WAPNER: NO, I HAVE NO OTHER WITNESSES.



1 THE COURT: LADIES AND GENTLEMEN OF THE JURY, BOTH  
2 SIDES HAVE RESTED. THAT MEANS TESTIMONY IN THIS CASE HAS  
3 BEEN CONCLUDED.

4 WE ARE IN THE PROCESS OF GOING OVER THE JURY  
5 INSTRUCTIONS AND I THINK IT WILL TAKE PROBABLY THE REST  
6 OF THE DAY SO WHAT I WILL ASK YOU TO DO IS TO COME BACK  
7 TOMORROW MORNING AND WE WILL BE READY FOR ARGUMENT AND  
8 INSTRUCTIONS ON THE LAW AS SOON AS ARGUMENT HAS BEEN  
9 COMPLETED. SEE YOU TOMORROW MORNING AT 10:00 O'CLOCK.  
10 THAT IS 10:00 O'CLOCK.

11 SORRY THAT WE CAN'T FILL IN THE TIME FOR YOU  
12 BUT THIS IS THE WAY IT GOES. THANK YOU VERY MUCH.

13 THE SAME ADMONITION I GAVE YOU WOULD STILL  
14 APPLY.

15 ALL RIGHT, COME INTO CHAMBERS, PLEASE, COUNSEL.

16 (RECESS.)  
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1 (THE FOLLOWING PROCEEDINGS WERE HELD  
2 IN CHAMBERS WITH THE DEFENDANT AND ALL  
3 COUNSEL PRESENT:)

4 THE COURT: ALL RIGHT. I TALKED TO ABOUT THREE JUDGES  
5 WHO ARE KNOWLEDGEABLE IN THIS PARTICULAR AREA AND I GET  
6 DIFFERENT SUGGESTIONS.

7 BUT THE CONSENSUS SEEMS TO BE THAT IT MIGHT BE  
8 DESIRABLE TO REFRESH THE RECOLLECTION OF THE JURORS WITH  
9 RESPECT TO SOME OF THE STANDARD INSTRUCTIONS. SO WHAT I WILL  
10 DO IS, GO OVER THE INSTRUCTIONS WITH YOU AGAIN.

11 FOR EXAMPLE, 100, PROSPECTIVE DUTIES OF JUDGE  
12 AND JURY:

13 "NOW LADIES AND GENTLEMEN, YOU HAVE  
14 HEARD THE EVIDENCE ON THE PENALTY PHASE OF THIS  
15 TRIAL AND WE COME TO THAT PART OF THE TRIAL WHERE  
16 YOU ARE INSTRUCTED ON THE APPLICABLE LAW ..."

17 MR. WAPNER: YOUR HONOR, EXCUSE ME FOR INTERRUPTING.  
18 BUT THERE IS A PENALTY PHASE INTRODUCTORY INSTRUCTION THAT  
19 YOU MIGHT WANT TO JUST USE.

20 THE COURT: INSTEAD?

21 MR. WAPNER: INSTEAD. I WOULD JUST ASK YOU TO TAKE  
22 A LOOK AT IT AND SEE. THEN YOU CAN DECIDE WHETHER YOU WANT  
23 TO GIVE BOTH OR --

24 THE COURT: IT SAYS:

25 "MERELY BECAUSE THE DEFENDANT IN THIS  
26 CASE HAS BEEN FOUND GUILTY OF MURDER IN THE FIRST  
27 DEGREE ..."

28 IS THAT THE ONE YOU MEAN?

1 MR. WAPNER: RIGHT.

2 THE COURT: BUT THE INTRODUCTORY PART OF THE GENERAL  
3 INSTRUCTION 100, DOESN'T CONTAIN THE SAME LANGUAGE.

4 MR. WAPNER: OKAY. THAT IS FINE.

5 THE COURT: NOW, HERE IS THE WAY I INTEND TO MODIFY  
6 IT.

7 "NOW THAT YOU HAVE HEARD THE EVIDENCE,  
8 WE COME TO THAT PART OF THE -- NOW THAT YOU HAVE  
9 HEARD THE EVIDENCE ON THE PENALTY PHASE OF THE  
10 TRIAL, YOU ARE NOW TO BE INSTRUCTED ON THE  
11 APPLICABLE LAW -- THE LAW APPLICABLE TO THE  
12 PENALTY PHASE. WHETHER THE DEFENDANT IS TO BE ..."

13 THAT WAS FOR THE GUILTY PHASE. THERE IS NO  
14 GUILTY OR NOT GUILTY. WE CAN'T GIVE THAT.

15 MR. BARENS: IF THEY FIND PROOF BEYOND A REASONABLE  
16 DOUBT OF THE AGGRAVATING CIRCUMSTANCES.

17 THE COURT: NO. I DON'T THINK I WILL GIVE 100 AT ALL  
18 AS A MATTER OF FACT, BECAUSE THEN IT TALKS ABOUT HOW THEY  
19 ARE NOT TO BE INFLUENCED BY PITY OR MERE SENTIMENT.

20 NO, I WON'T GIVE THAT AT ALL. I THINK THAT I  
21 OUGHT TO START OFF AS YOU HAVE INDICATED WITH 101.

22 MR. CHIER: THEY MAY CONSIDER PITY FOR A DEFENDANT.

23 THE COURT: (READING:)

24 "IF ANY RULE, DIRECTION OR IDEA IN  
25 THESE INSTRUCTIONS IS REPEATED OR STATED IN  
26 VARYING WAYS ..."

27 WELL, 101 YOU HAVE SUBMITTED. I WILL GIVE THAT  
28 AFTER 884, PENALTY TRIAL INTRODUCTORY INSTRUCTION.

12- 1 MR. WAPNER: MY FEELING ABOUT THE SEQUENCE OF THE  
2 INSTRUCTIONS WAS THAT WE COULD GIVE THE PENALTY PHASE  
3 INTRODUCTORY INSTRUCTION WHICH IS 884 AND THEN --

4 THE COURT: HAVE YOU GOT THOSE HERE?

5 MR. WAPNER: THEY ARE AT THE VERY BACK.

6 THE COURT: ALL RIGHT. BECAUSE THE WAY THEY ARE --

7 MR. WAPNER: THEY ARE IN NUMERICAL SEQUENCE BUT MOST  
8 OF THE INSTRUCTIONS I THINK ARE GOING TO APPLY TO THE  
9 EVIDENCE OF OTHER CRIMES, ALTHOUGH SOME OF THEM APPLY  
10 GENERALLY.

11 I THINK THAT SOMEHOW, WE HAVE TO FIGURE OUT A  
12 WAY TO DIVIDE UP SO THAT THEY ARE IN SECTIONS SO THEY KNOW  
13 WHICH INSTRUCTIONS TO APPLY TO WHICH PARTS OF THE EVIDENCE  
14 THAT THEY HAVE HEARD.

15 THE COURT: WHY DON'T I GIVE IT IN THE ORDER -- HOW  
16 ABOUT 884 FIRST, PENALTY TRIAL INTRODUCTORY AND THEN 884.1?

17 MR. CHIER: I DON'T --

18 THE COURT: (READING:)

19 "IN DETERMINING WHICH PENALTY IS TO BE  
20 IMPOSED ON THE DEFENDANT, YOU SHALL CONSIDER ALL  
21 OF THE EVIDENCE RECEIVED DURING ANY PART OF THE  
22 TRIAL OF THIS CASE, EXCEPT AS YOU MAY HEREAFTER  
23 BE INSTRUCTED. YOU SHALL CONSIDER AND TAKE INTO  
24 ACCOUNT AND BE GUIDED BY THE FOLLOWING FACTORS,  
25 IF APPLICABLE:"

26 ALL RIGHT. SO I WILL DO 884. THEN I WILL DO  
27 884.1.

28 MR. CHIER: 884.1 SHOULD HAVE SOME PORTIONS DELETED

2-1  
1 FROM IT, YOUR HONOR.

2 THE COURT: WHICH ONES?

3 MR. CHIER: JUST A MOMENT, HERE. I SHOULD HAVE IT.

4 THE COURT: DO YOU MEAN --

5 MR. CHIER: JUST A MOMENT. I HAD IT OUT HERE A MOMENT  
6 AGO.

7 MR. BARENS: COULD WE SEE YOUR COPY OF 884?

8 MR. CHIER: HERE IT IS. HERE IT IS, 884.1. SUB C SHOULD  
9 BE STRICKEN.

10 MR. WAPNER: WAIT A MINUTE. WAIT JUST A SECOND. YOU  
11 DON'T WANT TO HAVE THAT STRICKEN, DO YOU? YOU WANT TO ARGUE  
12 THAT HE DOESN'T HAVE ANY PRIOR FELONY CONVICTIONS.

13 THE COURT: (READING:)

14 "PRESENCE OR ABSENCE OF ANY PRIOR  
15 FELONY CONVICTIONS."

16 YOU WANT TO --

17 MR. CHIER: THE "PRESENCE" PART, YOUR HONOR.

18 THE COURT: ALL RIGHT. I WILL GIVE IT THE WAY IT IS.  
19 ALL RIGHT?

20 MR. CHIER: THERE IS NO FELONY CONVICTION AND --

21 THE COURT: 884.1, I WILL GIVE IT THE WAY IT IS. ALL  
22 RIGHT? YOUR OBJECTION IS OVERRULED.

23  
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13-1

1 MR. CHIER: ALSO, I DON'T THINK THAT HE IS --

2 (UNREPORTED COLLOQUY BETWEEN MR. CHIER  
3 AND THE DEFENDANT.)

4 THE COURT: THE LAW EXPRESSLY SETS FORTH ALL OF THESE  
5 FACTORS WHICH MUST BE TAKEN INTO CONSIDERATION AND THIS  
6 PARTICULAR INSTRUCTION IS DESIGNED FOR THAT PARTICULAR PURPOSE.

7 MR. CHIER: BUT THERE IS NO EVIDENCE, NOBODY IS GOING  
8 TO ARGUE IT.

9 THE COURT: ALL RIGHT.

10 MR. CHIER: NEITHER IS THERE WITH RESPECT TO (D).

11 THE COURT: ALL RIGHT, YOU HAVE YOUR OBJECTION ON THE  
12 RECORD.

13 NOW, THE INSTRUCTIONS, LET'S START WITH 101,  
14 THE EVIDENCE CONSIDERED AS A WHOLE, IS THAT WHAT YOU WOULD  
15 LIKE?

16 MR. WAPNER: YES.

17 THE COURT: ALL RIGHT, I WILL GIVE THAT NEXT. I WILL  
18 GIVE THAT NEXT.

19 HOW ABOUT 102, STATEMENTS OF COUNSEL AND SO  
20 ON AND SO FORTH?

21 MR. BARENS: I BELIEVE DURING THE PENALTY PHASE,  
22 STATEMENTS OF COUNSEL ARE RELEVANT.

23 THE COURT: ALL RIGHT, THEN I WILL GIVE 102.

24 WOULD YOU MAKE A NOTE OF THAT, MR. WAPNER,  
25 TO GIVE 102?

26 MR. WAPNER: YES, YOUR HONOR.

27 MIGHT I HAVE A MOMENT TO GO INTO THE COURTROOM?  
28 THERE IS ONE LIST I LEFT THAT I WANT TO GET. I WANT TO

1 GET MY NOTES.

2 MR. BARENS: I THINK 102 --

3 MR. WAPNER: WOULD YOU WAIT, MR. BARENS?

4 MR. BARENS: I AM SORRY.

5 (MR. WAPNER EXITS CHAMBERS.)

6 (PAUSE IN PROCEEDINGS.)

7 (MR. WAPNER REENTERS CHAMBERS.)

8 MR. CHIER: THIS INSTRUCTION, WE HAVE A SPEAKING  
9 OBJECTION TO.

10 THE COURT: ALL RIGHT, YOU HAVE GOT THAT ONE.

11 ALL RIGHT, THERE IS DIRECT AND CIRCUMSTANTIAL  
12 EVIDENCE.

13 MR. BARENS: YOUR HONOR, EXCUSE ME. BUT ON 1.02, I  
14 THOUGHT THERE WAS CASE LAW THAT SAYS ARGUMENT DURING THE  
15 PENALTY PHASE BY COUNSEL --

16 MR. CHIER: THE GUILT PHASE.

17 MR. BARENS: NO. I MEAN THE PENALTY PHASE.

18 THAT CAN BE CONSIDERED BY THE JURY.

19 MR. WAPNER: WHAT DO YOU MEAN CAN BE CONSIDERED BY  
20 THE JURY? THAT IS WHY WE MAKE ARGUMENT BUT THAT IS NOT  
21 EVIDENCE IN THE CASE.

22 MR. BARENS: NO. I THINK IF I MAY HAVE JUST ONE MINUTE.  
23 I THOUGHT THERE WAS SOME DIFFERENT TREATMENT THERE. THERE  
24 IS A CASE I JUST HAPPENED TO READ LAST NIGHT ABOUT ARGUMENT  
25 DURING A PENALTY PHASE.

26 I WILL DELAY THAT, SIR, SO AS NOT TO TAKE UP  
27 TIME AND RESERVE IT FOR LATER.

28 THE COURT: ALL RIGHT, WE HAVE GOT 102, HAVE WE?

1 MR. BARENS: YES, SIR.

2 THE COURT: THE NEXT ONE IS 200, DIRECT AND CIRCUMSTANTIAL  
3 EVIDENCE, I WILL GIVE THAT.

4 THAT HAS ALSO BEEN REQUESTED BY THE DEFENDANT.  
5 THAT WILL BE GIVEN.

6 THE NEXT IS 201, CIRCUMSTANTIAL EVIDENCE  
7 GENERALLY.

8 MR. CHIER: THAT HAS TO BE MODIFIED, YOUR HONOR.

9 THE COURT: WHERE?

10 MR. WAPNER: WELL, STARTING OUT SAYING "HOWEVER, A  
11 FINDING OF GUILT AS TO ANY PARTICULAR COUNT," WE WOULD CROSS  
12 THAT OUT.

13 MR. CHIER: I AM LOOKING AT 2.01.

14 THE COURT: YOU REQUESTED IT.

15 MR. CHIER: I KNOW, BUT IT HAS TO BE MODIFIED.

16 THE COURT: WHERE IS THE MODIFICATION? YOU HAVEN'T  
17 REQUESTED ANY MODIFICATION.

18 MR. CHIER: I DIDN'T HAVE TIME TO DO THAT. I KEEP  
19 TELLING YOU THAT.

20 THE COURT: HOW DO YOU WANT IT MODIFIED?

21 MR. CHIER: WE HAVE TO MODIFY IT SO AS TO ADOPT IT  
22 TO THE PENALTY PHASE.

23 THE COURT: OF COURSE, "AS TO ANY PARTICULAR COUNT,"  
24 THAT WILL BE ELIMINATED.

25 MR. CHIER: WELL, "A FINDING OF GUILT AS TO ANY CRIME,"  
26 I DON'T THINK IS PRECISELY THE ISSUE IN A PENALTY PHASE.  
27 IN THE BEGINNING THERE IT TALKS ABOUT GUILT AS TO ANY CRIME.

28 THE COURT: WHAT WOULD YOU CALL IT?



1 MR. WAPNER: I AM LOOKING AT IT AND THE WAY I HAVE  
2 IT NOW IS: "HOWEVER, A FINDING OF TRUTH AS TO ANY CRIME  
3 ALLEGED AS AN AGGRAVATING CIRCUMSTANCE."

4 THE COURT: HOWEVER, A FINDING OF WHAT?

5 MR. WAPNER: WHAT I HAVE SO FAR IS: "HOWEVER, A FINDING  
6 OF TRUTH AS TO ANY CRIME ALLEGED AS AN AGGRAVATING CIRCUMSTANCE"  
7 BUT SOMEHOW, THAT DOESN'T SOUND SO GOOD.

8 THE COURT: NO.

9 WELL, THAT IS ALL RIGHT. A FINDING OF --

10 MR. WAPNER: "FINDING THAT THE DEFENDANT COMMITTED  
11 ANY CRIME COMMITTED ALLEGED AS AN AGGRAVATING CIRCUMSTANCE --

12  
13 THE COURT: YES.

14 MR. CHIER: THE DEFENDANT WHAT, FRED?

15 MR. WAPNER: "HOWEVER, A FINDING THAT THE DEFENDANT  
16 COMMITTED ANY CRIME ALLEGED AS AN AGGRAVATING CIRCUMSTANCE  
17 MAY NOT BE BASED ON CIRCUMSTANTIAL EVIDENCE," ET CETERA.

18 THE COURT: YES. AS AN AGGRAVATING CIRCUMSTANCE.

19 MR. WAPNER: CORRECT.

20 MR. CHIER: THEN WHAT DO YOU DO WITH THE DEFENDANT'S  
21 GUILT THERE?

22 THE COURT: CROSS THAT OUT.

23 MR. CHIER: I MEAN IN THE NEXT PARAGRAPH.

24 THE COURT: "HOWEVER, A FINDING THAT THE DEFENDANT  
25 COMMITTED ANY CRIME ALLEGED AS AN AGGRAVATING CIRCUMSTANCE  
26 MAY NOT BE BASED ON CIRCUMSTANTIAL EVIDENCE UNLESS THE PROVED  
27 CIRCUMSTANCES ARE NOT ONLY CONSISTENT WITH THE THEORY THAT  
28 HE COMMITTED SUCH CRIME" -- IS THAT RIGHT?

29 MR. WAPNER: THAT IS FINE.

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1 THE COURT: ALL RIGHT.

2 "FURTHER, EACH FACT WHICH IS ESSENTIAL  
3 TO COMPLETE THE SET OF CIRCUMSTANCES NECESSARY TO  
4 ESTABLISH THE DEFENDANT'S COMMISSION OF ANY SUCH  
5 CRIME, MUST BE PROVED BEYOND A REASONABLE DOUBT.  
6 IN OTHER WORDS, BEFORE AN INFERENCE ESSENTIAL TO  
7 ESTABLISH ..."

8 WE CAN JUST USE THE WORD -- KEEP THE "GUILT" IN  
9 THERE. THAT IS, GUILTY OF THE CRIME --

10 MR. CHIER: I DON'T THINK THE ISSUE IS GUILT, YOUR HONOR.

11 THE COURT: (READING:)

12 "BEFORE AN INFERENCE NECESSARY TO  
13 ESTABLISH SUCH GUILT MAY BE FOUND TO HAVE BEEN  
14 PROVED BEYOND A REASONABLE DOUBT, EACH FACT OR  
15 CIRCUMSTANCE ... POINTING TO THE DEFENDANT'S  
16 COMMISSION OF SUCH CRIME ..."

17 MR. WAPNER: WHY DON'T WE JUST SUBSTITUTE THE "COMMISSION  
18 OF SUCH CRIME" FOR EACH TIME WHERE IT SAYS "GUILT"?

19 THE COURT: THAT'S RIGHT.

20 "THAT WHICH POINTS TO THE -- TO HIS  
21 COMMISSION OF SUCH CRIME."

22 MR. CHIER: WHAT?

23 THE COURT: ALL RIGHT. THAT ABOUT COVERS THAT. THAT  
24 COVERS 201, DOESN'T IT?

25 202, SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE --

26 MR. WAPNER: SAME PROBLEM WITH THIS.

27 THE COURT: YES.

28 MR. WAPNER: WE CAN JUST WHERE IT SAYS --

1 THE COURT: YES.

2 "FIND THE DEFENDANT COMMITTED ANY OF  
3 SUCH AGGRAVATING CIRCUMSTANCES UNLESS THE PROVED  
4 CIRCUMSTANCES ARE NOT ONLY CONSISTENT WITH THE THEORY  
5 THAT HE HAD THE REQUIRED SPECIFIC INTENT ..."

6 AND ALSO:

7 "IF THE EVIDENCE OF ANY SUCH SPECIFIC  
8 INTENT IS SUSCEPTIBLE OF TWO REASONABLE INTERPRETATIONS,  
9 ONE OF WHICH POINTS TO THE ... IT IS YOUR DUTY TO  
10 ADOPT THE --"

11 ALL RIGHT. THAT ABOUT COVERS 202. THERE ISN'T  
12 ANYTHING FURTHER TO BE INSERTED. THAT IS 202.

13 AND THE NEXT ONE IS 211. THAT WOULD BE GENERALLY  
14 APPLICABLE, WOULDN'T IT?

15 MR. WAPNER: I THINK SO.

16 THE COURT: ALL RIGHT. THAT IS 211. WHAT IS YOUR  
17 NEXT ONE?

18 MR. WAPNER: I DON'T THINK WE NEED 213, PRIOR CONSISTENT  
19 OR INCONSISTENT STATEMENTS.

20 THE COURT: "EVIDENCE OF SOME ..."

21 AND IT GOES ON, SO ON AND SO FORTH --

22 MR. WAPNER: I DON'T THINK THAT ANY OF THE TESTIMONY  
23 IN THE PENALTY PHASE -- I CAN'T THINK WHERE SOMEBODY WAS  
24 IMPEACHED BY A PRIOR INCONSISTENT --

25 THE COURT: THE NEXT ONE IS CREDIBILITY OF WITNESS,  
26 220. ALL RIGHT?

27 MR. CHIER: IS THAT GIVEN?

28 THE COURT: YES. LET ME SEE. WE ARE GOING TO KEEP

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1 IN THE CHARACTER OF THE WITNESS FOR HONESTY AND TRUTHFULNESS.  
2 WE DON'T HAVE ANY OF THAT? DO WE? PAGE 2 OF 220?

3 MR. WAPNER: NO. I DON'T THINK WE HAVE ANY CHARACTER  
4 WITNESS OR HONESTY OR TRUTHFULNESS --

5 THE COURT: AN ADMISSION BY THE WITNESS OF UNTRUTHFULNESS --  
6 PRIOR COMMISSION OF A FELONY -- NONE OF THAT IS IN. THAT  
7 IS OUT, TOO.

8 ALL RIGHT. THAT TAKES CARE OF 220.

9 MR. BARENS: JUST ONE MOMENT, YOUR HONOR.

10 MR. CHIER: THE FIRST PAGE OF 220, ARE YOU LEAVING IT  
11 ALL IN?

12 MR. BARENS: THAT IS WHAT I AM NOT CLEAR ON, JUDGE.  
13 DID YOU TAKE SOMETHING OUT OF THE FIRST PAGE?

14 THE COURT: NO.

15 MR. WAPNER: NO, ON THE SECOND PAGE.  
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1 THE COURT: ON THE SECOND PAGE, I TOOK OUT THE  
2 "CHARACTER OF THE WITNESS FOR HONESTY, AN ADMISSION BY THE  
3 WITNESS OF UNTRUTHFULNESS, WITNESS'S PRIOR CONVICTION OF  
4 FELONY."

5 MR. BARENS: I AM CORRECTED. THANK YOU, SIR.

6 THE COURT: ALL RIGHT. NOW, 221, WITNESS WILLFULLY  
7 FALSE. ALL RIGHT?

8 MR. CHIER: YOU ARE GIVING THAT? THERE IS NO BASIS  
9 FOR THAT.

10 THE COURT: FOR WHAT?

11 MR. CHIER: FOR THIS INSTRUCTION.

12 THE COURT: YOU MEAN THERE WERE NO WITNESSES THAT  
13 TESTIFIED HERE --

14 MR. CHIER: MAY I HAVE A MOMENT?

15 (PAUSE.)

16 MR. BARENS: WE WILL LEAVE THAT IN, YOUR HONOR.

17 MR. CHIER: WAIT A MINUTE.

18 MR. BARENS: WE WILL LEAVE THAT IN, SIR.

19 THE COURT: THEN WE GO TO WEIGHING CONFLICTING TESTIMONY.  
20 THAT WILL STAY.

21 CONFESSION AND ADMISSION, THAT WON'T BE  
22 APPLICABLE HERE, WILL IT?

23 MR. WAPNER: THIS APPLIES -- NOW, MAYBE WE SHOULD SET  
24 THIS ASIDE, BEGIN TO SET THESE APART. IT APPLIES TO STATEMENTS  
25 ATTRIBUTED TO MR. HUNT BY MR. KARNY AND ALSO MR. TAGLIANETTI  
26 REGARDING THE SWARTOUT AND COKER INCIDENTS.

27 MR. BARENS: I DON'T BELIEVE THE TESTIMONY WAS THAT  
28 THE DEFENDANT TALKED TO TAGLIANETTI ABOUT THOSE INCIDENTS,

1 MR. WAPNER.

2 MR. WAPNER: WELL, MY RECOLLECTION IS THAT  
3 MR. TAGLIANETTI HAD A CONVERSATION ABOUT A CONVERSATION WITH  
4 MR. HUNT, WHERE MR. HUNT HAD A HIT LIST OR A LIST THAT HE  
5 DESCRIBED AS PEOPLE THAT HE THOUGHT HE WOULD BE BETTER OFF  
6 WITHOUT AND THAT MR. SWARTOUT'S NAME WAS ON THE LIST. AND  
7 I INCLUDED THIS INSTRUCTION BECAUSE --

8 THE COURT: WAS THERE A CONFESSION? IS IT A CONFESSION  
9 AS SUCH OR WAS IT AN ADMISSION?

10 MR. WAPNER: IN MY VIEW, THE JURY COULD CONSIDER IT  
11 AS AN ADMISSION.

12 THE COURT: BUT NOT A CONFESSION?

13 MR. WAPNER: RIGHT. THE STATEMENT HOWEVER BY MR. HUNT  
14 TO MR. KARNY THAT HE WAS INVOLVED IN BOTH OF THESE INSTANCES,  
15 IN MY VIEW, CONSTITUTES A CONFESSION.

16 THAT IS WHY I CHOSE THIS INSTRUCTION, AS OPPOSED  
17 TO THE ONE THAT JUST TALKS ABOUT ADMISSIONS BECAUSE 2.70 DEALS  
18 WITH CONFESSIONS AND ADMISSIONS.

19 BUT, MAYBE WE CAN SET THIS ASIDE BECAUSE I THINK  
20 THAT THIS INSTRUCTION SHOULD GO IN A GROUP OF INSTRUCTIONS  
21 THAT ONLY APPLY TO THOSE CRIMES THAT I GUESS -- THAT WOULD  
22 ALSO GO FOR THE CIRCUMSTANTIAL EVIDENCE -- IT WOULD APPLY  
23 TO THOSE CRIMES THAT ALLEGE AGGRAVATING CIRCUMSTANCES.

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1 THE COURT: THIS GENERAL LANGUAGE IS APPLICABLE. THERE  
2 WAS ACTUALLY A CONFESSION.

3 MR. CHIER: THERE IS NO CONFESSION IN THIS CASE, YOUR  
4 HONOR.

5 THE COURT: DIDN'T YOU HEAR WHAT HE SAID?

6 MR. CHIER: I HEARD WHAT HE SAID BUT THERE IS NO  
7 CONFESSION.

8 THE COURT: ISN'T THAT WHAT YOU SAID, THERE WAS A  
9 CONFESSION?

10 MR. WAPNER: IN MY VIEW, THE STATEMENT BY MR. HUNT,  
11 TESTIFIED TO BY MR. KARNY, COULD BE CONSTRUED AS A CONFESSION,  
12 "I SHOT UP THE PLACE IN ORANGE COUNTY."

13 THE COURT: ALL RIGHT, I WILL GIVE IT.

14 MR. CHIER: THIS IS OVER THE OBJECTION OF THE DEFENDANT.

15 THE COURT: OF COURSE.

16 BE SURE YOU HAVE GOT THAT DOWN THERE, WILL  
17 YOU?

18 ALL RIGHT, WHAT IS THIS 271.7?

19 MR. WAPNER: THAT HAS TO DO SPECIFICALLY WITH THE  
20 STATEMENT THAT WAS MADE TO MR. TAGLIANETTI AND THE LIST  
21 HE WAS SHOWN, TO WIT, "I WOULD BE BETTER OFF WITHOUT THESE  
22 PEOPLE IF THEY WEREN'T AROUND," THE SO-CALLED, "HIT LIST,"  
23 QUOTE, UNQUOTE.

24 MR. BARENS: WELL, YOUR HONOR, I ALWAYS HAD A PROBLEM  
25 WITH THAT. THE WITNESS NEVER SAID THAT THE DEFENDANT CALLED  
26 IT A HIT LIST BUT, RATHER -- AND THE WITNESS NEVER SAID  
27 THAT THE DEFENDANT SAID HE WAS GOING TO KILL THE PEOPLE  
28 ON THAT LIST.

1 HE SIMPLY SAID THOSE WERE PEOPLE THAT HE WOULD  
2 BE BETTER OFF WITH IF HE DIDN'T HAVE BUSINESS COMPETITION  
3 WITH AND THAT IS WHAT THE TESTIMONY WAS.

4 MR. CHIER: THIS TYPE OF EVIDENCE IS INADMISSIBLE UNDER  
5 BOYD & LUCKY.

6 THE COURT: "EVIDENCE HAS BEEN RECEIVED FROM  
7 WHICH YOU MAY FIND THAT AN ORAL STATEMENT WAS MADE BY THE  
8 DEFENDANT," WHICH OFFENSE WOULD THAT BE?

9 MR. BARENS: HE IS TALKING ABOUT THE SWARTOUT MATTER,  
10 YOUR HONOR.

11 BUT WHAT I AM SAYING IS THE DEFENDANT NEVER  
12 MADE A STATEMENT THAT HE WAS GOING TO KILL SOMEBODY OR THAT  
13 HE HAD A PLAN OR DESIGN TO KILL MR. SWARTOUT.

14 THE SOLE TESTIMONY ELICITED WAS THAT HE SAID  
15 THESE WERE PEOPLE THAT HE WOULD BE BETTER OFF IF HE DIDN'T  
16 HAVE BUSINESS COMPETITION SETTINGS WITH.

17 MR. WAPNER: ALSO, I WAS THINKING ABOUT THE SWARTOUT  
18 THING. IT WOULD ALSO GO, OBVIOUSLY, TO THE PLANNING IN  
19 THE ESLAMINIA MATTER.

20 THE COURT: WHICH OF THESE: PLAN, MOTIVE, DESIGN, OR INTENT,  
21 WHICH OF THEM? THE PLAN?

22 MR. CHIER: YOU ARE SPEAKING TO MR. WAPNER NOW?

23 MR. WAPNER: YES. I AM THINKING.

24 I THINK "INTENT AND PLAN".

25 THE COURT: NO. MOTIVE AND DESIGN, THAT GOES OUT?

26 MR. WAPNER: YES.

27 MR. BARENS: AGAIN, WE WOULD RESPECTFULLY OBJECT TO  
28 THAT, YOUR HONOR.



1 THE COURT: ALL RIGHT. LET ME SEE, THAT IS ON BOTH  
2 OFFENSES, IS THAT IT?

3 MR. WAPNER: "BEFORE THE OFFENSES WITH WHICH HE IS CHARGED  
4 AS AGGRAVATING CIRCUMSTANCES," IT WOULD BE BEFORE.

5 THE COURT: THERE ARE ONLY TWO OF THEM.

6 YOU MEAN ALL THREE?

7 MR. WAPNER: NO. IT WOULD BE AS TO TWO OF THEM.

8 MR. CHIER: WOULD THE COURT BE GOOD ENOUGH TO SHARE  
9 ITS CHANGES WITH COUNSEL?

10 THE COURT: SWARTOUT AND WHO ELSE?

11 MR. WAPNER: ESLAMINIA.

12 MR. BARENS: HE IS NOT TALKING ABOUT COKER IN THIS  
13 INSTANCE. HE IS SAYING SWARTOUT AND ESLAMINIA.

14 MR. WAPNER: SWARTOUT AND ESLAMINIA. I THINK IT WOULD  
15 BE SUFFICIENT TO SAY IT WAS MADE BY THE DEFENDANT BEFORE  
16 TWO OF THE OFFENSES WITH WHICH HE IS CHARGED AS AGGRAVATING  
17 CIRCUMSTANCES.

18 THE COURT: WELL, BEFORE THE OFFENSES INVOLVING SWARTOUT  
19 AND ESLAMINIA WITH WHICH HE IS CHARGED WITH AGGRAVATING  
20 CIRCUMSTANCES, THE PLURAL, AND THEY MUST DECIDE WHETHER  
21 SUCH STATEMENTS WERE MADE, IS THAT IT?

22 MR. WAPNER: YES.

23 THE COURT: ALL RIGHT, THE RECORD WILL SHOW THAT THE  
24 DEFENDANT HAS OBJECTED TO THAT INSTRUCTION.

25 MR. CHIER: I DON'T KNOW WHAT THE CHANGES ARE YOU HAVE  
26 MADE.

27 THE COURT: "EVIDENCE HAS BEEN RECEIVED FROM WHICH  
28 YOU MAY FIND THAT AN ORAL STATEMENT OF INTENT OR PLAN WAS

1 MADE BY THE DEFENDANT BEFORE THE TWO OFFENSES INVOLVING SWARTOUT  
2 AND ESLAMINIA WITH WHICH HE IS CHARGED AS AGGRAVATING  
3 CIRCUMSTANCES. IT IS YOUR DUTY TO DECIDE WHETHER SUCH  
4 STATEMENTS WERE MADE BY THE DEFENDANT. EVIDENCE OF AN ORAL  
5 STATEMENT OUGHT TO BE VIEWED WITH CAUTION."

6 MR. CHIER: HOW ABOUT EVIDENCE OF ORAL STATEMENTS,  
7 SINCE WE ARE DEALING WITH THE PLURAL HERE?

8 I AM NOT WAIVING MY OBJECTION.

9 BUT I AM MAKING THE MOST OUT OF A BAD SITUATION.

10 THE COURT: I DON'T THINK IT MATTERS BUT I WILL PUT  
11 IT IN.

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1 MR. CHIER: WE HAD REQUESTED 2.71, YOUR HONOR, WHICH  
2 WOULD PRECEDE THIS NUMERICALLY. 2.72, I GUESS, WHICH FOLLOWS.

3 THE COURT: I THINK ADMISSION OUGHT TO BE GIVEN ALSO.  
4 WE GAVE IT IN THE OTHER, ON THE GUILT PHASE, DIDN'T WE?

5 MR. WAPNER: YES, I THINK -- I HAVEN'T CHECKED IT EXACTLY  
6 BUT I THINK THAT 270 INCLUDES 271.

7 THE COURT: NO, NO. THEY ARE TWO SEPARATE INSTRUCTIONS.  
8 CONFESSION AND ADMISSION, THEY ARE TWO SEPARATE INSTRUCTIONS.

9 PUT IT DOWN, WILL YOU, PLEASE? 271 ON ADMISSION.  
10 WELL, HOW ABOUT 240, EVIDENCE HAS BEEN RECEIVED  
11 WHICH MAY TEND TO SHOW THE GOOD CHARACTER OF THE DEFENDANT.

12 MR. CHIER: THAT IS NOT APPLICABLE, YOUR HONOR.

13 THE COURT: HASN'T THERE BEEN CHARACTER EVIDENCE HERE?

14 MR. CHIER: MITIGATION EVIDENCE IS NOT CHARACTER  
15 EVIDENCE. IT IS NOT DEALT WITH THE SAME AS CHARACTER  
16 EVIDENCE. IT IS NOT DEALT WITH THE SAME INSTRUCTION AS  
17 TO CHARACTER EVIDENCE.

18 WE HAVE FILED A WRITTEN OBJECTION TO THIS  
19 INSTRUCTION.

20 THE COURT: I HAVEN'T SEEN IT. WHERE IS THAT?

21 MR. BARENS: HIS HONOR DOES NOT SEE THE OBJECTION.

22 MR. CHIER: WELL, IF YOU WILL LOOK WHERE IT SAYS 2.42,  
23 REQUEST NUMBER 4, CROSS-EXAMINATION OF CHARACTER WITNESS  
24 ONLY, IF THE COURT GIVES 240, WHICH THE DEFENDANT OBJECTS  
25 TO --

26 THE COURT: MAYBE I HAVEN'T ATTENDED THE SAME TRIAL.  
27 DIDN'T YOU GIVE CHARACTER EVIDENCE HERE?

28 MR. BARENS: YES, YOUR HONOR, I THINK WHERE WE MIGHT

1 BE GETTING A FEEL FROM ONE ANOTHER, MY SENSE IS THAT ACTS  
2 IN MITIGATION, PER SE, ARE ACTS IN AND OF THEMSELVES NOT  
3 NECESARILY TREATED AS CHARACTER ACTS ARE DURING THE GUILT  
4 PHASE OF A TRIAL.

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1 THE COURT: MITIGATING CIRCUMSTANCES CONSIST OF A NUMBER  
2 OF THINGS, THE AGE OF THE DEFENDANT, HIS CHARACTER, HIS PRIOR  
3 HISTORY AND EVERYTHING IS TAKEN INTO CONSIDERATION, DESIGNATED  
4 GENERALLY AS MITIGATING CIRCUMSTANCES.

5 ONE OF THE THINGS IS HIS CHARACTER. DON'T YOU  
6 REMEMBER? YOU SAID ANY NUMBER OF TIMES THAT --

7 MR. BARENS: THERE IS NO QUESTION THAT I MADE THAT  
8 REPRESENTATION TO THE COURT THAT IT WAS GOOD CHARACTER --

9 THE COURT: ALL RIGHT. SO I AM GIVING AN INSTRUCTION  
10 ON TRAITS OF CHARACTER OF THE DEFENDANT.

11 MR. CHIER: IT IS CORRECT.

12 MR. WAPNER: FIRST OF ALL, I DON'T THINK THAT THIS  
13 INSTRUCTION SHOULD BE GIVEN.

14 SECOND OF ALL, IF YOU LOOK AT THE SECOND PARAGRAPH  
15 WHERE IT TALKS ABOUT GOOD CHARACTER FOR TRAITS INVOLVED IN  
16 THE COMMISSION OF THE CRIMES CHARGED, MAY BE SUFFICIENT BY  
17 ITSELF TO RAISE A REASONABLE DOUBT AS TO THE GUILT OF THE  
18 DEFENDANT -- I DON'T THINK THAT THAT IS THE ISSUE IN THIS  
19 PHASE OF THE TRIAL.

20 AND TO START MONKEYING AROUND WITH THIS  
21 INSTRUCTION OR TO --

22 THE COURT: IF YOU DON'T WANT IT, FORGET ABOUT IT.  
23 ALL RIGHT?

24 YOU DON'T WANT 2.40. IS THAT THE IDEA?

25 MR. WAPNER: CORRECT.

26 THE COURT: BUT YOU CROSS-EXAMINED THESE CHARACTER  
27 WITNESSES, HAVE YOU NOT?

28 MR. WAPNER: YES. I HAD.

1 THE COURT: WELL, DON'T YOU WANT AN INSTRUCTION ON THAT,  
2 WHERE ON THE CROSS-EXAMINATION OF WITNESSES THEY WERE ASKED  
3 IF THEY HEARD OF REPORTS OF THINGS INCONSISTENT WITH THE GOOD  
4 CHARACTER -- AND IT MAY BE CONSIDERED ONLY FOR PURPOSE OF  
5 THE WEIGHT TO BE GIVEN TO THE OPINION OF THE WITNESS.

6 YOU DON'T MEAN THAT THEY SHOULDN'T GIVE -- WELL,  
7 IF YOU DON'T WANT IT, I WON'T GIVE IT.

8 MR. WAPNER: THANK YOU.

9 THE COURT: YOU DON'T WANT IT EITHER?

10 MR. BARENS: NO, SIR, WE DO NOT.

11 THE COURT: ALL RIGHT. FINE. 2.42 WILL NOT BE GIVEN.  
12 AND BOTH SIDES AGREE THAT IT WON'T BE GIVEN.

13 MR. WAPNER: THAT'S CORRECT.

14 THE COURT: ALL RIGHT. 2.40 WON'T BE GIVEN EITHER,  
15 IS THAT CORRECT?

16 MR. WAPNER: CORRECT.

17 THE COURT: OKAY.

18 MR. CHIER: HOW ABOUT 260?

19 THE COURT: WE HAVE NOT COME TO THAT YET.

20 MR. WAPNER: I DIDN'T INCLUDE EITHER ONE OF THOSE BECAUSE  
21 I DIDN'T KNOW WHEN WE PREPARED THIS LIST, WHETHER HE WAS GOING  
22 TO TESTIFY OR NOT.

23 THE COURT: WELL, IT IS NOT AN INFERENCE OF GUILT.

24 MR. BARENS: NO. NO INFERENCE THAT HE HAS COMMITTED  
25 THE OFFENSES --

26 THE COURT: HOW ABOUT 260, CONSTITUTIONAL RIGHT OF --  
27 I HAVE ALREADY INSTRUCTED THEM ON THAT, DIDN'T I?

28 MR. WAPNER: ALL RIGHT.

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1 MR. BARENS: WE WOULD MOST VIGOROUSLY REQUEST THIS ONE,  
2 YOUR HONOR.

3 THE COURT: ALL RIGHT. YOU MAKE A NOTE TO GET 260,  
4 PLEASE.

5 MR. WAPNER: YES. WHAT IS THE COURT SAYING ABOUT 261?

6 THE COURT: I HAVE NOT GOTTEN THROUGH WITH 260, YET.  
7 I AM COMING TO THAT.

8 261, ELEMENTS OF AGGRAVATING CIRCUMSTANCES CHARGED  
9 AGAINST HIM. ALL RIGHT. THAT IS 261. WHY DON'T YOU HAVE  
10 270? I THINK THAT YOU HAD STATEMENTS BY THE DEFENDANT AT  
11 HIS TRIAL THAT MAY BE AN ADMISSION OR A CONFESSION.

12 THEN, THEY DEFINE WHAT AN ADMISSION IS AND THEN  
13 THEY DEFINE WHAT A CONFESSION IS.

14 MR. CHIER: YOU ARE READING 271?

15 THE COURT: 270. AND THEN WE COME TO 271. WHY DON'T  
16 YOU GIVE THE CALJIC -- DIDN'T YOU HAVE 270 HERE? WE HAVE  
17 270. WILL YOU GET 271, PLEASE.

18 MR. WAPNER: YES.

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161 1 THE COURT: ALL RIGHT.

2 MR. CHIER: HOW ABOUT 272, WHICH WE HAVE REQUESTED?

3 THE COURT: HOW ABOUT THAT?

4 MR. WAPNER: I HAVE NO OBJECTION.

5 THE COURT: ALL RIGHT. I WILL GIVE IT. FURNISH ME  
6 WITH THAT, TOO. THAT IS 272.

7 WE HAD EXPERT TESTIMONY. I WILL GIVE 280.

8 NOW, HOW ARE WE GOING TO TREAT 290 -- THAT WOULD  
9 BE APPLICABLE TO THE PENALTY PHASE TOO, WOULDN'T IT?

10 MR. WAPNER: WELL, YOU HAVE TO BE -- IT IS APPLICABLE  
11 TO THE PROOF OF THE AGGRAVATING CIRCUMSTANCES. BUT I THINK  
12 ONCE WE ARE DONE WITH ALL THESE INSTRUCTIONS, WE HAVE TO  
13 SEPARATE OUT THE ONES THAT ONLY GO TO THE AGGRAVATING  
14 CIRCUMSTANCES SO THE JURY DOESN'T GET CONFUSED AND THINK THAT  
15 THEY HAVE --

16 THE COURT: WELL, THE JURY KNOWS ALL OF THESE ARE  
17 AGGRAVATING CIRCUMSTANCES. WE ARE ONLY DEALING WITH  
18 AGGRAVATING CIRCUMSTANCES.

19 MR. WAPNER: I KNOW, JUDGE. BUT WHAT I AM SAYING IS  
20 THAT THE JURY IS TOLD THAT WHEN THEY MAKE A DECISION AS TO  
21 WHETHER IT IS LIFE OR DEATH, THE STANDARD IS NOT BEYOND A  
22 REASONABLE DOUBT. BUT IT IS A WEIGHING TEST AND WHETHER THE  
23 AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH THE MITIGATING  
24 FACTORS OR VICE VERSA.

25 MR. CHIER: I THINK THERE IS A PRESUMPTION OF LIFE,  
26 WHICH IS --

27 MR. WAPNER: WELL, I DON'T THINK THAT --

28 THE COURT: WELL, 209 WOULD NOT BE APPLICABLE.



1 MR. WAPNER: IT IS APPLICABLE TO THEIR DECISION AS TO  
2 WHETHER THESE AGGRAVATING CIRCUMSTANCES ARE TRUE OR NOT BECAUSE  
3 THE LAW IS THAT BEFORE THEY CAN CONSIDER THEM AS AGGRAVATING  
4 CIRCUMSTANCES, THEY HAVE TO BE CONVINCED THAT THEY ARE TRUE  
5 BEYOND A REASONABLE DOUBT.

6 BUT THAT IS NOT TO BE CONFUSED WITH THEIR DECISION  
7 THAT DEATH OR LIFE IS THE APPROPRIATE PENALTY, WHICH IS NOT  
8 BEYOND A REASONABLE DOUBT BUT WHICH IS A DIFFERENT STANDARD.  
9 THAT IS, ONE SUBSTANTIALLY OUTWEIGHING THE OTHER.

10 MR. CHIER: I THINK THAT IT OUGHT TO BE MODIFIED TO  
11 PROVIDE FOR THE PRESUMPTION OF LIFE.

12 THE COURT: I DON'T KNOW OF ANY RULE THAT SAYS YOU HAVE  
13 TO GIVE IT THAT WEIGHT. ISN'T THERE ANY PENALTY PHASE  
14 INSTRUCTION --

15 MR. WAPNER: YOU GIVE AN INSTRUCTION THAT SAYS -- I  
16 THINK IT IS 88411 TALKS ABOUT PROOF BEYOND A REASONABLE DOUBT.

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1 MR. WAPNER: RIGHT. I THINK IT IS 8.84.1.2.

2 THE COURT: WHAT IS IT?

3 MR. WAPNER: 8.84.1.2.

4 THE COURT: YES, THAT WILL BE GIVEN, 8.84.1.2.

5 I DON'T THINK WE NEED 290.

6 MR. WAPNER: WELL, I THINK WE NEED IT, AT LEAST AS  
7 MODIFIED, WHICH IS TO TELL THEM WHAT REASONABLE DOUBT IS.

8 MR. CHIER: HE IS PRESUMED TO BE GUILTY OF THE FACTS  
9 IN AGGRAVATION, I GUESS.

10 THE COURT: IS THERE A PRESUMPTION THAT HE IS INNOCENT  
11 OF THE AGGRAVATING CIRCUMSTANCES? I DON'T KNOW THAT THAT  
12 MAY BE SO.

13 MR. CHIER: I GUESS HE IS PRESUMED GUILTY.

14 MR. BARENS: HOW COULD THE REVERSE BE TRUE?

15 THE COURT: I DON'T KNOW.

16 THE REVERSE ISN'T TRUE EITHER. IT IS A WHOLE  
17 SET OF CIRCUMSTANCES WHICH DOESN'T APPLY.

18 MR. BARENS: IF THE GOVERNMENT HAS AN OBLIGATION, SIR,  
19 TO PROVE THE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE  
20 DOUBT, IT WOULD APPEAR TO BE, BY LOGIC, THAT HE WAS PRESUMED  
21 INNOCENT OF THEM IN THE FIRST INSTANCE.

22 THE COURT: THE DEFENDANT IS PRESUMED TO BE INNOCENT,  
23 IS THAT THE WAY YOU WANT TO GO?

24 I DON'T KNOW THAT YOU CAN GO THAT WAY. IS THERE A  
25 PRESUMPTION OF INNOCENCE WHICH APPLIES IN A CASE OF AGGRAVATING  
26 CIRCUMSTANCES?

27 MR. WAPNER: I DON'T KNOW.

28 MR. CHIER: HE MUST BE PRESUMED GUILTY?

1 MR. BARENS: NO.

2 YOU SEE, YOUR HONOR, IT JUST SEEMS LOGICAL  
3 TO THIS COUNSEL THAT THERE HAS TO BE AN ATTACHED PRESUMPTION  
4 TO HUMAN CONDUCT.

5 THE COURT: ALL RIGHT. WHY DON'T WE SAY THAT THE  
6 DEFENDANT IS PRESUMED TO BE INNOCENT OF THE AGGRAVATING  
7 CIRCUMSTANCES?

8 MR. BARENS: THE FACTORS ALLEGED -- THE CIRCUMSTANCES  
9 ALLEGED IN AGGRAVATION.

10 THE COURT: AND UNTIL THE CONTRARY IS PROVED, IN CASE  
11 OF A REASONABLE DOUBT WHETHER --

12 MR. WAPNER: WAIT A SECOND. CAN WE CHANGE IT TO "THE  
13 CRIMES ALLEGED AS AGGRAVATING CIRCUMSTANCES"?

14 THE COURT: YES, THAT'S RIGHT.

15 MR. WAPNER: BECAUSE I DON'T WANT --

16 THE COURT: WHY DON'T YOU REVISE 290, WILL YOU, PLEASE?  
17 THEN WE WILL GO OVER IT.

18 MR. WAPNER: THIS AFTERNOON?

19 THE COURT: YES.

20 AND THE REST OF IT IS OKAY. "REASONABLE DOUBT  
21 IS DEFINED AS FOLLOWS" THAT IS OKAY.

22 MR. WAPNER: IT IS POSSIBLE WE CAN JUST GIVE THE SECOND  
23 PART OF IT.

24 THE COURT: YES, THE SECOND PART WILL BE ALL RIGHT.

25 WHERE DO WE GO FROM THERE?

26 MR. WAPNER: MAYBE TO LUNCH, YOUR HONOR.

27 MR. BARENS: WELL, WHAT ABOUT -- CAN WE JUST KNOCK  
28 OFF AT 272? DID WE DO 272?

1 THE COURT: DIDN'T WE HAVE THAT?

2 MR. BARENS: DID WE DO THAT?

3 THE COURT: WHY DON'T YOU DO 272 ALSO?

4 MR. WAPNER: YES, WE AGREED WE WOULD GIVE 272. I WILL  
5 PROVIDE IT TO THE COURT.

6 MR. BARENS: I AM SORRY.

7 THE COURT: THEN WE ARE IN THE 300 BRACKET.

8 MR. WAPNER: RIGHT, AIDERS AND ABETTORS AND PRINCIPALS  
9 AND ACCOMPLICES.

10 THE COURT: WE DON'T NEED THAT AT ALL.

11 MR. WAPNER: WELL, AS FAR AS THE ESLAMINIA THING IS  
12 CONCERNED AND THE COKER MATTER IS CONCERNED AND THE SWARTOUT  
13 THING, I THINK IT IS KIND OF IMPORTANT TO INSTRUCT THEM  
14 ON THAT.

15 THE COURT: WHY DON'T I GIVE THEM THE SAME INSTRUCTIONS  
16 I GAVE THEM AT THE GUILT PHASE?

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1 MR. CHIER: YOU DIDN'T GIVE THEM AT THE GUILT PHASE.

2 MR. BARENS: WE DIDN'T DO IT AT THE GUILT PHASE.

3 MR. WAPNER: WE DIDN'T DO THE ACCOMPLICE INSTRUCTION.

4 WE DID DO THE AIDING AND ABETTING INSTRUCTION.

5 THE COURT: YOU DON'T HAVE IT THERE?

6 MR. WAPNER: I DO HAVE THEM HERE.

7 THE COURT: YOU MEAN 3 AND 301, YOU MEAN?

8 MR. WAPNER: 3 AND 301.

9 THE COURT: YOU MEAN PRINCIPALS DEFINED?

10 MR. WAPNER: RIGHT.

11 MR. CHIER: ARE YOU GOING TO GIVE 3.01, IS THAT WHAT

12 IS HAPPENING?

13 THE COURT: I AM GIVING 3.00.

14 MR. CHIER: 3.00?

15 THE COURT: 3.01.

16 MR. CHIER: 3.00?

17 THE COURT: AND 3.11.

18 MR. BARENS: DIDN'T WE ASK FOR 3.10?

19 THE COURT: ACCOMPLICE DEFINED, YES, I HAVE GOT THAT.

20 MR. CHIER: 3.10?

21 THE COURT: I AM GIVING 3.10 AND 3.11 AND 3.12.

22 316, YOU REQUESTED THAT, THAT WILL BE GIVEN.

23 MR. CHIER: DOESN'T IT HAVE TO BE FIXED UP A LITTLE?

24 THE COURT: YES.

25 MR. WAPNER: ALL OF THESE PROBABLY HAVE TO BE MODIFIED.

26 THE COURT: I DON'T THINK WE HAVE 3.30, DO WE?

27 MR. WAPNER: ASSAULT WITH A DEADLY WEAPON IS A --

28 THE COURT: NO, NO. 3.30, CONCURRENCE OF ACT AND

1 GENERAL CRIMINAL INTENT.

2 MR. WAPNER: ARE YOU GOING TO GIVE THAT?

3 THE COURT: OH, YES. WELL, "IN THE AGGRAVATING  
4 CIRCUMSTANCES CHARGE INVOLVING" -- WHO IS IT NOW?

5 MR. WAPNER: WHAT INSTRUCTION ARE YOU ON?

6 THE COURT: NOT SWARTOUT.

7 MR. WAPNER: 3.30?

8 THE COURT: YES.

9 MR. WAPNER: THAT INVOLVES MR. COKER.

10 THE COURT: ALL RIGHT, SO THAT IN THE AGGRAVATING  
11 CIRCUMSTANCE INVOLVING MR. COKER; IS THAT RIGHT?

12 MR. WAPNER: RIGHT.

13 THE COURT: HOW DO YOU SPELL HIS NAME AGAIN, C-O-C?

14 MR. WAPNER: NO. C-O-K-E-R, YOUR HONOR.

15 THE COURT: ALL RIGHT, LET'S GO TO LUNCH.

16 MR. WAPNER: YES, I THINK WE SHOULD GO TO LUNCH.

17 ALSO, 310 AND SOME OF THESE OTHER INSTRUCTIONS  
18 NEED SOME MODIFICATION, I THINK, BUT I WILL WORK ON THAT.

19 THE COURT: I AM GOING TO MODIFY ALL OF THEM.

20 MR. BARENS: YOUR HONOR, COULD I JUST ASK A TIMING  
21 THING WHILE IT IS ON MY MIND AND WE ARE HERE AND JUST TAKE  
22 A MOMENT?

23 TOMORROW, MR. WAPNER ANTICIPATES HE WOULD FINISH  
24 BY NOON BUT THAT HE MIGHT GO OVER, I DON'T KNOW, HALF AN  
25 HOUR IN THE AFTERNOON OR MAYBE FROM 1:30 UNTIL 2:00 OR  
26 SOMETHING. I WOULD JUST LIKE THE COURT TO GIVE ME, ONLY  
27 IN THE EVENT THAT MR. WAPNER FINISHES IN THE AFTERNOON,  
28 I WOULD LIKE 20 MINUTES BETWEEN THE TIME HE FINISHES AND

1 THE TIME I START SO THAT --

2 MR. CHIER: I HAVE A BETTER SUGGESTION, MR. BARENS.  
3 IF MR. WAPNER IS GOING TO GO THROUGH THE NOON HOUR, THAT  
4 WE EXTEND THE NOON HOUR SO WE HAVE OUR NORMAL NOON BREAK  
5 TO PUT OUR CLOSING ARGUMENT TOGETHER.

6 MR. BARENS: NO. WHAT I AM CONCERNED ABOUT IS IF MR.  
7 WAPNER EXTENDS THE PERIOD OF TIME AFTER THE NOON HOUR, THAT  
8 I HAVE A HIATUS OF 20 MINUTES.

9 MR. CHIER: ARTHUR, LISTEN TO ME. I AM ASKING THAT  
10 WE HAVE THE NOON HOUR LATER SO THAT IF HE FINISHED AT 12:30,  
11 WE LUNCH FROM 12:30 TO 2:00.

12 MR. BARENS: I GUESS THAT IS A BETTER SUGGESTION. IN  
13 OTHER WORDS, THAT WE DELAY THE NOON HOUR UNTIL HE FINISHES  
14 SO THAT IF HE FINISHES, IN OTHER WORDS, IF HE NEEDS A HALF  
15 AN HOUR AT 12:00 O'CLOCK, THAT WOULD GO TO 12:30 AND SO  
16 THAT HE FINISHES AND I HAVE A PERIOD OF TIME BETWEEN THE  
17 TIME HE FINISHES AND THE TIME I START.

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1 THE COURT: WOULD YOU TRY TO FINISH IN TWO HOURS?

2 MR. WAPNER: I WILL TRY TO FINISH BY NOON. I DON'T  
3 LIKE THE IDEA OF WORKING THROUGH NOON BECAUSE IT IS BAD FOR  
4 THE COURT STAFF AND IT IS BAD FOR THE JURORS PAYING ATTENTION  
5 TO ANYTHING.

6 MR. BARENS: THE ONLY THING THAT I AM ASKING IS THAT  
7 IF WE ARE GOING TO DO IT -- IN THE UNLIKELY EVENT THAT  
8 MR. WAPNER NEEDED TIME AFTER THE BREAK --

9 THE COURT: WELL, HE WILL FINISH BY NOON, BY 12 O'CLOCK.

10 MR. BARENS: OKAY. BUT DO YOU UNDERSTAND WHAT I AM  
11 SAYING?

12 MR. WAPNER: I UNDERSTAND WHAT YOU ARE SAYING. SO DOES  
13 THE COURT. HE WANTS ME TO TRY TO FINISH BY 12 O'CLOCK.

14 I WILL MAKE EVERY EFFORT TO FINISH UP BY  
15 12 O'CLOCK.

16 MR. BARENS: IF HE DOESN'T, COULD I HAVE A LITTLE BREAK  
17 IN BETWEEN THE TIME THAT HE DID FINISH, IF IT WENT INTO THE  
18 AFTERNOON --

19 THE COURT: YOU WILL HAVE THE LUNCH HOUR.

20 MR. BARENS: NO. I AM SAYING, SUPPOSING THAT HE WENT  
21 OVER THE LUNCH HOUR, HE WAS NOT ABLE TO ACCOMMODATE THE TIME  
22 FRAME, SIR.

23 THE COURT: IF HE GOES OVER FIVE MINUTES, I DON'T THINK  
24 THAT IT REALLY MATTERS.

25 MR. BARENS: I AM SAYING IF HE WENT OVER 20 MINUTES  
26 OR 30 MINUTES, I WOULD LIKE A COUPLE OF MINUTES TO RESPOND.  
27 THAT IS ALL I AM SAYING.

28 THE COURT: ALL RIGHT.



18 1 MR. BARENS: I AM NOT ASKING FOR A LOT, JUST 20 MINUTES.

2 THE COURT: ALL RIGHT. IN ANY EVENT, IF IT IS 1:30  
3 OR EVEN A QUARTER OF 2:00, YOU WILL HAVE -- IT WILL BE FROM  
4 A QUARTER OF 2:00 AT LEAST TO --

5 MR. BARENS: YES, SIR.

6 THE COURT: A QUARTER OF 4:00. ALL RIGHT? AND THEN  
7 AT 4 O'CLOCK, I WILL INSTRUCT THE JURY.

8 MR. BARENS: ALL RIGHT. I WOULD JUST LIKE THE SAME  
9 AMOUNT OF TIME THAT MR. WAPNER GETS.

10 THE COURT: I THOUGHT YOU SAID YOU WOULD TAKE AN HOUR  
11 AND A HALF.

12 MR. BARENS: BUT AGAIN, WHAT I HAVE TO SAY IS -- WELL,  
13 I HAVE TO INCORPORATE WHAT HE --

14 THE COURT: WELL, YOU WILL HAVE THE LUNCH HOUR.

15 MR. BARENS: MY RESPONSE IS TO WHAT HE SAYS BUT I HAVE  
16 TO PROGRAM THAT INTO IT AND IT WILL ADD WORDS TO WHAT I WAS  
17 GOING TO SAY AND --

18 THE COURT: YOU WILL HAVE THE LUNCH HOUR.

19 MR. BARENS: I WILL DO THE BEST I CAN TO ACCOMMODATE  
20 EVERYTHING, THE TIME FRAME AND --

21 THE COURT: I HAVE GOT TO INSTRUCT THE JURY TOMORROW.

22 MR. BARENS: I UNDERSTAND THAT, SIR. YES, SIR.

23 THE COURT: WE WILL GO AS LATE -- PROBABLY AS LATE AS  
24 4:15 FOR YOUR ARGUMENT. THEN I CAN INSTRUCT THE JURY. I  
25 WILL TAKE HALF AN HOUR AND --

26 MR. BARENS: I WANTED TO ADD TO THAT ONE NAME IN CAMERA,  
27 SIR, IF I COULD DO IT JUST NOW.

28 THE COURT: PARDON ME. THEN WE WON'T HAVE ANY RECESS

187 7  
1 FOR THE JURY.

2 MR. BARENS: WELL --

3 MR. CHIER: WHY DOES THE JURY HAVE TO BE INSTRUCTED  
4 BY 4:15, YOUR HONOR? THIS IS A DEATH PENALTY CASE.

5 MR. BARENS: WELL, IF WE CAN RUN A LITTLE LATE ON THE  
6 OTHER END TOMORROW --

7 THE COURT: WHAT?

8 MR. BARENS: I AM MORE THAN WILLING TO STAY ON THE OTHER  
9 END OF TOMORROW IF WE NEED TO, YOUR HONOR.

10 THE COURT: WHAT DO YOU MEAN "OTHER END"?

11 MR. BARENS: IF WE NEED TO GO PAST 4:30, SIR, I WILL  
12 ACCOMMODATE THE COURT.

13 THE COURT: NO. YOU WILL FINISH AT 4 O'CLOCK. I WILL  
14 GIVE YOU TWO AND A HALF HOURS, FROM 1:30 TO 4 O'CLOCK.

15 MR. BARENS: YES, SIR.

16 THE COURT: THEN I WILL INSTRUCT AT 4 O'CLOCK.

17 MR. CHIER: IS THAT AN ORDER, YOUR HONOR?

18 THE COURT: I WILL FIRST GIVE THEM A 15-MINUTE BREAK,  
19 PROBABLY. THEN I WILL INSTRUCT THEM.

20 MR. BARENS: RIGHT. THAT WE WILL DO. ALL RIGHT.

21 YOUR HONOR, COULD I JUST DO THAT IN CAMERA? COULD  
22 I ADD THAT NAME IN CAMERA, TO THE RECORD NOW?

23 THE COURT: SURE.

24 MR. BARENS: THANK YOU.

25 MR. WAPNER: ALL RIGHT. WE ARE RESUMING AT 1:30 OR  
26 1:45?

27 THE COURT: 1:30. WELL, WE CAN DO IT AT 1:45. THAT  
28 WILL BE ALL RIGHT BECAUSE I THINK WE WILL FINISH GOING OVER

1 THE JURY INSTRUCTIONS BY THAT TIME. ALL RIGHT.

2 MR. BARENS: YES, SIR.

3 THE COURT: OKAY. THANK YOU.

4 (MR. WAPNER LEFT CHAMBERS AND AN  
5 IN CAMERA HEARING WAS HELD.)  
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(PAGE 15186 WAS ORDERED SEALED BY THE  
COURT AND IS NOT INCLUDED IN THE  
TRANSCRIPT.)

1 SANTA MONICA, CALIFORNIA; THURSDAY, MAY 28, 1987; 1:53 P.M.

2 DEPARTMENT WEST C HON. LAURENCE J. RITTENBAND, JUDGE

3 (APPEARANCES AS NOTED ON TITLE PAGE.)

4 (THE FOLLOWING PROCEEDINGS WERE HELD

5 IN CHAMBERS, THE DEFENDANT AND ALL

6 COUNSEL BEING PRESENT:)

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8 MR. WAPNER: THESE ARE JUST TYPED VERSIONS OF SOME OF  
9 THE ONES THAT I GAVE YOU IN EITHER HANDWRITTEN OR XEROXED  
10 FORM THIS MORNING.

11 I HAVE NOT YET PULLED THE INSTRUCTIONS THAT THE  
12 COURT ASKED ME TO PULL THIS MORNING BUT I WILL GET THEM FOR  
13 THE CLERK EITHER BY THIS AFTERNOON OR TOMORROW.

14 THE COURT: ALL RIGHT. I THINK WE STOPPED --

15 MAKE IT A POINT TO GET 318, WILL YOU? THAT IS  
16 REGARDING THE TESTIMONY OF AN ACCOMPLICE SHOULD BE VIEWED  
17 WITH DISTRUST. FRED, MAKE A NOTE OF 318, WILL YOU?

18 MR. WAPNER: YES.

19 THE COURT: ALL RIGHT.

20 MR. WAPNER: YOUR HONOR, YOU ASKED ME THIS MORNING TO  
21 TRY AND REVISE THE LANGUAGE IN 2.90, WHICH IS THE REASONABLE  
22 DOUBT INSTRUCTION, TO COMPORT WITH WHAT WE ARE DOING AND THIS  
23 IS THE LANGUAGE THAT I CAME UP WITH:

24 "REGARDING THE CRIMES ALLEGED AS FACTORS  
25 IN AGGRAVATION, A DEFENDANT IS PRESUMED TO BE  
26 INNOCENT UNTIL THE CONTRARY IS PROVED.

27 "THIS PRESUMPTION PLACES UPON THE  
28 STATE" --

1 THE COURT: ISN'T IT "IF IN THIS CASE YOU HAVE A  
2 REASONABLE DOUBT"?

3 MR. WAPNER: WELL, I TRIED TO MONKEY AROUND WITH THAT  
4 NEXT PHRASE IN THE INSTRUCTION AND DECIDED THAT IT DOESN'T --  
5 IN MY VIEW, AND WE CAN DISCUSS IT, IT DOESN'T LOSE ANY OF  
6 THE STRENGTH OF THE INSTRUCTION TO LEAVE THAT PHRASE OUT AND  
7 THEN PICK UP WITH THE NEXT SENTENCE WHICH IS:

8 "THIS PRESUMPTION PLACES UPON THE  
9 STATE THE BURDEN OF PROVING HIM GUILTY BEYOND A  
10 REASONABLE DOUBT."

11 THE COURT: WHY DON'T YOU LEAVE THE NEXT SENTENCE IN?  
12 IT IS JUST AS EFFECTIVE.

13 MR. WAPNER: BECAUSE I COULDN'T FIGURE OUT HOW TO DO  
14 IT AND MAKE IT SOUND RIGHT.

15 THE COURT: WELL, READ THE PART THAT YOU HAVE GOT SO  
16 FAR.

17 MR. WAPNER: (READING:)

18 "REGARDING THE CRIMES ALLEGED AS FACTORS  
19 IN AGGRAVATION, THE DEFENDANT IS PRESUMED TO BE  
20 INNOCENT UNTIL THE CONTRARY IS PROVED."

21 THE COURT: "AND IN CASE OF A REASONABLE DOUBT, WHETHER  
22 THE SPECIAL CIRCUMSTANCES ARE PROVED, HE IS ENTITLED TO THE  
23 BENEFIT OF THE DOUBT."

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20- 1 MR. WAPNER: BUT THAT IS EXACTLY WHAT IT SHOULD NOT  
2 SAY BECAUSE THEN YOU GET INTO A SITUATION OF HAVING THIS --  
3 FIRST OF ALL, THAT IS NOT AN APPROPRIATE STATEMENT OF HOW  
4 THEY ARE SUPPOSED TO TREAT IT BECAUSE THIS INSTRUCTION  
5 DOESN'T GO TO SPECIAL CIRCUMSTANCES BEING PROVED.

6 BECAUSE THEY HAVE ALREADY FOUND THE SPECIAL  
7 CIRCUMSTANCES TRUE. IT GOES TO WHETHER EACH CRIME ALLEGED  
8 AS A FACTOR IN AGGRAVATION, IS TRUE.

9 SO IF YOU WANT TO LEAVE THAT SENTENCE IN THERE,  
10 THEN IT HAS TO READ SOMETHING LIKE, "AND IN CASE OF A  
11 REASONABLE DOUBT AS TO WHETHER HE COMMITTED THE CRIMES  
12 ALLEGED AS AGGRAVATING FACTORS ..."

13 THE COURT: THEN YOU GIVE HIM THE BENEFIT OF THE DOUBT?

14 MR. WAPNER: WELL, I WILL LET THE COURT LOOK AT IT AND  
15 COUNSEL LOOK AT IT. DO YOU HAVE THE COPY OF 2.90?

16 MR. CHIER: DID YOU GIVE US ONE?

17 MR. WAPNER: WELL, I WILL LET THE COURT LOOK AT THE  
18 ONE I HAVE. I AM TRYING TO REVISE IT.

19 I CAN'T MAKE THAT SENTENCE COME OUT RIGHT.

20 MR. CHIER: THE QUESTION YOU HAVE IS AS TO 2.90?

21 MR. WAPNER: A PART OF THE REASON FOR IT I THINK IS  
22 BECAUSE THEY DON'T MAKE ANY SPECIFIC FINDING AS A JURY AS  
23 TO THE TRUTH OR AS TO THE GUILT OR INNOCENCE OF THE TRUTH  
24 OR FALSITY OF ANY ONE OF THESE PARTICULAR CRIMES.

25 MY UNDERSTANDING OF THESE INSTRUCTIONS AS A WHOLE,  
26 IS THAT EACH INDIVIDUAL JUROR IS ENTITLED TO MAKE A  
27 DETERMINATION AS TO WHETHER A PARTICULAR CRIME HAS BEEN  
28 PROVED BEYOND A REASONABLE DOUBT AND THEREFORE, THEY CONSIDER

1 IT.

2 THE COURT: THOSE CRIMES AS FACTORS, YOU MEAN?

3 MR. CHIER: BUT IT IS STATED AS ANY OTHER CRIME IN A  
4 CRIMINAL CASE. THE PROOF IS BEYOND A REASONABLE DOUBT. THE  
5 ELEMENTS HAVE TO BE THERE. IT IS JUST LIKE A CRIME.

6 SO THEY OBVIOUSLY, HAVE TO COME TO A CONCLUSION  
7 ABOUT WHETHER IT IS PROVED OR NOT PROVED. AND IN CASE --  
8 IN DECIDING WHETHER IT IS PROVED OR NOT PROVED, HE IS ENTITLED  
9 TO A REASONABLE DOUBT.

10 MR. WAPNER: IN THE MIND OF EACH, INDIVIDUAL JUROR BUT  
11 NOT NECESSARILY IN THE MIND OF THE JURY AS A WHOLE. I THINK --

12 THE COURT: REGARDING CRIMES ALLEGED AS FACTORS IN  
13 AGGRAVATION, THE DEFENDANT IS PRESUMED TO BE INNOCENT THEREOF  
14 UNTIL THE CONTRARY IS PROVED. AND IN CASE OF A REASONABLE  
15 DOUBT WHETHER THE CONTRARY HAS BEEN PROVED, HE IS ENTITLED  
16 TO --

17 MR. BARENS: A VERDICT OF LIFE WITHOUT POSSIBILITY OF  
18 PAROLE.

19 THE COURT: NO, NO.

20 MR. WAPNER: THAT IS NOT RIGHT.

21 MR. CHIER: NO, THE ISSUE IS WHETHER HE DID OR DIDN'T  
22 DO THESE THINGS.

23 MR. BARENS: WAIT A MINUTE. EXCUSE ME. I THINK WHAT  
24 YOU SAY -- THEN IT IS JUST NOT PROVED -- THAT UNLESS IT IS  
25 PROVED BEYOND A REASONABLE DOUBT, THE FACTOR IN AGGRAVATION  
26 IS NOT PROVED?

27 MR. CHIER: THEY CAN'T CONSIDER IT.

28 MR. WAPNER: WHAT I DID WAS -- WHAT I DECIDED COULD



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1 BE DONE WITH THAT PARTICULAR INSTRUCTION IS JUST TO LEAVE  
2 OUT THAT PHRASE THAT STARTS WITH, "AND IN CASE OF," AND PUT  
3 A PERIOD BEFORE THAT PHRASE AND THEN START WITH THE NEXT  
4 SENTENCE.

5 THE COURT: BUT THE NEXT PARAGRAPH DOESN'T MAKE ANY  
6 SENSE UNLESS YOU PUT THE REASONABLE DOUBT IN THERE.

7 MR. WAPNER: WELL, THIS IS THE WAY I WOULD HAVE IT READ:

8 "REGARDING THE CRIMES ALLEGED AS  
9 FACTORS IN AGGRAVATION, THE DEFENDANT IN A CRIMINAL  
10 ACTION IS PRESUMED TO BE INNOCENT UNTIL THE  
11 CONTRARY IS PROVED."

12 THE NEXT SENTENCE WOULD BE:

13 "THIS PRESUMPTION PLACES UPON THE  
14 STATE, THE BURDEN OF PROVING THESE FACTORS BEYOND  
15 A REASONABLE DOUBT. REASONABLE DOUBT IS DEFINED  
16 AS FOLLOWS:"

17 MR. CHIER: YOU LEFT OUT THE MEAT, FRED. THE MEAT IS  
18 THAT IN CASE OF A REASONABLE DOUBT WHETHER HIS GUILT IS  
19 SATISFACTORILY SHOWN, YOU MAY NOT CONSIDER THESE ALLEGED  
20 OFFENSES IN AGGRAVATION AS FACTORS IN AGGRAVATION. THAT IS  
21 WHAT WE ARE HERE FOR.

22 THE COURT: NO. THE SUBSTANCE OF WHAT THAT IS, IS THE  
23 CONCLUSION THAT HE IS ENTITLED TO A VERDICT OF NOT GUILTY.

24 BUT SINCE THERE IS NO VERDICT OF NOT GUILTY --

25 MR. BARENS: THEN IT IS NOT PROVEN.

26 MR. CHIER: NO. YOU MAY NOT CONSIDER THE FACTORS IN  
27 AGGRAVATION. THAT IS WHAT THIS IS ABOUT.

28 MR. BARENS: ACTUALLY, THAT IS THE STATE OF THE LAW.

1 JUDGE, I THINK THAT IT IS INEVITABLE THAT IF IT IS NOT PROVEN  
2 BEYOND A REASONABLE DOUBT, IT IS NOT CONSIDERED.

3 MR. CHIER: THEY HAVE TO ALL AGREE.

4 THE COURT: AND IN CASE OF A REASONABLE DOUBT OF THE  
5 COMMISSION BY THE DEFENDANT OF ANY OF SAID CRIMES, HE IS  
6 ENTITLED TO HAVE THE BENEFIT OF SUCH DOUBT. THAT WILL GIVE  
7 IT TO YOU.

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1 MR. BARENS: AND WOULDN'T WE HAVE TO ADD, SIR, "THAT  
2 SUCH AGGRAVATING FACTOR WOULD BE NOT PROVEN AND COULD NOT  
3 BE CONSIDERED A FACTOR IN AGGRAVATION"?

4 MR. WAPNER: NO. I THINK MR. CHIER IS RIGHT. IF YOU  
5 PUT LANGUAGE IN THERE TO SAY "IN CASE OF A REASONABLE DOUBT  
6 AS TO WHETHER ANY OF THESE ARE TRUE, YOU CANNOT CONSIDER  
7 THOSE --"

8 THE COURT: AS FACTORS IN AGGRAVATION.

9 MR. WAPNER: -- AS FACTORS IN AGGRAVATION.

10 MR. CHIER: YOU HAVE TO HAVE ALSO --

11 THE COURT: WHY DON'T YOU CHANGE IT THEN?

12 MR. CHIER: THEY HAVE TO ALL AGREE THAT EACH ALLEGED  
13 FACTOR IN AGGRAVATION IS PROVED BEYOND A REASONABLE DOUBT.

14 MR. WAPNER: I DISAGREE WITH THAT. I DON'T THINK THAT  
15 IS A CORRECT STATEMENT OF THE LAW.

16 THE COURT: NO, NO. THAT IS NOT THE LAW.

17 MR. WAPNER: I DON'T THINK THERE IS ANY LAW ON THAT  
18 ONE WAY OR THE OTHER BUT THERE IS NO LAW THAT SAYS THEY  
19 HAVE TO ALL AGREE.

20 THE COURT: BECAUSE THEY HAVE THEM CONSIDERING THE  
21 MITIGATING AND AGGRAVATING CIRCUMSTANCES ON THEIR OWN.

22 ALL RIGHT, NOW 331, CONCURRENCE OF ACT AND  
23 SPECIFIC INTENT: IN EACH OF THE AGGRAVATING CIRCUMSTANCES  
24 CHARGED, TO WIT, THE ESLAMINIA AND SWARTOUT MATTERS --

25 MR. WAPNER: YOUR HONOR?

26 THE COURT: WHAT?

27 MR. WAPNER: I APOLOGIZE FOR INTERRUPTING BUT CAN WE  
28 HAVE SOME AGREEMENT ON WHAT THE PRECISE LANGUAGE OF THIS

1 2.90 IS GOING TO BE?

2 THE COURT: I THOUGHT YOU SAID YOU AGREED WITH HIM  
3 THAT THAT IS WHAT YOU WERE GOING TO DO.

4 MR. WAPNER: I DID BUT I JUST WANT TO MAKE SURE WE  
5 HAVE THE LANGUAGE CORRECT.

6 THE COURT: WELL, READ WHAT YOU HAVE GOT.

7 MR. WAPNER: "REGARDING THE CRIMES ALLEGED AS FACTORS  
8 IN AGGRAVATION, THE DEFENDANT IS PRESUMED TO BE INNOCENT  
9 UNTIL THE CONTRARY IS PROVED AND IN CASE OF A REASONABLE  
10 DOUBT" --

11 THE COURT: "THAT HE COMMITTED ANY OF SAID CRIMES,  
12 THE DOUBT MUST BE RESOLVED IN HIS FAVOR."

13 DIDN'T I GIVE IT TO YOU?

14 MR. BARENS: BUT THEN I THINK WE HAVE TO ADD TO THAT,  
15 SIR, "IF THE DOUBT IS RESOLVED IN FAVOR OF THE DEFENDANT,  
16 THE JURY CANNOT CONSIDER THAT CONDUCT ALLEGED AS A FACTOR  
17 IN AGGRAVATION".

18 THE COURT: THAT IS IMPLICIT IN WHAT IT SAYS.

19 MR. BARENS: I THINK WE SHOULD TAKE IT TO THAT CONCLUSION,  
20 SIR, BECAUSE THAT IS THE LAW.

21 THE COURT: ALL RIGHT. WHY DON'T YOU ADD THAT, TOO?

22 MR. WAPNER: WELL, MAYBE IF WE JUST MAKE IT SIMPLE  
23 SO THAT IT SAYS: "IN CASE OF A REASONABLE DOUBT WHETHER  
24 HE COMMITTED ANY OF SAID CRIMES, YOU MAY NOT CONSIDER THEM  
25 AS FACTORS IN AGGRAVATION."

26 THE COURT: THAT IS ALL RIGHT.

27 MR. BARENS: YES, SIR.

28 MR. WAPNER: IS THAT ACCEPTABLE?

1 THE COURT: YES.

2 MR. BARENS: MR. CHIER?

3 I AM SORRY.

4 THE COURT: ALL RIGHT, CHANGE THAT, WILL YOU?

5 MR. WAPNER: YES, I WILL CHANGE THAT.

6 THE COURT: ALL RIGHT, THEN WHAT DID WE GO TO, 3.31?

7 I READ IT TO YOU: "IN EACH OF THE AGGRAVATING CIRCUMSTANCES  
8 CHARGED IN THE ESLAMINIA AND SWARTOUT MATTERS, THERE MUST  
9 EXIST A UNION OR 'JOINT OPERATION OF ACT AND CERTAIN  
10 SPECIFIC INTENT."

11 MR. CHIER: THAT IS WHAT NUMBER, SIR?

12 THE COURT: 331.

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1 MR. CHIER: MR. WAPNER, WOULD YOU LOOK AT THIS PARAGRAPH  
2 ON PAGE 822 OF THE FRIERSON, TOO?

3 THE COURT: ALL RIGHT, 331.

4 MR. CHIER: ARE YOU GOING TO FILL IN THE BLANKS ON  
5 331?

6 THE COURT: THERE AREN'T ANY BLANKS TO BE FILLED IN.

7 MR. CHIER: WELL THERE ARE ON THE ONE I WAS GIVEN.

8 THE COURT: "IN EACH OF THE AGGRAVATING  
9 CIRCUMSTANCES CHARGED IN THE ESLAMINIA AND  
10 SWARTOUT MATTERS,"

11 ALL RIGHT, YOU CAN SAY, "TO WIT, MURDER" --

12 MR. CHIER: I MUST HAVE A DIFFERENT ONE FROM YOU, YOUR  
13 HONOR.

14 THE COURT: 331?

15 MR. CHIER: 3.31, THE 1983 REVISION, CONCURRENCE OF  
16 ACT AND SPECIFIC INTENT.

17 THE COURT: YES.

18 MR. CHIER: I HAVE A BUNCH OF BLANKS.

19 THE COURT: I AM TRYING TO SHOW YOU THAT I CHANGED  
20 IT:

21 "IN EACH OF THE AGGRAVATING CIRCUM-  
22 STANCES CHARGED IN THE ESLAMINIA AND SWARTOUT  
23 MATTERS, THERE MUST EXIST A UNION OR JOINT  
24 OPERATION OF ACT OR CONDUCT AND A CERTAIN  
25 SPECIFIC INTENT IN THE MINDS OF THE PERPETRATOR AND  
26 UNLESS SUCH SPECIFIC INTENT EXISTS, THE CRIMES  
27 TO WHICH IT RELATES IS NOT COMMITTED."

28 THE SPECIFIC INTENT THAT IS REQUIRED IS INCLUDED

1 IN THE DEFINITION OF THE CRIMES CHARGED.

2 WE HAVE THE GENERAL INTENT CRIME, HAVEN'T WE?

3 MR. WAPNER: YES.

4 THE COURT: THAT WAS 330, I THINK, WASN'T IT?

5 MR. WAPNER: RIGHT.

6 THE COURT: WE HAVE GONE OVER THAT.

7 CONCURRENCE OF ACT AND GENERAL CRIMINAL INTENT  
8 IN THE CRIMES CHARGED -- WHAT IS THE CHARGE AS TO COKER,  
9 THAT WAS A FIRING IN A BUILDING ON COKER?

10 MR. WAPNER: COKER IS FIRING AT A BUILDING, RIGHT.

11 THE COURT: "IN THE CRIME INVOLVING MR. COKER, TO WIT,  
12 FIRING IN AN OCCUPIED BUILDING, THERE MUST EXIST A UNION  
13 OR JOINT OPERATION OF ACT OR CONDUCT AND GENERAL CRIMINAL  
14 INTENT." IS THAT CORRECT?

15 MR. WAPNER: I THINK IN THE --

16 THE COURT: IS THAT A GENERAL INTENT CRIME, MALICIOUSLY  
17 AND WILFULLY DISCHARGING A WEAPON; ISN'T THAT A SPECIFIC  
18 INTENT CRIME?

19 MR. WAPNER: MAY I HAVE JUST A MOMENT?

20 THE COURT: A PERSON WILFULLY AND MALICIOUSLY DISCHARGES  
21 A FIREARM, THAT IS A SPECIFIC INTENT CRIME, ISN'T IT?

22 MR. WAPNER: NO, I THINK NOT.

23 THE COURT: TAKE A LOOK AT THE INDEX AND FIND OUT WHETHER  
24 THAT IS A SPECIFIC INTENT CRIME.

25 MR. BARENS: ON THE COKER ISSUE, I DON'T BELIEVE THERE  
26 WAS TESTIMONY THAT ESTABLISHED KNOWLEDGE ON THE PART OF  
27 THE DEFENDANT OR THE PERPETRATOR THAT THE BUILDING WAS  
28 OCCUPIED. I BELIEVE THE TESTIMONY SO FAR --

1 THE COURT: THE FACT THAT IT WAS OCCUPIED, THAT IS  
2 ENOUGH.

3 MR. BARENS: I SEE, SIR.

4 MR. WAPNER: GENERAL INTENT CRIME, WITH A COMMENT TO  
5 CALJIC 9.03.1 AND IT SAYS:

6 "A VIOLATION OF PENAL CODE SECTION  
7 246, FIRING AT AN INHABITED DWELLING IS A GENERAL  
8 INTENT CRIME"

9 AND THEN IT TALKS ABOUT DIMINISHED CAPACITY  
10 IS NOT APPLICABLE.

11 MR. CHIER: AN INHABITED DWELLING OR BUILDING?

12 MR. WAPNER: THE NOTE SAYS "DWELLING" BUT THE CRIME  
13 ITSELF IS THE SAME, IT IS A VIOLATION OF SECTION 246 AND  
14 IT IS A GENERAL INTENT CRIME.

15 THE COURT: IT IS A GENERAL INTENT CRIME, SO THAT  
16 INSTRUCTION 330:

17 "THE CRIME CHARGED INVOLVING MR. COKER,  
18 NAMELY, FIRING AT AN INHABITED BUILDING, THERE  
19 MUST EXIST A UNION OR JOINT OPERATION OF ACT OR  
20 CONDUCT AND A CERTAIN GENERAL INTENT,"

21 THAT IS ALL RIGHT.

22 MR. WAPNER: YOUR HONOR?

23 THE COURT: WHAT?  
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1 MR. WAPNER: YOUR HONOR, I THINK THAT THE GENERAL INTENT  
2 ALSO APPLIES TO THE ASSAULT ON MR. SWARTOUT --

3 THE COURT: THAT IS A SPECIFIC INTENT CRIME.

4 MR. WAPNER: I HAVE ALWAYS FELT THAT IT WAS A GENERAL  
5 INTENT CRIME. BUT I CAN --

6 THE COURT: WELL, IF IT IS GENERAL, IT MEANS COKER AND  
7 SWARTOUT --

8 MR. WAPNER: ALL I CAN TELL YOU IS THAT IT IS NOT LISTED  
9 245 IS NOT LISTED IN THE INDEX OF SPECIFIC INTENT FELONIES.

10 THE COURT: 245?

11 MR. WAPNER: RIGHT.

12 THE COURT: WHAT IS THE INSTRUCTION ON ASSAULT?

13 MR. WAPNER: 903.

14 ASSAULT WITH A DEADLY WEAPON IS A GENERAL INTENT  
15 CRIME, PEOPLE V. PARKS, 4 CAL.3D 955, CITED IN THE COMMENT  
16 TO 9.03.

17 THE COURT: ALL RIGHT. SO, WE'LL HAVE TO CHANGE THAT,  
18 THEN.

19 MR. WAPNER: RIGHT.

20 THE COURT: WHAT IS THE COMMENT AGAIN?

21 MR. WAPNER: IT IS RIGHT --

22 THE COURT: YES, IT IS 330. SO, I WILL HAVE TO CHANGE  
23 THAT INVOLVING MR. COKER AND MR. SWARTOUT. OKAY?

24 MR. CHIER: 331 --

25 THE COURT: NAMELY, COKER, FIRING AT AN INHABITED  
26 DWELLING AND WHAT ARE YOU CHARGING --

27 MR. BARENS: 245.

28 MR. WAPNER: ASSAULT BY MEANS OF FORCE LIKELY TO

1 PRODUCE GREAT BODILY INJURY.

2 MR. CHIER: WHY IS 331 BEING GIVEN IF THERE IS NO  
3 SPECIFIC INTENT REQUIRED.

4 MR. WAPNER: MURDER IS A SPECIFIC INTENT CRIME.

5 THE COURT: OKAY. LIKELY TO CAUSE GREAT BODILY INJURY?

6 MR. BARENS: INFLICT GREAT BODILY INJURY.

7 THE COURT: ALL RIGHT. THOSE ARE THE GENERAL INTENT  
8 CRIMES.

9 THE SPECIFIC INTENT CRIME ONLY INVOLVES ESLAMINIA,  
10 NAMELY, MURDER. ISN'T IT?

11 MR. WAPNER: YES. YOU ARE TALKING ABOUT THE SPECIFIC  
12 INTENT?

13 THE COURT: YES, 331.

14 MR. WAPNER: YES.

15 THE COURT: ALL RIGHT. NOW, WE COME TO THE DEFINITIONS  
16 OF THE CRIMES.

17 WE HAVE NOT EVERY PERSON WHO MALICIOUSLY AND  
18 WILLFULLY -- SPECIAL INSTRUCTION NUMBER 1. AS USED IN THESE  
19 INSTRUCTIONS, THE WORD "FIREARM" INCLUDES ANY DEVICE -- AND  
20 THAT IS ALL WE NEED ON THAT AND --

21 MR. WAPNER: I HAVE INCLUDED THE WILLFUL AND MALICIOUS  
22 INSTRUCTIONS, TOO.

23 THE COURT: WHY DON'T I PUT THOSE AT THE BEGINNING?

24 MR. WAPNER: WELL, I PUT THEM THERE BECAUSE THEY ARE  
25 PART OF THE DEFINITION OF THE CRIME.

26 THE COURT: ALL RIGHT. WILLFULLY AND MALICIOUSLY  
27 AND SO FORTH.

28 THEN THE NEXT ONE IS ASSAULT. ALL RIGHT. WE

22 -  
1 HAVE ASSAULT DEFINED.

2 MR. CHIER: IS 908 GIVEN AS REQUESTED?

3 THE COURT: WHAT?

4 MR. CHIER: 9.08? SORRY.

5 MR. WAPNER: I DON'T THINK HE GOT THERE YET.

6 THE COURT: HERE WE ARE. YEAH, 9.08, ASSAULT, PRESENT  
7 ABILITY TO COMMIT. WHY IS IT THAT 908 COMES BEFORE 900?

8 MR. WAPNER: I DON'T KNOW. I DIDN'T PUT IT THERE FOR  
9 ANY PARTICULAR REASON.

10 THE COURT: WELL, I CAN REVISE THAT.

11 MR. WAPNER: IT SHOULD PROBABLY BE 903, 900 AND THEN  
12 908.

13 THE COURT: 903 -- THIS IS NO GOOD TO ME THIS WAY.

14 MR. WAPNER: NO. I REALIZE THAT, YOUR HONOR. I THINK  
15 THAT IN THE TYPED INSTRUCTIONS THAT I GAVE YOU THIS AFTERNOON,  
16 THERE SHOULD BE AN APPROPRIATELY TYPED COPY.

17 THE COURT: ALL RIGHT. 903, 908 AND 900. IS THAT IT?

18 MR. WAPNER: RIGHT.

19 THE COURT: ALL RIGHT. NOW, 800 IS HOMICIDE AND MURDER  
20 DEFINED.

21 MR. WAPNER: IN THE 900 INSTRUCTIONS, IT STARTED OUT  
22 WITH, "THE DEFENDANT IS CHARGED IN COUNT ..." AND THEN SO  
23 ON AND SO FORTH WITH A VIOLATION OF SECTION -- THAT SHOULD  
24 ALL BE LEFT OUT PROBABLY, AS WELL AS THAT SAME LANGUAGE IN  
25 903.

26 AND THEY SHOULD JUST BE GIVEN THE DEFINITIONS  
27 OF THE CRIME.

28 THE COURT: YES. YES, I WILL REVISE IT. 800, HOMICIDE,

2-  
1 MURDER, MALICE AFORETHOUGHT. WHY IS IT NECESSARY TO HAVE  
2 SECOND DEGREE MURDER?

3 MR. WAPNER: BECAUSE THAT IS WHAT I THINK IT IS.

4 THE COURT: ESLAMINIA?

5 MR. WAPNER: YES.

6 MR. BARENS: IT IS ARGUABLE, YOUR HONOR, AND THE DEFENSE  
7 BELIEVES THE SAME WAY, THAT IT WAS A SECOND DEGREE MURDER,  
8 SIR.

9 MR. WAPNER: IT WAS DELIBERATE --

10 THE COURT: THAT IS WHAT HE IS CHARGED WITH UP NORTH?

11 MR. WAPNER: NO. HE IS CHARGED WITH MURDER. THEY DO  
12 IT THE SAME WAY THAT WE DO IT, WHICH IS JUST TO CHARGE UNDER  
13 THE GENERAL SECTION WHICH INCLUDES ALL OF THE DEGREES OF  
14 MURDER.

15 BUT IN GIVING THE INSTRUCTIONS, ALTHOUGH THERE  
16 WAS DELIBERATION AND PREMEDITATION, HE DIDN'T DIE IN THE MANNER  
17 IT WAS CONTEMPLATED THAT HE WOULD DIE.

18 SO IN ESSENCE, I HAVE PROVIDED SECOND DEGREE,  
19 IMPLIED MALICE AND FELONY MURDER INSTRUCTIONS.

20 THE COURT: ARE YOU SATISFIED WITH THAT?

21 MR. BARENS: YES, YOUR HONOR.

22 THE COURT: WHEN A NUMBER OF PERSONS CONSPIRE TOGETHER  
23 TO COMMIT A FELONY INHERENTLY DANGEROUS TO HUMAN LIFE -- NAMELY,  
24 WHAT?

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1 MR. BARENS: KIDNAPPING.

2 MR. WAPNER: KIDNAPPING.

3 THE COURT: KIDNAPPING.

4 MR. WAPNER: IN FACT, I PUT IN HERE THAT IT IS  
5 ACTUALLY KIDNAPPING FOR THE PURPOSES OF ROBBERY.

6 MR. BARENS: I THINK YOU GET TO THE SAME PLACE, MR.  
7 WAPNER, IRRESPECTIVE OF THAT.

8 DO YOU THINK WE OUGHT TO MAKE IT KNOWN THAT  
9 THAT IS NOT A DEATH PENALTY OFFENSE?

10 MR. WAPNER: NO. I THINK THAT IS COMPLETELY IRRELEVANT.

11 MR. BARENS: WELL, LET ME JUST SUBMIT FOR THE RECORD  
12 THAT I THINK IT IS RELEVANT.

13 THE COURT: ALL RIGHT, 833, FELONY, INHERENTLY DANGEROUS  
14 TO HUMAN LIFE, TO WIT, KIDNAPPING, IS THAT IT, 833?

15 MR. WAPNER: YES, I THINK THAT KIDNAPPING FOR THE PURPOSE  
16 OF ROBBERY -- HOLD ON.

17 THE COURT: NOT FOR THE PURPOSES OF ROBBERY -- YES.

18 MR. WAPNER: YOU COULD PUT IN, IF YOU WANT, I CAN PROVIDE  
19 AN INSTRUCTION ON SIMPLE KIDNAPPING.

20 THE INSTRUCTION I PROVIDED IS KIDNAPPING FOR  
21 EXTORTION, IN ESSENCE, VIOLATION OF SECTION 209.

22 THE COURT: THIS WASN'T A CASE OF SIMPLE KIDNAPPING,  
23 WAS IT?

24 MR. WAPNER: NO. IT WAS A KIDNAPPING FOR THE PURPOSE  
25 OF AN EXTORTION.

26 THE COURT: THEREFORE, IT ISN'T A SIMPLE KIDNAPPING.

27 MR. WAPNER: RIGHT. SO WHEN YOU PUT IN THAT INSTRUCTION  
28 8.33, A FELONY, INHERENTLY DANGEROUS TO HUMAN LIFE, NAMELY,

23-2

1 KIDNAPPING FOR THE PURPOSES OF EXTORTION, OR YOU CAN JUST  
2 PUT IN "VIOLATION OF SECTION 209 OF THE PENAL CODE," EITHER  
3 ONE.

4 THE COURT: THEN YOU HAVE TO DEFINE 209.

5 MR. WAPNER: WELL, THERE IS ONE IN THERE THAT DEFINES  
6 THAT BUT --

7 THE COURT: ALL RIGHT.

8 MR. CHIER: I DON'T KNOW WHAT PAGE YOU ARE ON. I AM  
9 HAVING A HARD TIME FOLLOWING YOU.

10 THE COURT: 834.

11 MR. CHIER: 834?

12 THE COURT: ALL RIGHT, 833 FIRST: CONSPIRACY TO KIDNAP,  
13 IF A NUMBER OF PERSONS CONSPIRING TOGETHER, AND SO FORTH.

14 THEN SECOND DEGREE FELONY MURDER, AIDER AND  
15 ABETTOR.

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3A-1

1 ALL RIGHT, 922 THEN DEFINES THE CRIME OF  
2 KIDNAPPING FOR EXTORTION, THAT IS 922.

3 ALL RIGHT, NOW AT THE BOTTOM OF THE PAGE OF  
4 922, "THAT A PERSON IS KIDNAPPED. AND TWO, THAT THE  
5 KIDNAPPING OF SUCH PERSON WAS DONE WITH THE SPECIFIC INTENT  
6 TO HOLD AND DETAIN SUCH OTHER PERSON FOR RANSOM AND THAT  
7 DETAINED SUCH PERSON TO COMMIT EXTORTION TO OBTAIN SOMETHING  
8 OF VALUE" -- THAT WILL BE CROSSED OUT. THAT IS 922.

9 NOW, 925, ACHIEVEMENT OF PURPOSE NOT ESSENTIAL  
10 TO KIDNAPPING.

11 ALL RIGHT, THEN YOU GO BACK TO 884, THE PENALTY  
12 TRIAL, INTRODUCTORY, AND SO FORTH, AND THE FACTORS IN  
13 CONSIDERATION. WELL, WE HAVE THAT ALREADY. WE DON'T NEED  
14 THIS, DO WE -- OH, YES, YOU DO.

15 HAVEN'T YOU GOT THE PRINTED ONE?

16 MR. WAPNER: YES. THEY SHOULD BE IN THE ONES THAT  
17 I GAVE YOU THIS AFTERNOON THAT ARE TYPED UP.

18 THE COURT: ALL RIGHT, THEN I WILL SUBSTITUTE THEM.

19 WHAT IS THIS SPECIAL YOU HAVE?

20 MR. BARENS: I BELIEVE YOUR HONOR MIGHT BE LOOKING  
21 AT A HANDWRITTEN VERSION OF SOMETHING MR. WAPNER HAS HAD  
22 TYPED.

23 MR. WAPNER: I DID PROVIDE THAT IN THE TYPED FORM.

24 THE COURT: WE DON'T NEED THIS THEN, DO WE?

25 MR. WAPNER: THE HANDWRITTEN VERSION, WE DON'T NEED,  
26 NO.

27 THE REASON I PROVIDED THESE OTHER SPECIAL  
28 INSTRUCTIONS WAS BECAUSE I THOUGHT THAT WE SHOULD ARRANGE

1 THESE INSTRUCTIONS IN SOME ORDER SO THAT IT IS CLEAR, THERE  
2 IS A CLEAR DISTINCTION BETWEEN WHAT THEY ARE CONSIDERING  
3 BEYOND A REASONABLE DOUBT AND WHICH INSTRUCTIONS THEY ARE  
4 USING TO MAKE A DETERMINATION AS TO THE TRUTH OR FALSITY  
5 OF THE COMMISSION OF THESE OTHER CRIMES AND THE INSTRUCTIONS  
6 THAT THEY USE TO DETERMINE THE PENALTY BECAUSE, OTHERWISE,  
7 THERE IS LIKELY TO BE A BIG CONFUSION.

8 THE COURT: I DON'T UNDERSTAND.

9 MR. WAPNER: WE ARE INSTRUCTING THEM ON TWO DIFFERENT  
10 STANDARDS. ONE IS THIS CONCLUDING INSTRUCTION, WHICH IS  
11 8.84.2 AND IT SAYS:

12 "IN WEIGHING THE VARIOUS CIRCUM-  
13 STANCES, YOU SIMPLY DETERMINE UNDER THE RELEVANT  
14 EVIDENCE WHICH PENALTY IS JUSTIFIED AND  
15 APPROPRIATE BY CONSIDERING THE TOTALITY OF THE  
16 AGGRAVATING CIRCUMSTANCES WITH THE TOTALITY OF  
17 THE MITIGATING CIRCUMSTANCES.

18 "TO RETURN A JUDGMENT OF DEATH,  
19 EACH ONE OF YOU MUST BE PERSUADED THAT THE  
20 AGGRAVATING EVIDENCE (CIRCUMSTANCES) IS (ARE)  
21 SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING  
22 CIRCUMSTANCES THAT IT WARRANTS DEATH INSTEAD OF  
23 LIFE WITHOUT PAROLE.

24 THE COURT: WHICH NUMBER IS THAT?

25 MR. WAPNER: THAT IS 8.84.2.

26 THE COURT: YES.

27 MR. WAPNER: BUT I WANT TO MAKE SURE THAT THEY DON'T  
28 CONFUSE THAT WITH SOME REASONABLE DOUBT REQUIREMENT, BECAUSE



1 THERE IS NO REQUIREMENT THAT THEY FIND BEYOND A REASONABLE  
2 DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE  
3 MITIGATING CIRCUMSTANCES.

4 THE COURT: THAT IS CORRECT. ALL IT HAS TO DO IS  
5 SUBSTANTIALLY OUTWEIGH THE MITIGATING CIRCUMSTANCES.

6 MR. WAPNER: RIGHT. BUT SINCE WE HAVE HAD OTHER  
7 CRIMES AND SINCE THE COURT IS GIVING THEM INSTRUCTIONS ON  
8 BEYOND A REASONABLE DOUBT, I DON'T WANT TO GET THEM CONFUSED  
9 AND I DON'T WANT THE JURY TO BE CONFUSED.

10 THE COURT: I THINK GIVING IT YOUR WAY IS GOING TO  
11 CONFUSE THEM.

12 YOU SAID : "THE FOLLOWING SECTIONS APPLY ONLY  
13 TO YOUR DETERMINATION AS TO WHETHER OR NOT THE DEFENDANT  
14 COMMITTED THE THREE CRIMES ALLEGED AS AGGRAVATING CIRCUMSTANCES.  
15 YOU CONSIDER THEM ONLY FOR THAT PURPOSE."

16 WHAT DOES THAT MEAN?  
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1 MR. WAPNER: WHAT I AM TRYING TO DO BY THAT IS TO  
2 SEGREGATE OUT A GROUP OF INSTRUCTIONS THAT ARE ONLY GOING  
3 TO APPLY TO THEIR DETERMINATION AS TO WHETHER THE OTHER CRIMES  
4 HAVE BEEN COMMITTED.

5 THE COURT: WHY DO YOU HAVE TO DO THAT?

6 MR. WAPNER: SORRY?

7 THE COURT: WHY DO YOU HAVE TO DO THAT?

8 MR. WAPNER: IN THE HOPES OF AVOIDING THE CONFUSION  
9 BETWEEN THE REASONABLE DOUBT STANDARD VERSUS AGGRAVATING  
10 CIRCUMSTANCES OUTWEIGHING MITIGATING CIRCUMSTANCES.

11 THE COURT: SINCE I HAVE IT TYPED NOW, I DON'T NEED  
12 THESE TWO, DO I?

13 MR. WAPNER: RIGHT.

14 THE COURT: 848.2. WE DON'T NEED THESE, EITHER.  
15 I THOUGHT WE HAD 903. DIDN'T WE ALREADY HAVE THAT?

16 NOW WE HAVE 903.

17 MR. WAPNER: I THINK THAT THIS IS A CONCURRING AND  
18 DISSENTING OPINION. BUT THIS PORTION YOU ARE CITING ME TO  
19 IS A DISSENT.

20 THAT COMMENT TO COUNSEL WAS REFERRING TO THE  
21 FRIERSON CASE.

22 THE COURT REPORTER: HOW DO YOU SPELL THAT?

23 MR. WAPNER: F-R-I-E-R-S-O-N.

24 THE COURT: THE FRIERSON CASE?

25 MR. WAPNER: WELL, MR. CHIER CITED ME TO THIS FIERSON  
26 CASE FOR THE PROPOSITION THAT THE JURY MUST AGREE UNANIMOUSLY  
27 BEYOND A REASONABLE DOUBT AS TO THE FACTORS IN AGGRAVATION  
28 AND FACTORS IN MITIGATION.

4A 1 BUT I HAVE NOT READ THE ENTIRE CASE -- BUT THE  
2 PORTION THAT HE CITED ME TO WAS A PORTION OF A CONCURRING  
3 AND DISSENTING OPINION BY JUSTICE BIRD THAT AMOUNTED TO A  
4 DISSENT.

5 THE COURT: WELL, LET'S THROW THAT OUT. I AM NOT  
6 CONCERNED WITH BIRD, PARTICULARLY IF IT IS A CONCURRING  
7 OPINION.

8 MR. WAPNER: WELL, IT WAS CONCURRING AND A DISSENTING  
9 OPINION BUT THE PORTION HE CITED ME TO WAS THE DISSENTING  
10 PORTION OF THE OPINION.

11 THE COURT: THEN WE DON'T WANT THAT, DO WE?

12 MR. WAPNER: SO IF THEY ARE CITING THAT TO ME AS THE  
13 LAW, I DON'T THINK IT IS.

14 THE COURT: IT WILL TAKE A LONG TIME BEFORE THAT POISON  
15 WEARS OUT OF OUR JUDICIAL SYSTEM.

16 MR. CHIER: THIS IS BEING CITED FOR THE PROPOSITION  
17 THAT THEY ALL HAVE TO AGREE TO WHATEVER STANDARDS --

18 THE COURT: DISSENTING OPINIONS ARE NEVER AUTHORITY.

19 MR. WAPNER: IT IS A CONCURRING AND DISSENTING.

20 THE COURT: THEN IT IS NEVER AUTHORITY. THE LEAD OPINION  
21 IS THE THING THAT COUNTS.

22 MR. WAPNER: WELL, IT WAS ALSO THE PORTION OF THE OPINION  
23 THAT WAS THE DISSENTING PORTION OF THE OPINION.

24 MR. BARENS: I WOULD FEEL REMISS IF I DIDN'T SPEAK A  
25 WORD OF PRAISE FOR JUSTICE BIRD, WHO I THINK YOUR HONOR, DID  
26 A LOT OF GOOD FOR OUR STATE. YOUR HONOR --

27 THE COURT: SHE CERTAINLY DID.

28 MR. CHIER: ALL THE JURORS HAVE TO AGREE BEFORE -- THAT

4^

1 THE DEFENDANT DID OR DID NOT -- OR DID COMMIT THIS ALLEGED  
2 FACTOR IN AGGRAVATION BEFORE THEY CAN CONSIDER THAT AS AN  
3 AGGRAVATING FACTOR.

4 MR. WAPNER: WHAT IS THE AUTHORITY FOR THAT?

5 MR. CHIER: OTHERWISE WE HAVE CHAOS. I DON'T THINK --  
6 I MEAN, THE AUTHORITY IS LOGIC 1A.

7 YOU HAVE CHAOS IF THEY ARE ALL IN ROUTE STEP. (SIC)

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1 THE COURT: DO YOU AGREE THAT THEY MUST ALL UNANIMOUSLY  
2 AGREE THAT THE AGGRAVATING CIRCUMSTANCES SUBSTANTIALLY  
3 OUTWEIGH THE MITIGATING CIRCUMSTANCES? IS THAT RIGHT?

4 MR. WAPNER: RIGHT.

5 THE COURT: THAT IS ALL THEY HAVE TO UNANIMOUSLY AGREE  
6 ON?

7 MR. WAPNER: BUT I DON'T THINK THEY HAVE TO UNANIMOUSLY  
8 AGREE OVER WHICH ARE AGGRAVATING OR WHICH ARE MITIGATING.

9 THE COURT: NO. EACH IN THEIR OWN MIND, MAKES UP WHAT  
10 IS AGGRAVATING AND WHAT IS MITIGATING.

11 IF ONE JUROR REACHES A CONCLUSION THAT THE  
12 AGGRAVATING OUTWEIGHS THE MITIGATING AND IT MAY NOT BE THE  
13 SAME AS THE CONCLUSION REACHED BY ANOTHER JUROR.

14 THE ULTIMATE THING IS, HAVE THEY UNANIMOUSLY  
15 AGREED THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE  
16 MITIGATING CIRCUMSTANCES?

17 ALL RIGHT, NOW, LET ME SEE --

18 MR. BARENS: YOUR HONOR MADE REFERENCE TO ALL OF THE  
19 FIRST PAGE OF THE DEFENDANT'S AND ON THE SECOND PAGE YOUR  
20 HONOR, WE HAD --

21 THE COURT: EVIDENCE OF ASSOCIATION ALONE DOES NOT PROVE  
22 MEMBERSHIP IN A CONSPIRACY?

23 MR. BARENS: YOUR HONOR --

24 THE COURT: LET ME SEE WHAT THIS WOULD BE FROM. 613,  
25 HUH?

26 EVIDENCE THAT A PERSON WAS IN THE COMPANY OF OR  
27 ASSOCIATED WITH ONE OR MORE OF THE PERSONS ALLEGED OR PROVED  
28 TO HAVE BEEN MEMBERS OF A CONSPIRACY IS NOT IN ITSELF,

1 SUFFICIENT TO PROVE SUCH PERSON WAS A MEMBER OF AN ALLEGED  
2 CONSPIRACY.

3 WITH REFERENCE TO THIS CASE, WHAT DOES THAT MEAN?  
4 THAT THE DEFENDANT WAS MERELY IN THE COMPANY OF THOSE WHO  
5 PERPETRATED THE ALLEGED OFFENSE? I DON'T UNDERSTAND THAT.

6 HOW IS THAT REFERENCED TO THIS PARTICULAR CASE?

7 MR. WAPNER: THEY WANT TO ARGUE THAT IF HE WAS AT THE  
8 HOTEL OR THE APARTMENT BUILDING OR THE TRUCK RENTAL PLACE --

9 THE COURT: THOSE ARE CIRCUMSTANCES TO BE TAKEN INTO  
10 CONSIDERATION.

11 MR. WAPNER: WELL, I AGREE. BUT I ASSUME THAT THAT  
12 IS THE POINT OF IT ALL.

13 MR. BARENS: THE INSTRUCTION IS REQUESTED AND THE MATTER  
14 IS SUBMITTED.

15 MR. WAPNER: IT SEEMS TO ME TO BE TOTALLY OUT OF CONTEXT.  
16 IT IS A PART OF A WHOLE GROUP OF INSTRUCTIONS, CONSPIRACY  
17 INSTRUCTIONS FOR WHEN THERE IS A CONSPIRACY CHARGED AND THERE  
18 IS NO CONSPIRACY CHARGED.

19 THE COURT: IT IS LIKE NOT PARTICIPATING, JUST MERE  
20 PRESENCE AT THE SCENE OF A CRIME DOESN'T MEAN THAT THEY ARE  
21 GUILTY OF THE CRIME?

22 MR. WAPNER: RIGHT.

23 THE COURT: HAVE YOU ANY OBJECTION TO IT?  
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1 MR. WAPNER: I GUESS IT IS HARMLESS BASICALLY.

2 THE COURT: ALL RIGHT, THEN THERE IS NO HARM IN GIVING  
3 IT, IS IT?

4 MR. WAPNER: OKAY.

5 THE COURT: MAKE A NOTE TO GIVE IT, 833:

6 NEXT WE HAVE 884.1. THAT COMPLETES IT.

7 NOW THE SPECIAL INSTRUCTIONS.

8 MR. BARENS: YOUR HONOR, WE ARE GOING TO RESERVE TO  
9 SUBMIT TO YOUR HONOR POSSIBLY A COUPLE OF ADDITIONAL SPECIAL  
10 INSTRUCTIONS TOMORROW, SIR.

11 THE COURT: THAT IS ALL RIGHT.

12 NOW SPECIAL INSTRUCTION NUMBER 1, HAVE YOU  
13 GOT THAT, FRED?

14 MR. WAPNER: YES.

15 I WAS JUST TRYING TO MAKE A NOTE.

16 THE COURT: "YOU MAY NOT FIND THAT THERE  
17 WAS A CORPUS DELICTI UNLESS THERE IS  
18 SOME PROOF OF EACH ELEMENT OF THIS ALLEGED  
19 ASSAULT INDEPENDENT OF ANY ADMISSION ALLEGEDLY  
20 MADE BY JOE HUNT OUTSIDE OF THIS TRIAL."

21 WHAT KIND OF AN ADMISSION DID HE MAKE OUTSIDE  
22 OF THE TRIAL? IT WAS IN THE TRIAL THAT THE ADMISSION CAME  
23 IN THROUGH ANOTHER WITNESS, DIDN'T IT?

24 MR. BARENS: WE ARE TALKING ABOUT SIR, A NON-HEARSAY  
25 ADMISSION.

26 MR. CHIER: NO.

27 IT WAS A HEARSAY ADMISSION.

28 MR. BARENS: I MEAN A HEARSAY ADMISSION IS ALL WE HAVE

25-2

1 GOT.

2 THE COURT: DID YOU READ IT?

3 MR. WAPNER: I AM READING IT. I THINK WE HAVE OTHER  
4 INSTRUCTIONS, THERE IS ANOTHER INSTRUCTION THAT WE ARE  
5 ALREADY GIVING, A CALJIC INSTRUCTION THAT SAYS THAT EACH  
6 ELEMENT OF THE OFFENSE MUST BE PROVED INDEPENDENT OF ANY  
7 ADMISSION OR CONFESSION AND I THINK THAT COVERS THE SITUATION.

8 ALSO, THERE IS ANOTHER INSTRUCTION ON MOTIVE  
9 AND A CALJIC INSTRUCTION ON MOTIVE THAT IS CONTRARY, I THINK,  
10 TO THIS INSTRUCTION.

11 THE COURT: WHAT IS THE SOURCE OF THE SPECIAL  
12 INSTRUCTION NUMBER 1, WHAT CITATION DO YOU HAVE FOR IT?

13 MR. CHIER: THIS IS THE MOST RECENT MODIFICATION OF CALJIC  
14 THE CORPUS DELICTI INSTRUCTION, YOUR HONOR.

15 THE COURT: WHAT SECTION IS THAT?

16 MR. CHIER: 2.72.

17 THE COURT: WHAT DO WE NEED A SPECIAL INSTRUCTION FOR,  
18 IF IT IS COVERED BY 2.72?

19 MR. CHIER: WE ARE ENTITLED TO A SPECIFIC INSTRUCTION.

20 THE COURT: NO, YOU ARE NOT, NOT NECESSARILY. IF YOU  
21 HAVE ANOTHER INSTRUCTION, WHAT DO YOU NEED IT FOR?

22 MR. CHIER: SEARS AND GRENADOS --

23 THE COURT: WE HAVE 2.72, WE ARE GIVING THAT?

24 MR. WAPNER: YES.

25 MR. CHIER: SEARS AND GRENADOS SAYS WE ARE ENTITLED  
26 TO THE SPECIFIC INTENT INSTRUCTION.

27 THE COURT: I AM NOT GOING TO GIVE IT.

28 MR. CHIER: OKAY. I AM ABIDING BY YOUR HONOR'S DECISION



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1 BUT I AM NOT AGREEING WITH YOUR HONOR.

2 THE COURT: I DON'T UNDERSTAND. THIS SPECIAL INSTRUCTION  
3 SAYS "IN THIS CASE THE DEFENDANT HAS FAILED TO --"

4 MR. CHIER: THE INSTRUCTION WE WANTED THE COURT TO  
5 GIVE IF THE DEFENDANT -- THIS IS THE INSTRUCTION WE WANTED  
6 THE COURT TO GIVE AND THE COURT SAID IT WOULD NOT GIVE IT,  
7 IN THE EVENT HE FAILED TO TESTIFY.

8 THE COURT: SHOVE IT. HOW CAN I GIVE AN INSTRUCTION  
9 OF THAT KIND WHERE IT SAYS THAT HE HAS TESTIFIED, HOW CAN  
10 I?

11 MR. CHIER: I DIDN'T ASK YOU TO GIVE IT.

12 THE COURT: THAT IS WHAT YOU ARE GIVING IT TO ME FOR  
13 AS A REQUESTED INSTRUCTION.

14 MR. CHIER: I THINK THERE SHOULD BE AN INSTRUCTION  
15 IN THE RECORD THAT --

16 THE COURT: OH, BULL.

17 MR. BARENS: LET ME TRY TO MAKE SURE I KNOW WHERE WE  
18 ARE. I THINK WHAT THE DEFENSE IS CONTENDING --

19 THE COURT: I DON'T WANT ANY TRICKY LITTLE BUSINESSES,  
20 YOU KNOW, FOR THE PURPOSE OF MAKING A RECORD. WHAT IS IT  
21 YOU ARE SAYING I SHOULD DO THAT I HAVEN'T DONE?

22 MR. BARENS: SIR, I AM NOT TRYING TO DO ANYTHING TRICKY  
23 HERE.

24 THE COURT: ALL RIGHT, GO AHEAD. LET ME KNOW WHAT  
25 IT IS YOU WANT.

26 MR. BARENS: I DON'T KNOW ENOUGH ABOUT WHAT I AM DOING  
27 TO GET TRICKY IN THIS AREA.

28 THE COURT: WE HAD DISCUSSED THE POSSIBILITY OF THE

25A

1 DEFENDANT TAKING THE STAND, HADN'T WE?

2 MR. BARENS: YES, SIR.

3 THE COURT: AT THAT TIME, I INDICATED TO YOU THAT INSTRUC-  
4 TION 2.62 MIGHT BE INDICATED.

5 MR. BARENS: YES, SIR.

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1 THE COURT: WHERE HE ONLY TESTIFIED AS TO SWARTOUT  
2 AND TESTIFIED AS TO THE COKER MATTERS.

3 MR. BARENS: YES, SIR.

4 THE COURT: HE WASN'T GOING TO TESTIFY TO ANYTHING WITH  
5 RESPECT TO ESLAMINIA.

6 MR. BARENS: YES, SIR.

7 THE COURT: ALL RIGHT, AND THEN WE HAD A LONG DISCUSSION  
8 AND FINALLY COUNSEL SAID TO ME HE DIDN'T THINK THAT THAT  
9 INSTRUCTION SHOULD BE GIVEN, 2.62 AND THEN I SAID AT THAT  
10 TIME I WOULDN'T GIVE THE INSTRUCTION, IF YOU GO AHEAD AND  
11 TAKE THE STAND AND HAVE HIM TESTIFY ON THE TWO MATTERS ALONE  
12 AND NOT THE THIRD; IS THAT RIGHT?

13 MR. BARENS: YES, SIR.

14 THE COURT: HE ELECTED NOT TO TESTIFY AT ALL.

15 MR. BARENS: YES, SIR.

16 THE COURT: ALL RIGHT, NOW WHAT IS IT YOU WANT ME TO  
17 GIVE THAT INSTRUCTION FOR?

18 MR. CHIER: THEN WE ASKED IF YOUR HONOR WOULD GIVE  
19 AN INSTRUCTION BASED UPON THE CASE LAW THAT WE THOUGHT WAS  
20 APPLICABLE IN THIS CASE.

21 THE COURT: YOU WANT TO HAVE HIM TAKE THE STAND, IS  
22 THAT WHAT YOU WANT HIM TO DO?

23 MR. CHIER: IF YOUR HONOR WOULD GIVE THIS INSTRUCTION,  
24 YES.

25 THE COURT: I WILL NOT GIVE THAT INSTRUCTION BECAUSE  
26 IT IS NOT APPLICABLE.

27 MR. CHIER: I THINK THE RECORD SHOULD CONTAIN THIS  
28 INSTRUCTION THAT WE REQUESTED, YOUR HONOR.

1 THE COURT: I AM NOT GOING TO MAKE IT PART OF THE RECORD  
2 BECAUSE IT IS INAPPLICABLE.

3 I TOLD YOU PRECISELY WHAT IT IS THAT I WILL  
4 DO. IF HE WANTED TO TESTIFY AS TO THE COKER AND SWARTOUT  
5 MATTERS, HE IS ENTITLED TO DO THAT.

6 MR. CHIER: YOUR HONOR, THERE IS A DIFFERENCE BETWEEN --

7 THE COURT: I SAID I WILL NOT GIVE 2.62.

8 MR. CHIER: THERE IS A DIFFERENCE BETWEEN GIVING THE  
9 INSTRUCTION AND MAKING IT PART OF THE RECORD.

10 THE COURT: THAT IS MAYBE PART OF YOUR TRICKY WAYS  
11 OF TRYING TO GET A REVERSAL IN THIS CASE AND I AM NOT GOING  
12 TO STAND FOR IT. COME ON, LET'S GET ON.

13 MR. BARENS: YOUR HONOR --

14 MR. WAPNER: YOUR HONOR, ON THIS POINT --

15 THE COURT: WHY DO YOU PUT IN THIS SPECIAL INSTRUCTION,  
16 HOW CAN I GIVE THIS INSTRUCTION NOW?

17 MR. CHIER: YOUR HONOR, I AM NOT ASKING THAT YOU GIVE  
18 IT.

19 THE COURT: THAT IS WHAT YOU ARE ASKING. YOU CAN LOOK  
20 AT IT, IT SAYS CATEGORICALLY "COURT SPECIAL INSTRUCTION  
21 NUMBER 2."

22 MR. CHIER: IF YOU WILL PLEASE LISTEN TO ME, I WILL  
23 EXPLAIN TO YOU.

24 I AM SAYING THAT IF THE DEFENDANT WISHED TO  
25 TESTIFY, IF YOU WILL GIVE THIS INSTRUCTION, WHICH WE  
26 DISCUSSED --

27 THE COURT: I NEVER SAW THE INSTRUCTION. YOU NEVER  
28 GAVE IT TO ME.

1 MR. CHIER: I AM SUBMITTING IT NOW, YOUR HONOR.

2 THE COURT: NOT AT THIS STAGE. HE HAS RESTED AND  
3 THAT IS THE END OF IT. IT IS ACADEMIC.

4 MR. CHIER: I DID NOT HAVE THE OPPORTUNITY TO SUBMIT  
5 THIS BEFORE NOW.

6 THE COURT: IT WAS NEVER SUBMITTED TO ME BEFORE YOU  
7 MADE UP YOUR MIND TO REST.

8 ALL RIGHT, THAT IS SPECIAL INSTRUCTION NUMBER  
9 3.

10 MR. WAPNER: YOUR HONOR, WHILE WE ARE ON THIS SUBJECT  
11 AND WE ARE ON THE RECORD, THE COURT DURING THE GUILT PHASE  
12 TOOK A WAIVER FROM THE DEFENDANT, A PERSONAL WAIVER FROM  
13 THE DEFENDANT ON HIS RIGHT TO TESTIFY, INDICATING THAT HE  
14 HAD A RIGHT, IF HE SO DESIRED, TO TESTIFY AND WAS IT HIS  
15 ELECTION NOT TO?

16 AND I WONDER IF THAT SAME WAIVER MIGHT BE  
17 APPROPRIATE IN THE PENALTY PHASE OF THE PROCEEDINGS.

18 THE COURT: WELL, IT WAS A WAIVER TO TESTIFY, HE WAIVES  
19 EVERY RIGHT TO TESTIFY AND UNLESS -- UNLESS HE CHANGES HIS  
20 MIND.

21 MR. WAPNER: I AM NOT SURE.

22 THE COURT: YOU MEAN YOU WANT TO HAVE ANOTHER PERSONAL  
23 WAIVER?

24 MR. WAPNER: I AM JUST THINKING --

25 THE COURT: I DON'T THINK IT IS NECESSARY.

26 MR. BARENS: NUMBER 3, YOUR HONOR --

27 THE COURT: YES?

28 MR. BARENS: MAY WE HAVE NUMBER 3, SIR?

29 THE COURT: HAVEN'T WE GOT THAT GENERAL INSTRUCTION?

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1 MR. WAPNER: IT IS INCLUDED IN THE GENERAL INSTRUCTIONS  
2 ALSO.

3 THE COURT: IT IS 8.41 THAT HAS ALL OF THIS, DOESN'T  
4 IT?

5 MR. BARENS: YOUR HONOR, IF I MIGHT JUST ADDRESS IT.

6 YOUR HONOR IN SUBMITTING THIS MATTEER TO THE COURT,  
7 THE DEFENSE POSITION IS THAT THE DEFENSE IS ENTITLED TO A  
8 THEORY OF THE DEFENSE -- A SPECIAL INSTRUCTION AS TO THE THEORY  
9 OF THE DEFENSE IN THE PENALTY PHASE, WHICH IS SUMMARIZED IN  
10 SPECIAL INSTRUCTION NUMBER 3, WHICH IT IS THE DEFENSE  
11 REQUEST BE GIVEN AS A SEPARATE INSTRUCTION.

12 THE COURT: ALL RIGHT. NOW 2A IS THE AGE AT THE TIME  
13 OF THE ALLEGED OFFENSE. THAT IS CONTAINED IN 8.841 AND AS  
14 FOLLOWS, SUBDIVISION 1, THE AGE OF THE DEFENDANT AT THE TIME  
15 OF THE CRIME, HIS CHARACTER, BACKGROUND, HISTORY AND LACK  
16 OF PRIOR CRIMINAL RECORD.

17 THAT IS CONTAINED IN C, PRESENCE OR ABSENCE OF  
18 ANY PRIOR FELONY CONVICTION. THE ONLY THING I DON'T SEE IN  
19 8841 IS HIS CHARACTER AND BACKGROUND AND HISTORY.

20 MR. WAPNER: LOOK AT K.

21 THE COURT: WHAT? K?

22 MR. WAPNER: ANY OTHER CIRCUMSTANCES WHICH EXTENUATES  
23 THE GRAVITY OF THE CRIME.

24 THE COURT: YES. BUT THEY WANT THE SPECIFIC REFERENCE  
25 TO HIS CHARACTER, BACKGROUND AND HISTORY. AS A MATTER OF  
26 FACT, THE STATUTE SPECIALLY PROVIDES, DOESN'T IT, THAT IN  
27 CONSIDERING THE FACTORS, CHARACTER, BACKGROUND AND HISTORY --  
28 IT IS EXPRESSLY MENTIONED.

5-  
1 I DON'T KNOW WHY THEY DIDN'T -- THE BAJI COMMITTEE  
2 DIDN'T INCLUDE THAT ONE. ALL RIGHT. I WILL INCLUDE THE  
3 FOLLOWING LANGUAGE:

4 "HIS BACKGROUND, INCLUDING BUT NOT  
5 LIMITED TO HIS CHARACTER, BACKGROUND, HISTORY AND  
6 LACK OF PRIOR CRIMINAL RECORD."

7 WELL, THAT IS ALREADY AN INSTRUCTION. IT IS  
8 INCLUDING HIS CHARACTER AND BACKGROUND AND HISTORY.

9 MR. BARENS: WHAT ABOUT NUMBER 1 OF THIS INSTRUCTION,  
10 SIR?

11 THE COURT: THAT FACTOR TO BE CONSIDERED?

12 MR. BARENS: THE POTENTIAL --

13 THE COURT: THE LAW DOESN'T SAY SO, DOES IT?

14 MR. BARENS: SIR, WE ARE ASKING FOR THAT SPECIAL  
15 INSTRUCTION BASED ON THE DEFENSE THEORY OF THE CASE, AS WE  
16 UNDERSTAND --

17 THE COURT: WELL, WHAT AUTHORITY IS THERE THAT THIS  
18 SHOULD BE A FACTOR TO BE CONSIDERED?

19 MR. CHIER: 8.41.

20 THE COURT: WHAT DO WE NEED THAT FOR?

21 MR. BARENS: WE ARE TRYING TO ARTICULATE THE DEFENSE  
22 THEORY, MEANING 8.8.41 SUB K.

6B -  
1 MR. WAPNER: WHAT DOES HIS POTENTIAL FOR REHABILITATION  
2 HAVE TO DO WITH A CASE THAT INVOLVES THE SENTENCE OF EITHER  
3 LIFE WITHOUT POSSIBILITY OF PAROLE OR DEATH?

4 MR. CHIER: WELL, IF YOU ARE GOING TO SAVE HIS LIFE --

5 THE COURT: IS THERE ANY CASE THAT YOU HAVE WHICH SAYS  
6 THAT THIS INSTRUCTION MUST BE GIVEN IN THE PENALTY PHASE?

7 MR. CHIER: I CAN'T RECALL ONE AT THIS TIME, YOUR HONOR.

8 THE COURT: WELL THEN, YOU HAVE NOT GOT ANY, THEN.

9 MR. CHIER: I HAVE NOT HAD TIME TO DO ANYTHING, YOUR  
10 HONOR, AND --

11 THE COURT: WELL, I TELL YOU THAT YOU COULD HAVE HAD  
12 A LOT MORE TIME IF YOU HAD NOT MADE THE MOTION THAT YOU DID  
13 ABOUT THE -- THE TIME THAT YOU SPENT MAKING THE MOTION TO  
14 CONTINUE IN THIS PARTICULAR MATTER, SO THAT YOU COULD HAVE  
15 MORE TIME TO DO IT.

16 IF YOU SPENT THE TIME DRAFTING THOSE INSTRUCTIONS  
17 INSTEAD OF DRAFTING THAT MOTION, YOU WOULD HAVE HAD PLENTY  
18 OF TIME.

19 MR. CHIER: IT TOOK EIGHT MINUTES, JUDGE.

20 THE COURT: I DON'T CARE.

21 MR. BARENS: JUST SO I UNDERSTAND IT NOW -- BECAUSE  
22 THE MATTER IS SUBMITTED TO THE COURT, YOUR HONOR IS DISPOSED  
23 ON SPECIAL INSTRUCTION 3, AS SUBMITTED, TO GIVE SOLELY THE  
24 REFERENCE TO SECTION 2B BY WAY OF SAYING --

25 THE COURT: 2A ALREADY HAS BEEN GIVEN.

26 MR. BARENS: YOUR HONOR, THE DEFENSE HAS A PARTICULAR  
27 CONTEXTUAL SETTING IN MIND FOR THE INSTRUCTION WHICH IS  
28 IMPORTANT TO THE DEFENSE AS THE LANGUAGE, PER SE. HOWEVER --



1 THE COURT: WHAT IS IT YOU WANT ME TO PUT IN? I TOLD  
2 YOU THAT I WOULD SAY THAT YOU MAY CONSIDER AS MITIGATING  
3 CIRCUMSTANCES THE DEFENDANT'S CHARACTER, BACKGROUND, HISTORY  
4 AND LACK OF PRIOR CRIMINAL RECORD. THAT LACK OF PRIOR  
5 CRIMINAL RECORD HAS ALREADY BEEN GIVEN IN THE INSTRUCTION  
6 AND --

7 MR. BARENS: I SEE, SIR.

8 THE COURT: ALL RIGHT.

9 MR. CHIER: MEANING YOU UNDERSTAND?

10 MR. BARENS: YES. YOUR HONOR, NUMBER 4, BEFORE I  
11 COMMENT, SIR, I WOULD LIKE TO ADVISE THE COURT THAT -- ARE  
12 YOU LOOKING AT NUMBER 4, SIR?

13 THE COURT: NO. I JUST WANTED TO MAKE THE CHANGES.  
14 4?

15 MR. BARENS: YES, SIR. NUMBER 4, THE SECOND SENTENCE  
16 OF THAT IS WITHDRAWN BY THE DEFENSE.

17 MR. CHIER: WAIT A MINUTE. WHAT? IT IS NOT 4. IT  
18 IS 5.

19 MR. BARENS: I AM SORRY. I AM A NUMBER AHEAD OF MYSELF.

20 SIR, MY COMMENT IS FOR NUMBER 5. NUMBER 4 IS  
21 SUBMITTED.

22 THE COURT: WHAT IS THE AUTHORITY THERE FOR THAT  
23 INSTRUCTION?

24 MR. CHIER: I THINK IT IS THE LAW, JUDGE.

25 THE COURT: WHAT AUTHORITY HAVE YOU GOT FOR IT?

26 MR. CHIER: I DON'T HAVE ANY AUTHORITY.

27 THE COURT: THAT WILL BE REFUSED.

28 MR. BARENS: SIR, AS TO NUMBER 5, THE DEFENSE IS

5R  
1 WITHDRAWING THE SENTENCE OF NUMBER 5 AND REQUESTS ONLY THE  
2 FIRST SENTENCE.

3 THE COURT: WHAT YOU ARE ASKING TO BE DELETED IS, "ANY  
4 AGGRAVATING CIRCUMSTANCES MAY OUTWEIGH ALL OF THE MITIGATING  
5 CIRCUMSTANCES," IS THAT IT?

6 MR. BARENS: YES. WE ARE ASKING FOR SOLELY THE FIRST  
7 SENTENCE.

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27 ' 1 THE COURT: I DON'T UNDERSTAND IT. WHAT IS THE PURPOSE  
2 OF THAT PARTICULAR INSTRUCTION?

3 MR. BARENS: BECAUSE IT IS MY CATEGORICAL UNDERSTANDING  
4 OF THE LAW, SIR, THAT A SINGLE MITIGATING CIRCUMSTANCE, A  
5 JUROR MAY CONSIDER TO OUTWEIGH ALL OF THE AGGRAVATING  
6 FACTORS, EVEN THOUGH THEY MIGHT NOT NUMERICALLY BE IN GREATER  
7 NUMBER.

8 THE COURT: WHAT IS THE AUTHORITY FOR THAT?

9 MR. BARENS: SIR, I AM POSITIVE THAT IS THE EXISTENT  
10 STATE OF THE LAW, SIR.

11 IT IS NOT AN ARITHMETIC STANDARD FOR THE JURY.

12 MR. WARNER: I DON'T KNOW. I WISH I COULD SEE CASES  
13 THAT SAY THAT BUT TO GIVE THAT INSTRUCTION, ALONG WITH 8.84.2  
14 IS GOING TO BE VERY CONFUSING TO THE JURY.

15 THE COURT: ALL RIGHT, IT SAYS THAT "WEIGHING THE  
16 AGGRAVATING AND MITIGATING CIRCUMSTANCES DOES NOT MEAN A MERE  
17 MECHANICAL POINTING ON EACH SIDE OF AN IMAGINARY SCALE OR  
18 THE ARBITRARY ASSIGNMENT OF WEIGHTS TO ANY OF THEM. YOU ARE  
19 FREE TO ASSIGN WHATEVER MORAL OR SYMPATHETIC VALUE YOU DEEM  
20 APPROPRIATE TO GIVE TO EACH OF ALL OF THE VARIOUS FACTORS  
21 YOU ARE TO CONSIDER IN WEIGHING THE VARIOUS CIRCUMSTANCES,  
22 YOU SIMPLY DETERMINE UNDER THE RELEVANT EVIDENCE WHICH  
23 PENALTY IS JUSTIFIED AND THEN BY CONSIDERING THE TOTALITY  
24 OF THE CIRCUMSTANCES WITH THE TOTALITY OF THE MITIGATING  
25 CIRCUMSTANCES. TO RETURN A JUDGMENT OF DEATH, EACH OF YOU  
26 MUST BE PERSUADED THAT THE AGGRAVATING EVIDENCE, CIRCUMSTANCES  
27 IS OR ARE SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING  
28 CIRCUMSTANCES THAT IT WARRANTS DEATH INSTEAD OF LIFE WITHOUT

1 PAROLE."

2 "IN THIS CASE, IF YOU CANNOT AGREE UPON THE PENALTY  
3 INFLICTED ON" -- WE DON'T NEED THAT ONE, DO WE? THAT WILL  
4 HAVE TO COME OUT. WE DON'T NEED THAT.

5 I SEE NOTHING IN THAT INSTRUCTION OR ANYTHING  
6 IN THE LAW WHICH JUSTIFIES ANY MITIGATING CIRCUMSTANCE, EVEN  
7 ONE, THAT HE HAS BEEN A GOOD SON AND HE LOVED DOGS OR SOMETHING  
8 LIKE THAT, THAT WOULD OUTWEIGH ALL OF THE AGGRAVATING FACTORS.

9 MR. BARENS: A JUROR IN THEIR OWN MIND COULD IN THEIR  
10 WEIGHING IT.

11 THE COURT: IT DOESN'T SAY THAT.

12 MR. CHIER: THAT IS HOW IT WORKS.

13 MR. BARENS: I BELIEVE THAT IS CLEARLY WHAT THE  
14 LEGISLATURE INTENDED, SIR.

15 IF I, AS AN INDIVIDUAL JUROR -- JUST HEAR ME ON  
16 THIS, SIR.

17 THE COURT: GO AHEAD.

18 MR. BARENS: IF I, AS AN INDIVIDUAL JUROR, CONSIDER  
19 ONE FACTOR ABOUT THAT DEFENDANT SO WORTHWHILE SO AS TO SPARE  
20 HIS LIFE BASED ON THAT SINGLE FACTOR, I MAY DO SO IRRESPECTIVE  
21 OF THE FACT THAT THERE MIGHT BE 50 AGGRAVATING FACTORS.

22 THE COURT: WELL, IT IS A QUESTION OF WEIGHING. IF  
23 YOU TAKE ONE MITIGATING FACTOR, ASSUME IT IS A VALID ONE,  
24 AGAINST A HUNDRED AGGRAVATING CIRCUMSTANCES WHICH OUTWEIGH  
25 IT, YOU MEAN THAT THEY MUST NOT CONSIDER DEATH OR THEY  
26 MUST FIND FOR THE MITIGATING CIRCUMSTANCES?

27 MR. CHIER: RIGHT.

28 MR. BARENS: AN INDIVIDUAL JUROR COULD, YES, SIR.

1 THE COURT: WHERE IS THERE ANY AUTHORITY ON THAT?

2 I WILL GIVE IT IF YOU SHOW ME AUTHORITY THAT SAYS  
3 SO.

4 MR. BARENS: THE WAY WE GET TO THAT, IF YOU WERE TO  
5 LOOK AT CALJIC 17.40.

6 THE COURT: 17 --

7 MR. BARENS: .40.

8 THE COURT: 17?

9 MR. BARENS: .40, SIR.

10 MR. CHIER: THE LANGUAGE IN THIS SECTION WAS CHANGED  
11 FROM "SHALL" TO "MAY" AND THAT WAS THE LEGISLATIVE INTENT.

12 MR. BARENS: I SUBMIT --

13 MR. WAPNER: WHAT DOES THAT SAY? IT IS NOTHING --

14 MR. BARENS: WHAT I AM SUBMITTING HERE, GENTLEMEN, IS  
15 THAT THAT LANGUAGE SHOWS THAT IT IS THE INDIVIDUAL  
16 RESPONSIBILITY OF THE JUROR, ONCE AGAIN, TO BRING IN THEIR  
17 DETERMINATION AND NOT A GROUP DECISION WHEN WE ARE TALKING  
18 ABOUT MITIGATING.

19 THE COURT: THAT HAS NOTHING TO DO WITH MITIGATING OR  
20 AGGRAVATING CIRCUMSTANCES.

21 MR. BARENS: IT TALKS ABOUT, I BELIEVE, THE SUGGESTION  
22 THERE SIR IS THAT IT IS THE INDIVIDUAL RESPONSIBILITY OF A  
23 JUROR TO COME IN WITH THEIR INDIVIDUAL VERDICT.

24 MR. CHIER: MR. BARENS, THE SECTION USED TO READ "SHALL"  
25 AND IT WAS CHANGED AS A RESULT OF A CASE TO "MAY," THE INTENT  
26 BEING THAT THE JURY CONSIDER ANYTHING AND ASSIGN TO IT WHATEVER  
27 WEIGHT THEY DEEMED WAS MOST APPROPRIATE.

28 MR. BARENS: YOU SEE, YOUR HONOR, I THOUGHT THAT IS

1 WHAT THIS IS REALLY ABOUT.

2 THE COURT: 17.40 HASN'T BEEN MODIFIED. THERE IS NOTHING  
3 IN THE POCKET PART.

4 WHERE IS THERE ANYTHING IN HERE WHICH EVEN  
5 REMOTELY SUGGESTS WHAT YOU ARE SAYING?

6 MR. BARENS: I BELIEVE IT SAYS THAT BOTH THE PEOPLE  
7 AND THE DEFENDANT ARE ENTITLED TO THE INDIVIDUAL OPINION OF  
8 EACH JUROR.

9 THE COURT: THAT IS TRUE.

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1 MR. BARENS: MY LOGIC IN THAT, SIR, IS THAT SINCE EACH  
2 JUROR MUST DO THE WEIGHING TEST ON THEIR OWN, I DO NOT BELIEVE  
3 THE COURT COULD CONFIRM TO THE JURY THAT EACH JUROR COULD  
4 FIND -- HAS THE PROVINCE TO FIND OR THE OPTION OR THE  
5 DISCRETION OF THE INDIVIDUAL JUROR TO FIND THAT A SINGLE  
6 FACTOR IN MITIGATION IS SUFFICIENT TO OUTWEIGH ALL FACTORS  
7 IN AGGRAVATION, THOUGH THE FACTORS IN AGGRAVATION MAY BE  
8 ARITHMETICALLY GREATLY SUPERIOR.

9 I BELIEVE THAT WAS THE INTENT OF THE LEGISLATURE  
10 AND IS THE MORAL -- MORALLY APPROPRIATE STANDARD.

11 MR. CHIER: IT IS THE LEGAL STANDARD, ARTHUR.

12 MR. BARENS: AND THE LEGAL STANDARD.

13 MR. CHIER: NEVER MIND MORALITY. THAT IS THE LAW.

14 MR. BARENS: THAT IS AN IMPORTANT POINT AND I BELIEVE,  
15 YOUR HONOR, WAS THE WHOLE PRINCIPLE UPON WHICH THE PEOPLE  
16 OF THIS STATE CAME TO ACCEPT THE DEATH PENALTY.

17 THE COURT: GIVE ME A SINGLE AUTHORITY WHICH HOLDS WHAT  
18 YOU WANT ME TO SAY TO THE JURY.

19 YOU WANT ME TO SAY TO A JUROR THAT, FOR EXAMPLE,  
20 IF HE HAS BEEN GOOD TO HIS MOTHER, THAT OUTWEIGHS ALL OF THE  
21 AGGRAVATING CIRCUMSTANCES?

22 MR. BARENS: NO, I DIDN'T SAY THAT, YOUR HONOR.

23 THE COURT: YOU ARE SAYING THAT IT OUTWEIGHS ALL OF  
24 THE AGGRAVATING CIRCUMSTANCES IN THE CASE?

25 MR. BARENS: NO, I AM NOT SAYING IT DOES OUTWEIGH THEM.

26 I AM SAYING A JUROR DOES HAVE THE DISCRETION TO  
27 FIND IT DOES OUTWEIGH IT AND THAT THEY CAN MAKE THAT FINDING  
28 IN THEIR INDIVIDUAL DISCRETION.

1 THE COURT: THAT IS NOT TRUE.

2 THEY HAVE TO WEIGH ALL OF THE MITIGATING  
3 CIRCUMSTANCES AGAINST THE AGGRAVATING AND THEN COME TO A  
4 CONCLUSION.

5 MR. WAPNER: THAT IS RIGHT AND THIS INSTRUCTION THAT  
6 THEY ARE REQUESTING IS COMPLETELY CONTRARY TO THAT.

7 THE COURT: THERE IS NO WEIGHING AT ALL.

8 MR. CHIER: WHAT IS THE WEIGHT THAT THESE THINGS HAVE?  
9 WHEN YOU WEIGH THEM UP, WHAT IS THE WEIGHT THAT IS ASSIGNED  
10 TO THEM?

11 THE COURT: I CAN'T GIVE AN INSTRUCTION OF THAT KIND.  
12 I AM GOING TO REFUSE IT.

13 MR. BARENS: THE MATTER IS SUBMITTED, YOUR HONOR.  
14 THANK YOU.

15 THE COURT: NOW I THINK WE HAVE ENOUGH TIME, LET'S GO  
16 OVER EVERYTHING THAT WE HAVE DECIDED. WE DECIDED WE WEREN'T  
17 GOING TO GIVE INSTRUCTION NUMBER 100; IS THAT RIGHT?

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1 MR. WAPNER: CORRECT.

2 MR. BARENS: JUST BEFORE WE -- I DON'T MEAN TO TAKE  
3 UP THE COURT'S TIME, BUT --

4 THE COURT: WELL, THAT'S ALL RIGHT. TAKE IT UP. THAT  
5 IS WHAT WE ARE HERE FOR.

6 MR. BARENS: IT OCCURS TO ME, JUDGE, WHEN THE PEOPLE  
7 OF CALIFORNIA ACCEPTED THE DEATH PENALTY AS A REALITY AND  
8 THE LANGUAGE OF THESE PARTICULAR SECTIONS WERE DRAWN UP,  
9 THAT THE JURORS WERE CLEARLY GIVEN THE DISCRETION TO FIND  
10 A SINGLE MITIGATING FACTOR ABOUT A PERSON AS MAKING IT WORTH-  
11 WHILE ENOUGH TO SPARE THIS PERSON'S LIFE, EVEN THOUGH  
12 ARITHMETICALLY, THERE WERE MORE AGGRAVATING FACTORS. BUT  
13 THE JURY HAS THE DISCRETION TO BELIEVE THAT THE SINGLE,  
14 MITIGATING FACTOR OUTWEIGHED THE ARITHMETICALLY SUPERIOR  
15 AGGRAVATING FACTORS.

16 THE COURT: THAT IS NOT WHAT THEY SAID.

17 MR. CHIER: THEY ARE TO GIVE IT THEIR OWN WEIGHT.

18 THE COURT: WHAT THIS SAYS IS THAT ANY MITIGATING  
19 CIRCUMSTANCE PRESENTED TO YOU MAY OUTWEIGH ALL AGGRAVATING  
20 FACTORRS.

21 MR. BARENS: THEN, COULD I MODIFY IT AND SUBMIT IT  
22 IN THE LANGUAGE THAT I AM NOW INDICATING, THAT THE JURY  
23 HAS A DISCRETION TO FIND A SINGLE MITIGATING FACTOR OUTWEIGHS  
24 AN ARITHMETICALLY SUPERIOR NUMBER --

25 THE COURT: IT IS NOT ARITHMETIC.

26 MR. BARENS: I KNOW THAT. THAT IS WHAT I AM SAYING.

27 THE COURT: ONE MITIGATING AND FORTY AGGRAVATING DOESN'T  
28 MEAN BECAUSE ONE IS LESS THAN FORTY, THEREFORE, THEY HAVE

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1 GOT TO --

2 MR. BARENS: THAT IS WHAT I WANT TO SAY, JUDGE, IS  
3 THAT A JUROR HAS THE DISCRETION TO FIND THAT A SINGLE  
4 MITIGATING FACTOR CAN OUTWEIGH A GREATER NUMBER OF AGGRAVATING  
5 FACTORS. THAT IS ALL I AM SAYING.

6 THE COURT: IS THAT YOUR IDEA OF THE LAW?

7 MR. WAPNER: I DON'T KNOW WHETHER THAT IS THE LAW OR NOT.  
8 BUT IF THEY WANT TO HAVE THE INSTRUCTION THE WAY IT WAS  
9 ORIGINALLY WITH BOTH SENTENCES IN THERE, IT IS FINE WITH  
10 ME.

11 MR. BARENS: NO. I DON'T BELIEVE THAT THAT IS THE  
12 LAW.

13 MR. WAPNER: WHY NOT?

14 MR. BARENS: BECAUSE --

15 THE COURT: AGGRAVATING CIRCUMSTANCES MUST SUBSTANTIALLY  
16 OUTWEIGH MITIGATING?

17 MR. WAPNER: BUT IF IT IS --

18 THE COURT: MITIGATING CIRCUMSTANCES DON'T HAVE TO  
19 SUBSTANTIALLY OUTWEIGH AGGRAVATING?

20 MR. WAPNER: BUT WHAT HE IS TALKING ABOUT IS NUMBERS  
21 OF FACTORS, NOT THE WEIGHT.

22 IN OTHER WORDS, BY HIS LOGIC, IF THERE WAS  
23 ONE AGGRAVATING FACTOR AND FORTY MITIGATING, BUT THE  
24 AGGRAVATING FACTOR WAS SO SUBSTANTIAL AS TO OUTWEIGH BY  
25 MORAL VALUE ASSIGNED BY A JURY --

26 THE COURT: FOR EXAMPLE, MITIGATING CIRCUMSTANCES,  
27 THE DEVOTION OF THE DEFENDANT TO HIS FAMILY FOR EXAMPLE --  
28 ALL RIGHT?

1 MR. BARENS: YES, YOUR HONOR.

2 THE COURT: ALL RIGHT. THAT ONE FACTOR ALONE, AS YOU  
3 WANT ME TO INSTRUCT THE JURY, WOULD OUTWEIGH THE FACT THAT  
4 HE PARTICIPATED IN ANYTHING TO DO WITH A MURDER OF ESLAMINIA,  
5 WHICH IS AGGRAVATING CIRCUMSTANCES?

6 MR. BARENS: THE DIFFERENCE WE HAVE JUDGE, IS SOLELY  
7 THAT YOU ARE SAYING WOULD AND I AM SAYING COULD, COULD OUT-  
8 WEIGH.

9 THE COURT: IT WOULD BE INCREDIBLE THAT IT COULD.

10 MR. BARENS: IT MAY BE INCREDIBLE, SIR, BUT THERE MAY  
11 BE --

12 THE COURT: SUPPOSE I INSTRUCTED THE JURY THAT THEY  
13 HAVE THE RIGHT TO MAKE THAT DETERMINATION?

14 MR. BARENS: YES, SIR. IN OTHER WORDS, SIR, LET'S  
15 SAY THAT I FELT ALONE -- JUST HEAR ME ON THIS, PLEASE, SIR.

16 IF I FELT ALONE THAT THE FACT THAT -- LET'S  
17 SAY THE DEFENDANT HAD A BRILLIANT MIND AND THAT THE FACT  
18 THAT HE WAS EXTREMELY INTELLECTUAL MADE HIM WORTHWHILE ENOUGH  
19 TO SAVE FROM THE GAS CHAIR, IRRESPECTIVE OF THE FACT HE --  
20 THE BAD ACTS HE COMMITTED IN SOCIETY, BUT I WANTED TO KEEP  
21 THAT INTELLIGENCE ALIVE BECAUSE PERHAPS I BELIEVED THAT  
22 IN A JAIL SETTING, HE COULD DO SOME WRITING AND HE COULD  
23 DO SOME TEACHING AND WORK IN A LIBRARY AND HE COULD BE OF  
24 SERVICE -- AS WE ALL KNOW YOUR HONOR, MANY GREAT AUTHORS  
25 HAVE WRITTEN FROM BEHIND BARS.

26 THERE HAVE BEEN INTELLECTUAL PRODUCTS OF GREAT  
27 VALUE IN OUR SOCIETY GENERATED BEHIND BARS. AS A JUROR,  
28 I CAN CERTAINLY SAY THAT PERSONALLY I WOULD BE VERY LIKELY

1 TO WANT TO KEEP THIS PERSON ALIVE, TO SEE IF SOCIETY COULD  
2 BENEFIT FROM THE POTENTIAL PRODUCT.

3 THAT IS THE SOLE FACTOR IN MITIGATION WHICH  
4 CUOLD OUTWEIGH -- IF THEY TOLD ME THAT THE GUY DID FIVE  
5 MURDERS, I WOULD PROBABLY KEEP HIM ALIVE BECAUSE OF THE  
6 POTENTIAL VALUE TO SOCIETY WHERE THERE MIGHT BE NO VALUE  
7 IN JUST KILLING HIM.

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1 THE COURT: HOW DO YOU MEAN?

2 MR. BARENS: THE DEFENDANT --

3 THE COURT: HE MIGHT WRITE?

4 MR. BARENS: I DON'T KNOW.

5 THE COURT: CLASSIC BOOKS WHILE IN JAIL?

6 MR. BARENS: YES, SIR. IT HAS BEEN OUR EXPERIENCE

7 IN SOCIETY THAT --

8 THE COURT: WELL, UNLESS YOU SHOW ME AN AUTHORITY THAT  
9 SAYS I HAVE TO GIVE AN INSTRUCTION OF THAT KIND TO THE JURY,  
10 I WON'T GIVE IT THAT WAY. I CAN'T.

11 MR. BARENS: I UNDERSTAND, YOUR HONOR.

12 THE COURT: IT RUNS CONTRARY TO THE WHOLE TENOR OF  
13 THE INSTRUCTIONS WHICH I AM GIVING THEM ABOUT WEIGHING THE  
14 MITIGATING AND AGGRAVATING INSTRUCTIONS.

15 MR. CHIER: THAT IS WHAT THE INSTRUCTION SAYS IN THE  
16 BOTTOM LINE, YOUR HONOR.

17 MR. BARENS: SO, MAY I -- IF I AM MAKING AN ARGUMENT  
18 THAT THEY HAVE THE DISCRETION AS A CITIZEN IN THIS STATE  
19 TO WEIGH THAT ONE FACTOR ALONE, IRRESPECTIVE OF A MASS  
20 OF AGGRAVATING FACTORS --

21 MR. CHIER: THAT IS WHAT HAPPENED. THEY ORIGINALLY  
22 USED TO SAY SHALL USE, TO REQUIRE THE JURY TO ACTUALLY COUNT  
23 THEM UP, WHICH GAVE IT AN ARBITRARY VALUE OF ONE PLUS ONE  
24 PLUS ONE EQUALED EIGHT, FOR EXAMPLE.

25 AND ON THE DEFENDANT'S BALANCE SIDE, THEN MAYBE  
26 IT WAS ONE OR TWO. SO THERE WAS TWO TO EIGHT. THEREFORE,  
27 ONE OUTWEIGHED THE OTHER AND THEREFORE, THEY WERE REQUIRED  
28 TO FIND IT.

1                   NOW, THEY CAN GIVE THESE FACTORS IN AGGRAVATION  
2 AND MITIGATION WHATEVER VALUE THEY WANT TO ASSIGN TO IT  
3 IN THEIR OWN, SOLE DISCRETION.

4                   IF THEY WANT TO GIVE "GOOD TO YOUR MOTHER"  
5 TEN AND THEY WANT TO GIVE "ESLAMINIA" ONE, THEN THEY CAN  
6 DO THAT. SO THAT IN THEIR MINDS AT THE END OF THE CASE,  
7 THEY, WHEN THEY DELIBERATE THE FACTORS IN MITIGATION  
8 SUBSTANTIALLY OUTWEIGH THE FACTORRS IN AGGRAVATION -- BECAUSE  
9 THEY HAVE PLACED THE MOTHERLY LOVE HIGHER THAN --

10                  THE COURT: ISN'T THAT COVERED BY THE INSTRUCTION?  
11 YOU ARE FREE TO ASSIGN WHATEVER MORAL OR SYMPATHETIC VALUE  
12 YOU DEEM APPROPRIATE TO EACH OR ALL OF THE VARIOUS FACTORS  
13 YOU ARE PERMITTED TO CONSIDER? IN WEIGHING THE VARIOUS  
14 CIRCUMSTANCES, YOU SIMPLY DETERMINE UNDER THE RELEVANT EVIDENCE,  
15 WHICH PENALTY IS JUSTIFIED AND APPROPRIATE, BUT CONSIDERING  
16 THE TOTALITY OF YOUR AGGRAVATING CIRCUMSTANCES WITH THE  
17 TOTALITY OF THE MITIGATING CIRCUMSTANCES.

18                  MR. BARENS: YOUR HONOR, WOULD YOUR HONOR --

19                  THE COURT: THEY MAKE THAT DETERMINATION.

20                  MR. BARENS: YOUR HONOR, WOULD YOUR HONOR PROHIBIT  
21 ME FROM MAKING AN ARGUMENT LIKE I JUST SPOKE TO THE COURT --

22                  THE COURT: THERE IS NO SUCH LAW AS YOU ARE GIVING  
23 IT TO ME.

24                  MR. BARENS: WHAT WOULD BE --

25                  THE COURT: I CAN'T TELL THE JURY THAT THAT IS THE  
26 LAW OF THE CASE BECAUSE THAT IS NOT THE LAW.

27                  MR. BARENS: YOUR HONOR, COULD I NOT ARGUE TO THE JURY  
28 THAT IF THEY FOUND -- THAT IF THEY COULD FIND A SINGLE FACTOR

1 ABOUT THE DEFENDANT WORTHWHILE ENOUGH TO KEEP HIM ALIVE --

2 THE COURT: I DON'T WANT YOU TO PUT HIM IN THE CORNER  
3 AGAIN.

4 MR. BARENS: I WITHDRAW THE QUESTION. I WITHDRAW THE  
5 QUESTION.

6 THE COURT: ALL RIGHT.

7 MR. WAPNER: YOU WON'T GET ANY OBJECTION FROM ME IF  
8 YOU MAKE THE ARGUMENT.

9 THE COURT: PARDON ME?

10 MR. WAPNER: MY POSITION ON THE ARGUMENT IS THAT HE  
11 IS FREE TO ARGUE ANYTHING. YOU CAN ARGUE THINGS THAT THE  
12 COURT IS NOT GOING TO INSTRUCT ON, AS LONG AS YOU DON'T  
13 ARGUE THINGS THAT ARE CONTRARY TO THE LAW.

14 BUT I THINK THAT THE INSTRUCTION THAT THE COURT  
15 IS GOING TO GIVE, 8.84.2 COVERS THIS REQUEST IN DEFENDANT'S  
16 SPECIAL NUMBER 5.

17 MR. BARENS: ALL RIGHT.

18 THE COURT: I DON'T THINK YOU WILL FIND ANY COURT WHICH  
19 SAYS THAT -- ANY AUTHORITY WHICH HOLDS WITH WHAT YOU WANT  
20 ME TO GIVE IN THE FORM OF AN INSTRUCTION, WHAT YOU ARE GOING  
21 TO ARGUE. ONE MITIGATING CIRCUMSTANCE CAN OUTWEIGH ALL  
22 THE AGGRAVATING CIRCUMSTANCES --

23 MR. CHIER: THAT IS WHAT IT SAYS.

24 THE COURT: THAT IS NOT WHAT IT SAYS. THE TOTALITY  
25 IS WHAT IT SAYS.

26 MR. BARENS: YOU AND I MIGHT DISAGREE, RESPECTIFULLY,  
27 SIR. I JUST HAVE A DIFFERENT CONCEPT OF THOSE WORDS.

28 THE COURT: YOU CAN ARGUE AND I WILL TELL THE JURY

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1 THAT THEY ARE TO BE GUIDED BY MY INSTRUCTION AND NOT WHAT  
2 YOU SAY THE LAW IS.

3 MR. BARENS: I APPRECIATE THAT, SIR. SIR, WHILE WE  
4 ARE ON THIS, I DID WANT TO RAISE A MOTION IN LIMINE NOW,  
5 BEFORE WE LEAVE ALL OF THIS.

6 I WAS GOING TO MAKE A MOTION IN LIMINE TO RESTRICT  
7 THE PEOPLE FROM ARGUING THE DEATH PENALTY IS A DETERRENT.

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1 AND I AM GOING TO SUBMIT -- I AM GOING TO MAKE  
2 THAT REQUEST AND SUBMIT ON IT.

3 THE COURT: YOU DON'T INTEND TO DO THAT, DO YOU?

4 MR. WAPNER: I DIDN'T REALLY -- I HADN'T EVEN -- NO,  
5 I DON'T.

6 MR. CHIER: THERE ALSO WILL BE ONE MOTION IN LIMINE  
7 THAT TO ARGUE LACK OF REMORSE IS GRIFFIN ERROR.

8 THE COURT: DO YOU KNOW WHAT HE IS TALKING ABOUT?

9 MR. WAPNER: THAT THE DEFENDANT DIDN'T GET UP AND SAY  
10 "I AM SORRY"?

11 MR. CHIER: YES.

12 THE COURT: THAT IS RIGHT.

13 MR. CHIER: THAT IS A COMMENT ON HIS FAILURE TO TAKE  
14 THE STAND.

15 MR. WAPNER: I AM NOT SURE THAT THAT IS TRUE.

16 MR. BARENS: I THINK WE HAD BETTER HASH THIS OUT, YOUR  
17 HONOR.

18 THE COURT: HOW IS THAT GOING TO COME ABOUT, IN THE  
19 FORM OF AN INSTRUCTION IN ANY WAY?

20 MR. BARENS: NO, WE ARE NOT ASKING FOR AN INSTRUCTION.

21 THE COURT: YOU MEAN YOU DON'T WANT HIM TO SAY THAT  
22 THE DEFENDANT NEVER TOOK THE STAND AND TOLD YOU HOW SORRY  
23 HE WAS?

24 MR. BARENS: NO, SIR.

25 THE COURT: I DON'T THINK HE INTENDS TO DO THAT.

26 MR. CHIER: BY SAYING THAT THE DEFENDANT HAS EXHIBITED  
27 NO REMORSE.

28 THE COURT: YOU ARE NOT GOING TO SAY THAT EITHER, ARE

1 YOU?

2 MR. WAPNER: I DON'T REALLY KNOW EXACTLY WHAT I AM SAYING.

3 BUT I DON'T WANT TO MAKE ERROR IN THIS CASE. THIS  
4 COURT HAS BEEN TELLING ME SINCE THE FIRST DAY OF JURY SELECTION  
5 THAT I AM TOO CONCERNED ABOUT PROTECTING THE RECORD SO I AM  
6 SURELY NOT GOING TO BE GOING OUT OF THE WAY TO TRY AND CREATE  
7 ERROR.

8 MR. BARENS: THE ONLY THING I THINK, GENTLEMEN, OUR  
9 CONCERN IS THAT IF THE DISTRICT ATTORNEY COMES UP AND SAYS  
10 "MR. HUNT COULD HAVE TOLD YOU HOW BAD HE FEELS BUT HE CHOSE  
11 NOT TO."

12 THE COURT: NO, HE WILL NEVER DO THAT.

13 MR. WAPNER: NO, NO.

14 MR. BARENS: THAT IS WHAT WE ARE ADDRESSING.

15 THE COURT: HE WILL NEVER DO THAT.

16 MR. BARENS; I DON'T THINK MR. WAPNER WOULD.

17 THE COURT: THAT IS COMMENTING ON THE FACT HE DIDN'T  
18 TAKE THE STAND.

19 MR. BARENS: I WNATED TO BE SURE WHERE WE ARE.

20 THE COURT: YOU WILL IN NO WAY REFER DIRECTLY OR  
21 INDIRECTLY TO THE FACT HE DIDN'T TAKE THE STAND; IS THAT RIGHT?

22 MR. WAPNER: I AM NOT GOING TO REFER TO THE FACT HE  
23 DIDN'T TAKE THE STAND.

24 IF I COMMENT ABOUT SOMETHING IN THAT AREA, IT  
25 IS GOING TO BE A COMMENT ABOUT THE WITNESSES WHO DID TESTIFY  
26 OR THE FACTS THAT CAME OUT IN THIS PHASE OF THE TRIAL OR THE  
27 GUILT PHASE THAT WOULD INDICATE TO THE JURY THAT THEY COULD  
28 DRAW AN INFERENCE THAT THERE WAS NO REMORSE EXHIBITED FROM

1 THE CONDUCT THAT WAS TESTIFIED TO BY THE WITNESSES.

2 MR. BARENS: NOW, YOUR HONOR, AS SOON AS YOU INTRODUCE  
3 THE WORDS "NO REMORSE" INTO IT, INTO THE GOVERNMENT'S CASE --

4 MR. WAPNER: I DON'T KNOW THAT I AM GOING TO DO THAT  
5 BUT I AM SAYING IF IT IS DONE, IT IS GOING TO BE DONE IN THAT  
6 CONTEXT.

7 MR. BARENS: I AM ASKING IN A MOTION IN LIMINE --

8 THE COURT: WHAT AUTHORITY DO YOU HAVE FOR THAT?

9 MR. BARENS: GRIFFIN.

10 THE COURT: WHAT DOES GRIFFIN SAY?

11 MR. WAPNER: GRIFFIN IS THE ONE THAT SAYS YOU CAN'T  
12 COMMENT ON THE DEFENDANT'S FAILURE TO TAKE THE STAND.

13 MR. BARENS: I WILL TELL YOU HOW WE GET HERE. WHAT  
14 HE IS GOING TO SAY, HE WILL SAY "YOU SEE, WHEN MR. HUNT SAW  
15 THAT MR. ESLAMINIA WAS DEAD, YOU NOTICE HE DIDN'T TELL KARNY  
16 HOW SORRY HE WAS BUT THAT HE SHOWED NO REMORSE."

17 WELL, THIS WHOLE REMORSE BUSINESS REALLY GOES  
18 TO WHETHER A DEFENDANT SHOWS REMORSE TO THE JURY A FEW YEARS  
19 LATER WHEN HE IS ON TRIAL AND NOT WHETHER HE SHOWS REMORSE  
20 AT THE SCENE OF AN ALLEGED CRIME. YOU CAN'T BACK DOOR THE  
21 DEFENSE BY SAYING HE DIDN'T SHOW REMORSE AND PUT THAT REMORSE  
22 WORD IN FRONT OF THE JURY, WHICH BACKHANDS IT AND BOOTSTRAPS  
23 IT UP BEFORE A JURY NOW AND THAT IS A VERY UNFAIR THING TO  
24 DO AND I SUBMIT THAT IT WOULD BE CATEGORIC GRIFFIN ERROR.

25 THE COURT: I THOUGHT THERE WAS SOME DISCUSSION --

26 MR. WAPNER: YOUR HONOR, TO COMMENT ON THE DEFENDANT'S  
27 DEMEANOR AS TESTIFIED TO BY A WITNESS AT A TIME FOUR YEARS  
28 OR THREE YEARS BEFORE THE TRIAL IS HARDLY GRIFFIN ERROR.

1 TO SAY THAT WHEN JOE HUNT WAS IN THE TRUCK AND  
2 HE WAS JUST INFORMED THAT SOMEONE WAS KILLED AND THE NEXT  
3 THOUGHT IN HIS MIND WAS "WHAT CAN WE DO AND HOW CAN WE GET  
4 THE MONEY?" AND THAT THAT SHOWS HIS STATE OF MIND AT THAT  
5 TIME, THAT IS NOT GRIFFIN ERROR.

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1 THE COURT: OF COURSE, IT ISN'T.

2 MR. BARENS: THAT IS NOT MY POSITION. FOR HIM TO GET  
3 UP AND SAY "YOU SEE, JOE HUNT DIDN'T SHOW YOU ANY REMORSE  
4 AT ANY TIME" AND TO MAKE THAT KIND OF REMARK, BECAUSE AS SOON  
5 AS YOU DO THAT TYPE OF THING, SUCH AS "HAS JOE HUNT EVER  
6 SHOWN REMORSE," WHEN YOU GET INTO EVER OR AT ANY TIME IDEAS --

7 THE COURT: YOU ARE FAMILIAR WITH GRIFFIN? YOU  
8 UNDERSTAND UNDER GRIFFIN THE THINGS YOU CAN OR CANNOT DO?

9 MR. WAPNER: I AM, YOUR HONOR.

10 THE COURT: I WAS READING. THERE ARE MANY SECTIONS  
11 TO THESE GRIFFIN RULES ON WHAT YOU CAN SAY AND WHAT YOU CANNOT  
12 SAY ON COMMENTING ON THE FACT THAT THE DEFENDANT DID NOT TAKE  
13 THE STAND. CERTAIN THINGS ARE ALLOWED AND CERTAIN THINGS  
14 ARE NOT ALLOWED. I THINK I HAVE IT IN THE NEW EVIDENCE CODE,  
15 ISN'T IT?

16 AT ANY RATE, I WILL CHECK IT. I WILL CHECK IT  
17 OUT BEFORE THE ARGUMENT.

18 MR. BARENS: YOUR HONOR, THE COURT CERTAINLY HAS MUCH  
19 LATITUDE AND DISCRETION TO PROTECT THE DEFENDANT WITH HIS  
20 LIFE ON THE STAND.

21 THE COURT: I INTEND TO OBSERVE THAT AND I HAVE BEEN  
22 DOING THAT.

23 MR. BARENS: I KNOW YOU WILL AND HAVE BEEN, SIR.

24 THE COURT: YES.

25 MR. BARENS: I THOUGHT DURING CLOSING ARGUMENT, AND  
26 I SAY THIS MOST RESPECTFULLY TO MR. WAPNER AND I SAY THAT  
27 DURING THE CLOSING ARGUMENT OF THE GUILT PHASE OF THIS TRIAL,  
28 HE WENT OVER THE LINE.

1 THE COURT: PARDON ME. WHERE ARE THOSE BOOKS I HAD?

2 MR. BARENS: I AM JUST SAYING BY WAY OF CAUTION, JUDGE,  
3 I SAY RESPECTFULLY THROUGH YOU, OF MR. WAPNER, THAT DURING  
4 CLOSING ARGUMENT WE WENT WAY OVER THE GRIFFIN LINE, BY THE  
5 WAY. MR. WAPNER CHARACTERIZED THE EVIDENCE AND ARGUED AND  
6 CERTAINLY THAT IS GOING TO BE THE SUBJECT OF THE APPEAL, I  
7 THINK IT WAS CATEGORICALLY ERRONEOUS, ALTHOUGH NOT INTENTIONALLY  
8 SO BY MR. WAPNER.

9 I AM SEEKING, WITH MY CLIENT'S LIFE ON THE LINE,  
10 TO BE AS SANITARY AS WE CAN BE IN THIS GRIFFIN AREA BECAUSE  
11 IT IS EXTREMELY IMPORTANT.

12 THE COURT: WELL, SHE HAS GIVEN ME THESE VERDICT FORMS:  
13 "WE, THE JURY HAVING FOUND THE SPECIAL CIRCUMSTANCES TO BE  
14 TRUE, HEREBY FIX THE PENALTY AS DEATH" OR "HEREBY FIX THE  
15 PENALTY AS LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE."  
16 THOSE ARE THE VERDICT FORMS. ARE THEY SATISFACTORY TO YOU?

17 MR. BARENS: IN TERMS OF THE JURY VERDICT, DO YOU WANT  
18 TO TALK ABOUT THE VERDICT FORMS?

19 THE COURT: YES.

20 MR. BARENS: AS FAR AS THE VERDICT FORMS, I SUBMIT THAT  
21 THE VERDICT FORM SHOULD RECITE THAT THE JURY FINDS OR DOES  
22 NOT FIND THAT THE AGGRAVATING CIRCUMSTANCES DO OR DO NOT  
23 OUTWEIGH THE MITIGATING CIRCUMSTANCES AND THAT, THEREFORE,  
24 THE PUNISHMENT SHALL BE ONE OR THE OTHER AND THAT IS THE  
25 STANDARD.

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1 THE COURT: YOU MEAN THAT THE JURY FINDS THAT THE  
2 AGGRAVATING CIRCUMSTANCES SUBSTANTIALLY OUTWEIGH THE  
3 MITIGATING CIRCUMSTANCES AND FIX THE PENALTY AT DEATH?

4 MR. BARENS: THEREFORE, THE PUNISHMENT SHOULD BE --

5 MR. WAPNER: I DON'T SEE ANY REASON FOR THAT. THAT  
6 IS LIKE SAYING IN A REGULAR VERDICT FORM, "WE FIND THE CHARGE  
7 HAS BEEN PROVED BEYOND A REASONABLE DOUBT AND THEREFORE, WE  
8 FIND THE DEFENDANT GUILTY."

9 THEY JUST IN THEIR REGULAR JURY FORM -- IT IS  
10 EITHER GUILTY OR NOT GUILTY. IT DOESN'T MATTER I GUESS. YOU  
11 COULD DO IT THAT WAY.

12 BUT IT DOESN'T SEEM LIKE THERE IS ANY REASON FOR  
13 IT.

14 THE COURT: WELL, THE ONLY TIME THEY FIX PENALTY OF  
15 DEATH IS IF THE AGGRAVATING CIRCUMSTANCES SUBSTANTIALLY  
16 OUTWEIGH THE OTHER.

17 MR. WAPNER: I AM HAPPY TO HAVE IT THAT WAY.

18 THE COURT: IS THAT AGREEABLE TO YOU?

19 MR. BARENS: SUBSTANTIALLY.

20 THE COURT: THE JURY MIGHT FIND THE AGGRAVATING  
21 CIRCUMSTANCES SUBSTANTIALLY OUTWEIGH THE MITIGATING  
22 CIRCUMSTANCES AND FIX THE PENALTY AT DEATH?

23 MR. BARENS: HOW DO WE SAY THE OPPOSITE OF THAT, SIR?

24 THE COURT: WE THE JURY AND SO ON AND SO FORTH, FIND  
25 THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING  
26 CIRCUMSTANCES AND FIND THE PENALTY TO BE LIFE WITHOUT  
27 POSSIBILITY OF PAROLE.

28 MR. BARENS: OR DO WE WANT TO SAY --

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1 MR. WAPNER: THAT IS WHY I DON'T THINK WE SHOULD DO  
2 IT.

3 BECAUSE NOW, WE ARE GETTING INTO REDEFINING THINGS  
4 IN THE JURY INSTRUCTIONS.

5 MR. BARENS: JUST A MOMENT. MAY I HAVE JUST A MOMENT,  
6 SIR?

7 (PAUSE.)

8 ALL RIGHT. I THINK WHAT THE JUDGE IS SAYING IS  
9 FINE. MAY I HAVE A MOMENT, YOUR HONOR?

10 (PAUSE.)

11 MR. BARENS: YOUR HONOR, I JUST WANTED TO POINT OUT  
12 THAT THE MATERIAL I HAVE BEFORE ME INDICATES THAT IN ALAMEDA  
13 COUNTY, THE GENERAL PRACTICE ALL ALONG HAS BEEN TO CHANGE  
14 THE INSTRUCTION TO READ THAT IF THEY FIND THE AGGRAVATING  
15 CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, YOU MAY --  
16 THEN THEY ADD "BUT NEED NOT" IMPOSE THE DEATH SENTENCE. IS  
17 THAT THE LANGUAGE --

18 MR. CHIER: THAT IS THE LAW.

19 MR. BARENS: BUT THAT IS THE LANGUAGE THAT WE ARE USING.

20 MR. CHIER: NO.

21 MR. BARENS: WELL, I THINK THAT THAT INSTRUCTION LANGUAGE  
22 SHOULD BE USED AND I REQUEST IT AND --

23 THE COURT: WHAT DO YOU SAY TO THAT?

24 MR. WAPNER: THE ONLY THING THAT I AM FAMILIAR WITH  
25 IS THAT THEY SHOULD NOT EVER BE INSTRUCTED THAT THEY SHALL  
26 REACH A VERDICT OF DEATH.

27 BUT THIS INSTRUCTION DOESN'T SAY THAT THEY SHALL.  
28 IT SAYS TO RETURN A JUDGMENT OF DEATH, YOU MUST BE PERSUADED



1 THAT THE AGGRAVATING EVIDENCE IS SO SUBSTANTIAL IN COMPARISON  
2 TO THE MITIGATING CIRCUMSTANCES THAT IT WARRANTS DEATH INSTEAD  
3 OF LIFE WITHOUT POSSIBILTY OF PAROLE --

4 THE COURT: WELL, WHAT IS THE VERDICT FORM, THEN?  
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1 MR. WAPNER: WELL, COUNSEL IS NOW CONFUSING ME BECAUSE  
2 I DON'T KNOW IF HE SWITCHED GEARS.

3 MR. BARENS: I HAD LEFT THE SUBJECT OF VERDICT FORMS  
4 BECAUSE I HAD SEEN SOMETHING HERE THAT I THOUGHT --

5 THE COURT: LET'S TALK ABOUT THE VERDICT FORMS. WE  
6 WERE TALKING ABOUT THAT.

7 MR. BARENS: ALL RIGHT.

8 MR. WAPNER: I DON'T UNDERSTAND WHY WE HAVE GOT TO  
9 PUT THIS ON THE VERDICT FORM.

10 WHY CAN'T WE JUST HAVE IT LIKE WE HAVE A REGULAR  
11 VERDICT FORM FOR GUILTY AND NOT GUILTY? IT DOESN'T SAY  
12 ON THE REGULAR VERDICT FORM THAT WE THE JURY FIND THAT THE  
13 EVIDENCE PROVES BEYOND A REASONABLE DOUBT THAT THE DEFENDANT  
14 COMMITTED SUCH AND SUCH AND THEREFORE, WE FIND HIM GUILTY.  
15 IT JUST SAYS --

16 THE COURT: YOU MEAN, VERY SIMPLE VERDICT FORMS WHICH  
17 MERELY SAY THAT WE THE JURY IN THE ABOVE ENTITLED ACTION,  
18 FIND THE PENALTY IS DEATH AND THEN THE OTHER VERDICT FORM,  
19 WE FIX THE PENALTY TO BE LIFE WITHOUT POSSIBILITY OF PAROLE?

20 MR. WAPNER: THAT'S ALL. I DON'T SEE WHY IT HAS TO  
21 BE ANYTHING MORE THAN THAT.

22 THE COURT: THAT VERDICT FORM?

23 MR. WAPNER: RIGHT.

24 THE COURT: HOW ABOUT THAT?

25 MR. WAPNER: AS SOON AS YOU START PUTTING LANGUAGE  
26 IN THE VERDICT FORMS, THEN THEY WILL START COMPARING THAT  
27 LANGUAGE TO THE LANGUAGE IN THE INSTRUCTIONS.

28 MR. BARENS: I SUBMIT IT.

1 THE COURT: OKAY. LET'S DO IT THAT WAY. THAT MAKES  
2 IT SIMPLE.

3 THEY WILL KNOW WHAT IT IS ALL ABOUT, ANYWAY.  
4 ALL RIGHT, NOW, LET ME GO OVER FINALLY, WHAT WE ARE GOING  
5 TO HAVE.

6 WE HAVE CALJIC INSTRUCTION 101, INSTRUCTIONS  
7 TO BE CONSIDERED AS A WHOLE; CALJIC 200, DIRECT AND  
8 CIRCUMSTANTIAL EVIDENCE; 201, SUFFICIENCY OF CIRCUMSTANTIAL  
9 EVIDENCE GENERALLY.

10 MR. WAPNER: YOU WANTED ME TO GET 102, ALSO.

11 THE COURT: YES. THAT'S RIGHT.

12 THEN 201 READS:

13 "HOWEVER, A FINDING THAT THE  
14 DEFENDANT COMMITTED ANY CRIME ALLEGED AS  
15 AGGRAVATING CIRCUMSTANCES MAY NOT BE BASED ON  
16 CIRCUMSTANTIAL EVIDENCE UNLESS THE PROVED CIRCUM-  
17 STANCES NOT ONLY ..."

18 I AM GOING TO CHANGE IT FROM GUILTY TO "COMMITTED  
19 ANY CRIME ALLEGED AS AN AGGRAVATING CIRCUMSTANCE." ALL RIGHT.  
20 I WILL MAKE THOSE CHANGES.

21 THEN THERE IS SUFFICIENCY OF CIRCUMSTANTIAL  
22 EVIDENCE TO PROVE SPECIFIC INTENT. I AM MAKING THE SAME  
23 CHANGES IN THE SPECIFIC INTENT WITH WHICH AN ACT IS DONE,  
24 MAY BE SHOWN BY THE CIRCUMSTANCES OF THE COMMISSION OF THE  
25 ACT BUT YOU MAY NOT FIND THE DEFENDANT COMMITTED ANY OF  
26 SUCH AGGRAVATING CIRCUMSTANCES UNLESS THE PROVED CIRCUMSTANCES  
27 ARE NOT ONLY CONSISTENT WITH THE THEORY THAT HE HAD THE  
28 REQUIRED SPECIFIC INTENT -- NO SPECIFIC INTENT HERE WOULD

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1 APPLY, ONLY TO THE MURDER OF ESLAMINIA. RIGHT?

2 MR. WAPNER: RIGHT.

3 THE COURT: BUT LATER ON, I WILL TELL THEM WHICH OF  
4 THE CASES HAVE SPECIFIC INTENT. ALL RIGHT.

5 THERE IS 211, PRODUCTION OF ALL EVIDENCE NOT  
6 REQUIRED.

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1 MR. BARENS, THIS IS FOR YOUR BENEFIT THAT I  
2 AM GOING THROUGH THIS.

3 MR. BARENS: I KNOW. I WAS ASKING MR. CHIER ABOUT  
4 THE INSTRUCTION, YOUR HONOR.

5 THE COURT: WHICH ONE?

6 MR. BARENS: I WAS ASKING ABOUT AN INSTRUCTION WHICH  
7 WAS GIVEN DURING THE GUILT PHASE I WAS WONDERING IF WE SHOULD  
8 ESPECIALLY REQUEST AGAIN NOW WITH YOUR HONOR.

9 THE COURT: ALL RIGHT, MAKE A NOTE OF IT WHEN I GO  
10 THROUGH THIS.

11 ALL RIGHT, NUMBER 211, PRODUCTION OF ALL  
12 EVIDENCE NOT REQUIRED.

13 220, CREDIBILITY OF WITNESSES AND THE LAST  
14 TWO SENTENCES HAVE BEEN CROSSED OUT.

15 221, WITNESS WILLFULLY FALSE.

16 WEIGHING CONFLICTING EVIDENCE.

17 270, CONFESSION AND ADMISSION DEFINED.

18 271, THAT IS GOING TO BE PICKED UP; IS THAT  
19 RIGHT?

20 MR. WAPNER: YES, AND ALSO 261 AND 260 WILL BE PICKED  
21 UP.

22 THE COURT: ALL RIGHT, 271.7, WE WENT OVER THAT IN  
23 SOME DETAIL.

24 EXPERT TESTIMONY, 280.

25 PRINCIPAL DEFINED, 300.

26 MR. CHIER: WAIT A MINUTE. WHAT NUMBERS ARE THOSE,  
27 YOUR HONOR?

28 MR. BARENS: HE WAS AT 3.00.

1 MR. CHIER: IF YOU GIVE THE NAMES OF THEM --

2 THE COURT: I GAVE YOU 300.

3 MR. CHIER: WHAT HAPPENED TO 2.72?

4 MR. BARENS: HE GAVE IT.

5 MR. CHIER: OKAY.

6 MR. WAPNER: AND 2.90, YOU HAVE GOT IN THERE, TOO,

7 AS WE MODIFIED IT.

8 MR. BARENS: THERE WAS 270, 272, 290 AS MODIFIED.

9 THE COURT: WEREN'T YOU SUPPOSED TO MAKE A MODIFICATION  
10 ON THAT?

11 MR. WAPNER: ON 290?

12 THE COURT: YES.

13 MR. WAPNER: YES.

14 THE COURT: ALL RIGHT, NOW WE GO TO 301, AIDING AND  
15 ABETTING.

16 310, ACCOMPLICE DEFINED.

17 311, TESTIMONY OF AN ACCOMPLICE MUST BE  
18 CORROBORATED.

19 312, SUFFICIENCY OF EVIDENCE TO CORROBORATE AN  
20 ACCOMPLICE.

21 316, WITNESS, ACCOMPLICE AS A MATTER OF LAW.  
22 THAT APPLIES FOR DEAN KARNY; IS THAT RIGHT?

23 MR. WAPNER: CORRECT.

24 MR. CHIER: HAVE YOU FILLED IN THE BLANKS YET?

25 THE COURT: NOT YET.

26 THAT IS THE MURDER ONE, ISN'T THAT RIGHT?

27 MR. WAPNER: CORRECT.

28 THE COURT: WITNESS DEAN KARNY WAS AN ACCOMPLICE AS

1 A MATTER OF LAW AND THEN THERE WAS ANOTHER ONE.

2 MR. CHIER: YOU INSERTED "MURDER" IN THE FIRST BLANK  
3 AND "DEAN KARNY" IN THE SECOND BLANK?

4 THE COURT: YES.

5 NOW, I THINK WE HAD ANOTHER ONE, THAT I ASKED  
6 YOU TO GET, DIDN'T I?

7 MR. WAPNER: 318.

8 THE COURT: 318.

9 MR. WAPNER: THAT WAS ACCOMPLICE TESTIMONY TO BE VIEWED  
10 WITH DISTRUST.

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1 THE COURT: THAT IS RIGHT, YES.

2 NOW WE COME TO 330, CONCURRENCE OF ACT AND  
3 GENERAL CRIMINAL INTENT. THAT APPLIES TO SWARTOUT AND THE  
4 COKER INCIDENT.

5 MR. CHIER: 3.30, IS THAT IT?

6 THE COURT: 3.30.

7 3.31, CONCURRENCE OF ACT OR SPECIFIC INTENT.  
8 THAT APPLIES TO THE CRIME OF MURDER, AGGRAVATING CIRCUMSTANCES  
9 AS TO ESLAMINIA, NAMELY, MURDER.

10 THEN COMES SPECIAL INSTRUCTION NUMBER 1:

11 "EVERY PERSON WHO MALICIOUSLY AND  
12 WILLFULLY DISCHARGES A FIREARM,"

13 AND SO FORTH.

14 AND SPECIAL INSTRUCTION NUMBER 2:

15 "AS USED IN THESE INSTRUCTIONS, THE  
16 WORD FIREARM INCLUDES ANY DEVICE"

17 AND FOLLOWING THAT WOULD BE: "WILLFULLY DEFINED,"

18 1.20.

19 THEN MALICE AND MALICIOUSLY DEFINED, THAT IS

20 1.22.

21 THEN WE COME TO 9.03, WHICH IS ASSAULT WITH  
22 A DEADLY WEAPON BY MEANS OF FORCE, AND SO FORTH AND SO ON.

23 MR. WAPNER: YOUR HONOR, ON THE 1.22, MALICE AND  
24 MALICIOUSLY DEFINED, WE PROBABLY SHOULD DO SOMETHING SO  
25 THAT THEY DON'T CONFUSE THIS MALICE WITH THE MALICE INSTRU-  
26 TION, SINCE THE INSTRUCTION TALKS ABOUT MALICIOUSLY, THE  
27 246 INSTRUCTION, THAT IS THE PEOPLE'S SPECIAL NUMBER 1,  
28 I THINK IT WOULD BE APPROPRIATE TO CROSS OUT THE WORD



1 "MALICE" IN THAT MALICIOUSLY INSTRUCTION AND JUST HAVE IT  
2 READ "THE WORD MALICIOUSLY MEANS A WISH TO VEX, ANNOY,"  
3 ET CETERA, SO THEY DON'T CONFUSE IT.

4 THE COURT: DEFRAUD, THAT IS OUT?

5 MR. WAPNER: IS THERE A DEFRAUD IN THAT INSTRUCTION?

6 THE COURT: YES, DEFRAUD, I GUESS, IS IN THERE.

7 MR. WAPNER: THERE ISN'T ONE IN THE CALJIC I HAVE --  
8 YES, THAT GOES OUT.

9 THE COURT: ALL RIGHT. YOU WANT THE WORD "MALICIOUSLY"  
10 IS THAT IT?

11 MR. WAPNER: RIGHT.

12 THE COURT: THEN WE COME TO 9.03, ASSAULT WITH A DEADLY  
13 WEAPON. THIS HAS TO DO WITH THE AGGRAVATING CIRCUMSTANCE.

14 MR. WAPNER: WHICH INSTRUCTION ARE YOU LOOKING AT?

15 THE COURT: 903. YOU HAVE TO REVISE THAT. THAT IS  
16 THE AGGRAVATING CIRCUMSTANCE INVOLVING MR. COKER.

17 MR. WAPNER: INSTEAD OF "THE DEFENDANT IS CHARGED IN  
18 COUNT SO AND SO --"

19 THE COURT: YES.

20 MR. WAPNER: -- EITHER THAT OR YOU CAN JUST DELETE  
21 THAT.

22 MR. CHIER: I THOUGHT THIS WAS THE SWARTOUT DEAL.

23 THE COURT: OH, THAT IS RIGHT.

24 MR. WAPNER: YOU CAN DELETE THE FIRST PARAGRAPH ENTIRELY  
25 AND SAY "EVERY PERSON WHO COMMITS AN ASSAULT UPON ANOTHER  
26 PERSON," ET CETERA.

27 THE COURT: YES, BUT I HAVE TO HAVE A REFERENCE TO  
28 WHICH OF THE AGGRAVATING CIRCUMSTANCES THAT GOES. THAT

1 IS AS TO MR. SWARTOUT. ADD "AS TO MR. SWARTOUT."

2 IT CHARGES THE COMMISSION OF THE CRIME OF  
3 VIOLATION OF SECTION 245(A)(1) OF THE PENAL CODE. AND THEN  
4 IT GOES ON AND DEFINES IT. IS THAT SUFFICIENT?

5 MR. WAPNER: YES.

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1 THE COURT: WAIT A MINUTE. THERE IS NO FIREARM INVOLVED  
2 IN THAT NOR A DEADLY WEAPON AND --

3 MR. WAPNER: THE FIREARM AND DEADLY WEAPON PORTIONS  
4 SHOULD BE STRICKEN.

5 THE COURT: ALL RIGHT. THAT A PERSON WAS ASSAULTED --  
6 THAT THE ASSAULT WAS COMMITTED BY USE OF WHAT?

7 MR. WAPNER: BY MEANS OF FORCE LIKELY TO PRODUCE GREAT  
8 BODILY INJURY.

9 THE COURT: ALL RIGHT. DEADLY WEAPON IS OUT, IS THAT  
10 RIGHT?

11 MR. WAPNER: YES.

12 THE COURT: AND AS USED IN THIS INSTRUCTION, GREAT BODILY  
13 INJURY REFLECTS SIGNIFICANT OR SUBSTANTIAL BODILY INJURY OR  
14 DAMAGE -- AND IT GOES ON AND ON. FRANKLY, IT IS FOR THE JURY  
15 TO DECIDE. BUT I THINK THAT THIS INCIDENT WITH SWARTOUT  
16 DOESN'T QUITE REACH THE LEVEL OF AN ASSAULT.

17 BUT THAT ISN'T FOR ME TO DETERMINE.

18 MR. BARENS: TAKE IT AWAY FROM THEM, JUDGE. TAKE IT  
19 AWAY FROM THEM AND I THINK THAT A JUDGE FROM TIME TO TIME  
20 CAN MAKE A JUDICIAL STATEMENT AND CONCLUSIONS BASED ON THE  
21 EVIDENCE. THE EVIDENCE WE HAVE HEARD HERE, THE TEST OF --

22 MR. WAPNER: I WILL SUBMIT THE MATTER.

23 MR. BARENS: THE TEST IS --

24 THE COURT: ALL RIGHT. I THINK THAT WE REALLY OUGHT  
25 TO WITHDRAW THAT ENTIRELY. THAT SWARTOUT INCIDENT, THERE  
26 WASN'T ANY EVIDENCE OF ANY INJURY TO HIM EXCEPT THE LAST GUY  
27 THAT YOU PUT ON, SURPRISINGLY SAID THAT HE COMPLAINED OF A  
28 SHOULDER INJURY.

1                    THAT IS THE FIRST TIME I HEARD ABOUT IT, A  
2                    SHOULDER OR ARM INJURY.

3                    MR. WAPNER: IF WE COULD JUST CONTINUE THE CASE FOR  
4                    A FEW MORE DAYS, THEN THEY WILL GET SOME MORE WITNESSES IN.

5                    MR. CHIER: WE WERE GOING TO MAKE A MOTION TO HAVE  
6                    FRED WAPNER BE CO-COUNSEL.

7                    MR. BARENS: JUDGE --

8                    THE COURT: I REALLY THINK THAT I WILL WITHDRAW IT.  
9                    I DON'T THINK IT IS SUCH A SERIOUS THING. I THINK IT WILL  
10                    BE --

11                    MR. WAPNER: I SUBMIT IT TO THE COURT.

12                    THE COURT: IT TAKES AWAY FROM THE JURY A DISCUSSION  
13                    OF THIS, WHICH WILL TAKE UP AN AWFUL LOT OF TIME AND --

14                    MR. WAPNER: I SUBMIT IT. THAT'S FINE.

15                    MR. BARENS: WELL ON BEHALF OF MR. HUNT AND DEFENSE  
16                    COUNSEL, WE ARE EXTREMELY APPRECIATIVE.

17                    THE COURT: WELL, IT IS --

18                    MR. WAPNER: LET'S FORGET ABOUT THE APPRECIATIVE STUFF.  
19                    LET'S FIGURE OUT HOW WE ARE GOING TO DO IT.

20                    THE COURT: FROM WHAT I HEAR OF ALL OF THE EVIDENCE,  
21                    I DON'T THINK ANYTHING SERIOUS HAPPENED TO HIM. IT IS A  
22                    SIMPLE ASSAULT. THAT IS ALL THAT HAPPENED TO HIM.

23                    I AM NOT THE DISTRICT ATTORNEY PROSECUTING THE  
24                    CASE AND IT WAS A CRIME, WHATEVER WAS THROWN AT HIM AND --

25                    MR. WAPNER: ACTUALLY --

26                    MR. BARENS: MAY I MAKE A SUGGESTION THAT THE WAY TO  
27                    ACCOMPLISH THIS YOUR HONOR, I WOULD SUBMIT RESPECTFULLY, SIR,  
28                    WOULD BE TO SAY TO THE JURY PRIOR TO ARGUMENT THAT COUNSEL

2A  
1 WILL NOT BE ARGUING THE SWARTOUT MATTER, AS --

2 THE COURT: BECAUSE I HAVE WITHDRAWN IT FROM THE JURY.

3 MR. CHIER: THE CORRECT WAY TO DO THIS IF I MIGHT, IS  
4 TO FIRST HAVE THE JUDGE GRANT AN 1118.1 MOTION AND SECOND,  
5 TO INSTRUCT THE JURY THAT THEY MAY NOT CONSIDER FOR ANY  
6 CIRCUMSTANCE, FOR ANY PURPOSE, THE EVIDENCE CONCERNING THE  
7 ALLEGED ASSAULT ON BRUCE SWARTOUT. THEY MAY NOT CONSIDER  
8 IT AND THEY ARE TO DISREGARD --

9 THE COURT: IT WAS AN ASSAULT ON HIM. THERE IS NO  
10 QUESTION IN MY MIND.

11 BUT I DON'T THINK THAT IT SHOULD BE AN  
12 AGGRAVATING CIRCUMSTANCE TO THE POINT THAT THEY HAVE TO  
13 CONSIDER THAT AS A FACTOR IN DETERMINING DEATH OR LIFE WITHOUT  
14 POSSIBILITY OF PAROLE.

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1 MR. BARENS: SO YOUR HONOR -- WOULD YOUR HONOR THEN  
2 SAY TO THE JURY PRIOR TO ARGUMENT THAT --

3 THE COURT: I WILL TELL THEM THAT THE COURT HAS WITHDRAWN  
4 THE AGGRAVATING CIRCUMSTANCE INVOLVING MR. SWARTOUT FROM  
5 CONSIDERATION BY THE JURY.

6 MR. BARENS: AND THEREFORE, THEY ARE NOT TO CONSIDER  
7 IT. I THINK YOU SHOULD MAKE A POSITIVE STATEMENT, AS WELL.

8 THE COURT: YES, IT IS NOT TO BE CONSIDERED.

9 MR. BARENS: THANK YOU, YOUR HONOR.

10 MR. WAPNER: FINE.

11 THE COURT: ALL RIGHT.

12 MR. BARENS: ANY THOUGHTS AS TO THE OTHER TWO, JUDGE?

13 THE COURT: YES. THEY STAY.

14 MR. BARENS: JUST THOUGHT I WOULD ASK WHILE WE ARE HERE.

15 THE COURT: THEY STAY. ALL RIGHT. SO, WE'LL TAKE THAT  
16 OUT. I DON'T NEED THAT.

17 I WILL TAKE OUT THE INSTRUCTIONS AS TO ASSAULT.

18 MR. WAPNER: SO IT IS 900, 903 AND 908.

19 THE COURT: THAT'S RIGHT. ASSAULT DEFINED, THAT IS  
20 OUT. OKAY.

21 THEN COMES HOMICIDE DEFINED, 800 AND 810, MURDER  
22 DEFINED, AND 811, MALICE AFORETHOUGHT DEFINED.

23 NOW, I WILL TAKE A LOOK AT THE INSTRUCTIONS TO  
24 SEE WHETHER OR NOT THERE WERE ANY CHANGES THAT I MADE IN ANY  
25 OF THOSE.

26 MR. WAPNER: ALL RIGHT.

27 THE COURT: MALICE AFORETHOUGHT DEFINED. 831, SECOND  
28 DEGREE MURDER. ALL RIGHT. SECOND DEGREE FELONY MURDER.

2B -  
1 SECOND DEGREE FELONY MURDER PURSUANT TO A CONSPIRACY.

2 IF A NUMBER OF PERSONS CONSPIRE TOGETHER TO COMMIT  
3 ANOTHER FELONY INHERENTLY DANGEROUS TO HUMAN LIFE, NAMELY,  
4 KIDNAPPING FOR PURPOSES OF EXTORTION -- IS THAT RIGHT?

5 MR. WAPNER: RIGHT.

6 THE COURT: ALL RIGHT. SECOND DEGREE MURDER, FELONY  
7 MURDER, AIDER AND ABETTOR.

8 FELONY INHERENTLY DANGEROUS TO HUMAN LIFE,  
9 KIDNAPPING FOR THE PURPOSE OF EXTORTION. THAT IS AIDER AND  
10 ABETTOR.

11 SEIZURE, CONFINEMENT OR RANSOM OR EXTORTION --  
12 I HAVE TO CHANGE THAT. EVERY PERSON WHO SEIZES, CONFINES  
13 AND BLAH, BLAH, BLAH -- THAT SECTION 209 OF THE PENAL CODE.

14 ALL RIGHT. I WILL THROW THAT IN. ACHIEVEMENT  
15 OF PURPOSE NOT ESSENTIAL IN KIDNAPPING -- ALL RIGHT.

16 NOW THEN, SPECIAL INSTRUCTION NUMBER 3, I AM NOT  
17 GOING TO CATEGORIZE THE FOLLOWING INSTRUCTION APPLIES ONLY  
18 TO YOUR DETERMINATION, WHETHER THE DEFENDANT COMMITTED THE  
19 THREE CRIMES ALLEGED.

20 I DON'T THINK THAT IS NECESSARY THAT --

21 MR. CHIER: REJECTED?

22 THE COURT: YES.

23 MR. CHIER: OKAY.

24 THE COURT: WELL, REFUSED. IT WILL BE GIVEN IN SOME  
25 OTHER CONTEXT.

26 THEN WE GO TO THE PENALTY PHASE.

27 ALL RIGHT, FACTORS TO BE CONSIDERED, 8841, WE  
28 HAVE GONE OVER THOSE.

2B 7  
1 OTHER CRIMINAL ACTIVITIES, PROOF BEYOND A  
2 REASONABLE DOUBT, EVIDENCE INTRODUCED FOR THE PURPOSE OF SHOWING  
3 THE DEFENDANT HAS COMMITTED THE FOLLOWING CRIMINAL ACTS --

4 MR. CHIER: WHAT?

5 THE COURT: 88412.

6 MR. CHIER: 88412?

7 THE COURT: WELL, THE TWO ARE SHOOTING AT AN INHABITED  
8 DWELLING -- AN INHABITED BUILDING, RATHER AND MURDER COMMITTED  
9 DURING THE COURSE OF A KIDNAPPING FOR THE PURPOSE OF -- IS  
10 THAT IT? MURDER COMMITTED DURING THE COURSE OF KIDNAPPING.  
11 IS THAT RIGHT?

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1 MR. CHIER: I DON'T HAVE THAT ONE, JUDGE.

2 THE COURT: YOU HAVE 884.2.

3 MR. CHIER: NO, I DON'T. THAT IS THE ONE I GAVE TO  
4 MR. WAPNER.

5 MR. WAPNER: I GAVE IT BACK.

6 MR. CHIER: YOU MUST HAVE TAKEN IT BACK -- HERE IT  
7 IS.

8 THE COURT: ALL RIGHT, THEN YOU HAVE GOT 884.2, THE  
9 CONCLUDING INSTRUCTION. THAT IS WHERE I ADD --

10 MR. CHIER: 884?

11 THE COURT: THAT IS THE CONCLUDING INSTRUCTION, 884.2.

12 MR. BARENS: THEN WE HAVE SOMETHING FROM THE DEFENSE  
13 HERE, YOUR HONOR, THAT WAS APPROVED?

14 THE COURT: YES. LET'S SEE WHAT WE HAVE ON THAT.

15 MR. BARENS: WE HAVE, I BELIEVE, OUR SPECIAL.

16 THE COURT: OH, YES, THAT IS ON THE MITIGATING  
17 CIRCUMSTANCE -- NO.

18 MR. BARENS: SPECIAL NUMBER 3, AS MODIFIED.

19 THE COURT: YOU WANT TO WITHDRAW SPECIAL NUMBER 1 ON  
20 BRUCE SWARTOUT, RIGHT?

21 MR. BARENS: YES.

22 THE COURT: WE DON'T NEED THAT.

23 I WILL ADD: "YOU MAY CONSIDER AS MITIGATING  
24 FACTORS THE DEFENDANT'S CHARACTER, BACKGROUND AND HISTORY."

25 MR. BARENS: YES, YOUR HONOR.

26 THE COURT: IS THAT RIGHT?

27 MR. BARENS: YES, YOUR HONOR.

28 THE COURT: THE LACK OF PRIOR CRIMINAL RECORD IS IN

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1 THE OTHER INSTRUCTION AND THE AGE IS IN THE OTHER INSTRUCTION  
2 SO WE HAVE GOT A AND B TAKEN CARE OF.

3 MR. BARENS: WHILE WE ARE HERE, YOUR HONOR MIGHT WANT  
4 TO JUST VIEW IN PASSING, AS WE ARE LEAVING, SPECIAL NUMBER  
5 5 AGAIN.

6 THE COURT: 4 HAS BEEN REFUSED.

7 MR. BARENS: YES, BUT NUMBER 5 PERHAPS --

8 THE COURT: THAT WILL BE REFUSED, TOO, IN THE FORM  
9 IT IS GIVEN.

10 MR. BARENS: ALL RIGHT.

11 THE COURT: WAIT A MINUTE NOW. WHY DON'T YOU GET AN  
12 INSTRUCTION ON THIS SO I CAN PUT IT IN THE INSTRUCTION?

13 MR. BARENS: NUMBER 3?

14 THE COURT: NO -- YES, NUMBER 3.

15 MR. BARENS: MR. CHIER, WOULD YOU PLEASE DO THAT?

16 THE COURT: "CONSIDER MITIGATING FACTORS ADDITIONALLY:  
17 DEFENDANT'S CHARACTER, HIS BACKGROUND AND HISTORY."

18 MR. BARENS: THAT IS OUR NEW 3 THAT HIS HONOR WOULD  
19 LIKE SUBMITTED TO THE COURT, YOU WILL DRAFT THAT NEW 3,  
20 PLEASE?

21 THE COURT: LET ME GIVE IT TO YOU. HERE IT IS.

22 MR. BARENS: I WILL HAND IT TO YOU, MR. CHIER, AND  
23 WE WILL JUST RESUBMIT IT.

24 THE COURT: "YOU MAY CONSIDER AS ADDITIONAL MITIGATING  
25 FACTORS THE DEFENDANT'S CHARACTER, BACKGROUND AND HISTORY."

26 THE OTHERS ARE INCLUDED IN ANOTHER INSTRUCTION.

27 MR. BARENS: WOULD YOU REDRAFT THIS, MR. CHIER?

28 THERE IS ONE OTHER LITTLE THING I WANTED TO

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1 BRRING UP, JUDGE. IT IS SOMETHING THAT OCCURRED YESTERDAY  
2 AND I DIDN'T KNOW WHETHER YOUR HONOR WANTED TO ADDRESS IT.

3 IT CONCERNS ME BOTH PERSONALLY AND PROFESSIONALLY.  
4 DURING -- AND I DON'T KNOW WHAT THE SOLUTION IS TO THIS --  
5 I AM POSING IT AS A QUESTION BECAUSE I DON'T WANT THE JURY  
6 TO HAVE A BAD IMPRESSION AS WE GO IN TO ARGUE TOMORROW.  
7 AT A MOMENT OF DISTRACTION IN COURT YESTERDAY, YOUR HONOR  
8 MADE A REFERENCE TO DEFENSE COUNSEL AS MOUTHPIECES.

9 THE COURT: WHAT DO YOU WANT ME TO DO?

10 MR. BARENS: HERE IS WHAT I WOULD LIKE TO SUGGEST:  
11 THAT YOUR HONOR POINT OUT THAT THERE WAS A DISTRACTION IN  
12 THE COURTROOM AND THAT NOTHING PEJORATIVE TOWARDS DEFENSE  
13 LAWYERS AS A GENERALITY WAS BEING IMPLIED, BECAUSE I DON'T  
14 THINK YOUR HONOR INTENDED TO DO THAT.

15 THE COURT: NO.

16 MR. BARENS: BUT COULD YOUR HONOR MAKE THAT STATEMENT  
17 TO THE JURY BEFORE I ARGUE?

18 THE COURT: CERTAINLY.

19 MR. BARENS: I WOULD APPRECIATE THAT, SIR.

20 I THINK WE HAVE CONCLUDED OUR BUSINESS.  
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1 THE COURT: AND FRED, YOU ARE GOING TO TAKE CARE OF  
2 THOSE ADDITIONAL INSTRUCTIONS?

3 MR. WAPNER: YES, I WILL.

4 THE COURT: ARE YOU GOING TO TAKE CARE OF THAT ONE  
5 ABOUT THE PRESUMPTION OF INNOCENCE AND SO FORTH?

6 MR. WAPNER: WHAT I WILL DO IS HAVE IT RETYPED IN THE  
7 LANGUAGE THAT WE HAVE AGREED UPON AND THEN I WILL SUBMIT  
8 IT TO THE COURT AND TO COUNSEL IN THE MORNING.

9 I THINK WHAT WE SHOULD TRY AND DO IS TO MEET  
10 HERE EARLIER, VERY EARLY, UNLESS THERE IS SOME DISAGREEMENT  
11 ABOUT THAT.

12 THE COURT: I WILL BE HERE EARLY.

13 MR. WAPNER: I AM JUST AFRAID THAT IF I COME IN AT  
14 10:00 AND GIVE SOME INSTRUCTION, AND WE TALK ABOUT IT, BY  
15 THE TIME WE GET STARTED IT IS 10:30 AND WE ARE ALREADY  
16 THROWING THE SCHEDULE OFF.

17 THE COURT: IT IS PERFECTLY ALL RIGHT WITH ME TO COME  
18 IN AT 8:30.

19 MR. BARENS: COULD I HAVE MR. CHIER DO THAT IN MY BEHALF  
20 FOR THE REASON I HAVE TO NOW GET BACK TONIGHT AND WRITE  
21 THE ARGUMENT AND PREPARE ARGUMENT IN THE MORNING AND I  
22 AM GOING TO NEED ALL OF THE TIME I CAN JUST TO GET IT  
23 TOGETHER. I WOULD APPRECIATE THAT.

24 THE COURT: HE CAN COME AND CONFER WITH MR. WAPNER.

25 MR. BARENS: WHAT TIME?

26 MR. WAPNER: JUST 9:30, I THINK IS ALL RIGHT.

27 THE COURT: ALL RIGHT, MAKE IT 9:00. ARGUMENT BEGINS  
28 AT 10:00.

1 MR. CHIER: I ORIGINALLY HAD COURT APPEARANCES SET  
2 FOR FRIDAY BECAUSE WE WERE GOING TO BE OFF.

3 THE COURT: THAT MEANS MR. BARENS WILL HAVE TO COME.

4 (UNREPORTED COLLOQUY BETWEEN DEFENSE  
5 COUNSEL.)

6 MR. WAPNER: WELL, IF THE ONLY INSTRUCTION WE ARE TALKING  
7 ABOUT IS 2.90, THEN LET ME JUST READ IT TO YOU THE WAY I  
8 HAVE IT AND SEE IF THAT IS SATISFACTORY:

9 "REGARDING THE CRIMES ALLEGED AS  
10 FACTORS IN AGGRAVATION, A DEFENDANT IS PRESUMED  
11 TO BE INNOCENT UNTIL THE CONTRARY IS PROVED AND  
12 IN CASE OF A REASONABLE DOUBT THAT HE COMMITTED  
13 ANY OF SAID CRIMES, YOU MAY NOT CONSIDER THEM AS  
14 FACTORS IN AGGRAVATION. THIS PRESUMPTION PLACES  
15 UPON THE STATE THE BURDEN OF PROVING HIM GUILTY  
16 BEYOND A REASONABLE DOUBT. THE BURDEN OF PROVING  
17 THESE CRIMES --"

18 MR. CHIER: THE COMMISSION OF THESE CRIMES.

19 MR. WAPNER: I DON'T KNOW THAT THEY ARE --

20 MR. CHIER: THAT IS NOT IT EITHER. THE DEFENDANT'S  
21 RESPONSIBILITY FOR THE COMMISSION OF THESE CRIMES IS REALLY  
22 THE ISSUE.

23 THE COURT: READ IT TO ME NOW.

24 MR. CHIER: YOU SEE, THE PROBLEM IN THIS CASE IS THERE  
25 MAY HAVE BEEN -- SOMETHING MAY HAVE HAPPENED -- THERE IS  
26 A NEXUS PROBLEM, MR. WAPNER, SO THAT THE REASONABLE DOUBT  
27 IS AS TO WHETHER THE DEFENDANT PARTICIPATED OR IN ANY WAY  
28 HAS ANY COMPLICITY IN THIS SITUATION.

1 MR. WAPNER: OKAY.

2 "REGARDING THE CRIMES ALLEGED AS  
3 FACTORS IN AGGRAVATION, THE DEFENDANT IS PRESUMED  
4 TO BE INNOCENT UNTIL THE CONTRARY IS PROVEN AND  
5 IN CASE OF A REASONABLE DOUBT, WHETHER HE COMMITTED --"

6 MR. CHIER: YES, THAT IS BETTER.

7 THE COURT: OR AIDED IN THE COMMISSION, IF YOU WANT  
8 TO.

9 MR. WAPNER: WELL, WE HAVE GOT THE AIDING AND ABETTING  
10 INSTRUCTION.

11 IS THAT OKAY?

12 MR. CHIER: OKAY.

13 MR. WAPNER: "WHETHER HE COMMITTED SAID CRIMES,  
14 YOU MAY NOT CONSIDER THEM AS FACTORS IN AGGRAVATION.  
15 THIS PRESUMPTION PLACES UPON THE STATE THE BURDEN  
16 OF PROVING THE DEFENDANT'S COMMISSION OF THESE  
17 CRIMES BEYOND A REASONABLE DOUBT.

18 "REASONABLE DOUBT IS DEFINED AS FOLLOWS."

19 AND THEN IT GOES ON TO DEFINE WHAT REASONABLE  
20 DOUBT IS.

21 IS THAT SATISFACTORY TO ALL COUNSEL?

22 MR. CHIER: AGREED.

23 MR. BARENS: AGREED, SIR.

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1 MR. WAPNER: THEN AS FAR AS THE OTHER INSTRUCTIONS GO,  
2 THEY WILL JUST BE MODIFIED BY THE COURT, WHEREVER NECESSARY?

3 THE COURT: YES.

4 MR. WAPNER: ALL RIGHT. THANK YOU. SO WE DON'T NEED  
5 TO MEET THEN, THEY CAN JUST --

6 MR. CHIER: THERE IS ONE OTHER HOUSEKEEPING MATTER.  
7 THIS IS PROBABLY THE LAST TIME THE DEFENDANT WILL BE IN  
8 CHAMBERS AND HE HAS REQUESTED THAT HE BE PROVIDED WITH A  
9 PARTIAL TRANSCRIPT WHICH WOULD BE FIVE PAGES OF THE PROFFER  
10 AT THE SIDE BAR INVOLVING THIS EXHIBIT 37 ON THE VERY FIRST  
11 DAY OF TESTIMONY.

12 THE COURT: I WON'T GIVE HIM ANYTHING.

13 THE DEFENDANT: THE LAWYERS UP NORTH REQUESTED IT. THAT  
14 IS ALL, YOUR HONOR. IT WAS --

15 THE COURT: I WILL HEAR NO MORE ABOUT 37. THAT IS ALL  
16 WATER OVER THE DAM.

17 THE DEFENDANT: IT WAS PUT UNDER SEAL. I HAVE NO OTHER  
18 WAY OF GETTING IT, EXCEPT THROUGH YOU.

19 MY LAWYERS UP NORTH WANT IT BECAUSE IT INVOLVES  
20 AN ISSUE UP THERE.

21 THE COURT: AN ISSUE WHERE?

22 THE DEFENDANT: IN NORTHERN CALIFORNIA. WE WON'T BRING  
23 IT UP AGAIN IN THE CONTEXT OF THIS TRIAL.

24 MR. CHIER: THE LAWYERS HAVE NO STANDING IN THIS COURT.  
25 SINCE YOU ARE THE ONLY PERSON WHO CAN UNSEAL IT FOR THE  
26 DEFENDANT, WE ARE ASKING THAT YOU DO SO, SO THAT HE CAN GIVE  
27 IT TO THEM UP THERE BECAUSE IT IS GERMANE TO THE PROCEEDINGS  
28 UP THERE.

1 THE DEFENDANT: I JUST DESCRIBED WHAT IT WAS TO YOUR  
2 HONOR ON THE RECORD. ACTUALLY, IT IS ONLY PROBABLY TWO OR  
3 THREE PAGES OF TRANSCRIPT.

4 IT IS THE FIRST DAY OF TRIAL.

5 MR. WAPNER: WAIT A SECOND. ARE WE SAYING THAT THE  
6 DEFENDANT WANTS FOR HIS LAWYER IN NORTHERN CALIFORNIA,  
7 SOMETHING THAT HE SAYS IS A DESCRIPTION THAT THE DEFENDANT  
8 GAVE OF THIS THING?

9 THE DEFENDANT: ON THE RECORD.

10 THE COURT: I MADE --

11 MR. WAPNER: I AM OUT OF THIS. IT IS NOT UP TO ME.

12 THE COURT: SOMETHING ALLEGEDLY WAS TAKEN FROM THE HOME.

13 MR. WAPNER: I UNDERSTAND THAT. MY POSITION ON THIS  
14 HAS BEEN VERY CLEAR FROM THE BEGINNING, THAT THERE WAS NOTHING  
15 EVER TAKEN AND THAT THIS IS A TOTAL FABRICATION.

16 THE COURT: I MADE A RULING NOT THAT IT IS A FABRICATION.  
17 I MADE A RULING THAT NO SUCH EXHIBIT WAS TAKEN BY THE OFFICERS  
18 WHO WERE UP THERE.

19 MR. BARENS; I DON'T THINK THAT THIS IS AN ISSUE --  
20 THE DEFENDANT SIMPLY WANTS YOUR HONOR TO UNSEAL IT AND PROVIDE  
21 HIM WITH A COPY OF IT AND --

22 THE COURT: WHAT DOES HE WANT IT FOR?

23 MR. WAPNER: WAIT A SECOND. WHAT DOES UNSEALING,  
24 PROVIDING THAT ONCE IT IS UNSEALED --

25 MR. BARENS: I MEAN, THEY CAN SIMPLY BE PROVIDED WITH  
26 A TRANSCRIPT. I DON'T KNOW.

27 I KNOW THAT IT IS A REQUEST THAT CAME DOWN FROM  
28 THESE LAWYERS UP NORTH. I HAVE NOT TALKED TO THEM ABOUT IT.



34-3  
1 IT IS JUST A REQUEST THAT WAS MADE. I AM PASSING THE REQUEST  
2 ALONG.

3 THE COURT: LET THEM MAKE THEIR INDEPENDENT REQUEST.

4 MR. BARENS: THEY HAVE NOT GOT STANDING TO COME IN HERE  
5 AND ASK YOUR HONOR FOR THAT PORTION OF THE TRANSCRIPT THAT  
6 HAS BEEN SEALED.

7 THE COURT: IF THE JUDGE WANTS IT, LET HIM ASK ME FOR  
8 IT.

9 MR. CHIER: THE LAWYER WANTS --

10 THE COURT: IF THE JUDGE WANTS IT, HE CAN TELL HIM WHAT  
11 IT IS ALL ABOUT. IF HE THINKS HE WANTS TO MAKE A RULING UP  
12 THERE, I WILL RELEASE IT TO HIM.

13 MR. BARENS: I AM ADVISED.

14 THE COURT: ALL RIGHT. THANK YOU.

15 (AT 3:52 P.M. AN ADJOURNMENT WAS TAKEN  
16 UNTIL FRIDAY, MAY 29, 1987, AT 10 A.M.)  
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