

1 A That was about four weeks, around there somewhere.

2 Q So two weeks after you had seen Spence?

3 A Yes, sir, two weeks after I had seen Spence.

4 Q Okay, would that put it then somewhere in mid August?

5 A Yes, sir, around there somewhere.

6 Q Why didn't you ever go back and get your truck?

7 A I had worked on it, and I had some things that I  
8 was working on with the truck.

9           Shortly after that, I was arrested, and I never  
10 had a chance to go back to look at the truck.

11                           MR. FEAZELL: All right, that  
12 is all, Judge.

13                           MR. REAVES: We don't have any  
14 further questions, Your Honor.

15                           THE COURT: All right, you can  
16 step down, Mr. Melendez.

17   (Witness excused.)

18                           MR. FEAZELL: Your Honor, the  
19 State calls Captain Dan Weyenberg.

20                           D A N W E Y E N B E R G, recalled as a witness  
21 on behalf of the State, having been duly sworn,  
22 testified as follows:

23                           THE COURT: All right,  
24 Captain Weyenberg, having been previously sworn  
25 in this cause, you are ready to testify.

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MR. WEYENBERG: Yes, sir.

DIRECT EXAMINATION

QUESTIONS BY MR. FEAZELL:

Q You are Captain Dan Weyenberg?

A Yes, sir.

Q Will you spell your last name for the Court Reporter,  
please?

A W-e-y-e-n-b-e-r-g.

Q And you are the same Captain Weyenberg that has  
testified in this case previously?

A Yes, sir.

Q Did you bring some records with you for me to look  
at, sir?

A Yes, sir, I did.

(Whereupon an instrument was  
(marked for identification  
(as State's Exhibit No. 52.

Q Captain Weyenberg, I will show you what has been  
marked as State's Exhibit No. 52. I am going to  
ask you what that is, please, sir.

A This is a photostatic copy of the arrest record  
that we have in the McLennan County jail.

Q And an arrest record on who?

A It would be Gilbert Melendez.

Q All right, I am going to ask you to look at the  
original and tell me if it is an exact duplicate of

1 the original?

2 A Yes, sir, this is a copy that I made personally  
3 myself.

4 Q When does it show that Mr. Melendez was booked  
5 into jail?

6 A This booking card reflects that he was --

7 MR. VANCE: Your Honor, I will  
8 object to him testify from an exhibit that has not  
9 been admitted.

10 THE COURT: All right, offer  
11 the exhibit first.

12 MR. FEAZELL: We will offer it  
13 into evidence, Judge. It is an exact duplicate of  
14 the original.

15 MR. VANCE: We would like to  
16 see the original, too.

17 THE COURT: Let them compare  
18 them, Mr. Feazell.

19 MR. VANCE: We have no objection.

20 THE COURT: All right, Exhibit 52  
21 will be admitted.

22 (State's Exhibit No. 52 was then  
23 admitted into evidence.

24 MR. FEAZELL: Thank you,

25 Your Honor.

- 1 Q Now, Captain Weyenberg, when does it show that  
2 Mr. Melendez was booked into jail?
- 3 A It shows that he was booked into McLennan County  
4 jail on 9/10/82 at 4:31 p.m.
- 5 Q All right, can you point out for me where it  
6 indicates that?
- 7 A The date and the time.
- 8 Q And is he still in the custody of the McLennan County  
9 jail?
- 10 A Yes, sir, he is.
- 11 Q Has he ever been out of the custody of McLennan  
12 County jail?
- 13 A Since that date?
- 14 Q Yes, sir.
- 15 A Yes, sir.
- 16 Q And what was the purpose of that?
- 17 A He was transferred to TDC, Texas Department of  
18 Corrections, I believe, for seven years -- for  
19 seven years to do, yes.
- 20 Q All right, and then was he brought back into the  
21 custody of McLennan County jail?
- 22 A Yes, sir, he was.
- 23 Q Was he ever then out of the custody of the county  
24 jail, again?
- 25 A One other time when he was returned back to the

1 Texas Department of Corrections.

2 Q All right, and that was on a sentence that he was  
3 serving?

4 A Yes, sir.

5 Q Okay, the seven years you mentioned, does the  
6 booking sheet indicate what that was for?

7 A Yes, sir, he was charged with aggravated sexual  
8 abuse.

9 Q Okay, and that was on an unrelated case to this?

10 A Yes, sir.

11 MR. FEAZELL: We will pass the  
12 witness, Your Honor.

13 MR. REAVES: Your Honor, we  
14 don't have any questions.

15 THE COURT: All right, can the  
16 Captain be excused?

17 MR. FEAZELL: Yes, sir,  
18 Your Honor.

19 THE COURT: All right.

20 MR. VANCE: No objections.  
21 (Witness excused.)

22 MR. FEAZELL: If I may confer  
23 with Mr. Butler for one moment.

24 THE COURT: All right.  
25 (Brief pause.)

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MR. BUTLER: May we approach  
the bench, Your Honor?

(Conference at the bench.)

MR. FEAZELL: We rest,  
Your Honor.

THE COURT: Defense?

MR. REAVES: Your Honor, in  
light of the State's rebuttal, we do have some  
witnesses we need to talk to that we may offer in  
rebuttal.

THE COURT: Are they available?

MR. REAVES: No, sir, they are  
all in Waco.

THE COURT: Which specific ones  
are you referring to that the State has presented?

MR. VANCE: Judge, we are not --  
they are not required to tell us their rebuttal  
witnesses, and we are sure not required to let them  
know.

THE COURT: What I am getting  
at is, if there is any witnesses from yesterday,  
you had time to do that last night,

MR. VANCE: No, these would be  
others than we called yesterday.

THE COURT: The ones this morning,

1 you are talking about?

2 MR. VANCE: Well, we have the  
3 opportunity to rebut what their rebuttal is.

4 THE COURT: I am not denying you  
5 that. I am talking about how well you are managing  
6 this case and conserving time.

7 MR. VANCE: Judge, we don't know  
8 what their rebuttal is. If we do have testimony,  
9 it is not going to be very long.

10 THE COURT: Well, it is going  
11 to take an hour or so to get the witnesses down  
12 here, if you are going to use them. So give me an  
13 idea.

14 MR. VANCE: We had considered  
15 working on the Charge the rest of the day, as we  
16 discussed, and then if we don't have anything, we  
17 can go straight to argument. If we do have something,  
18 it is not going to be very long.

19 THE COURT: You are talking  
20 about an hour or so?

21 MR. VANCE: Probably not even  
22 that long.

23 THE COURT: And then if there  
24 is -- there will be a re-rebuttal.

25 MR. VANCE: Not necessarily,

1 no, sir.

2 THE COURT: We are going to  
3 have to bring this to an end somehow or another,  
4 gentlemen.

5 MR. VANCE: Judge, we don't  
6 know what their rebuttal was. They don't tell us.  
7 I would say if we have the jury here at --

8 THE COURT: Can you take 15  
9 minutes and find out what you want to do and then  
10 taken 15 minutes and call these witnesses and have  
11 them down here this afternoon?

12 MR. VANCE: We can try. We  
13 just need to discuss it in light of this testimony  
14 which we have never seen before.

15 If we can take about 20 minutes,  
16 I think, we can give the Court an answer.

17 THE COURT: And how about finding --  
18 if you do need the witnesses, do you know where to  
19 get in touch with them? Are they available  
20 immediately?

21 MR. VANCE: There is only one  
22 possible that we might have a problem with, but we  
23 will try.

24 THE COURT: I mean, do they  
25 have an immediate way that you can get in touch with

1           them -- not get them down here but call them at  
2           home and find out?

3                           MR. VANCE: Yes, sir.

4                           THE COURT: All right, it is  
5           10:36 -- 37. By 11:00 o'clock, let me know two  
6           things. Do you have a witness or witnesses, and  
7           if so, will they be here at 1:30? If you decide by  
8           11:00 and call them, that gives them ample time to  
9           get here.

10                          MR. VANCE: From Waco?

11                          THE COURT: Yes.

12                          MR. VANCE: All right, we will  
13           try the best we can, Judge.

14                          THE COURT: Well, report back  
15           and let me know something for sure.

16                          All right, ladies and gentlemen,  
17           we will have another recess. I don't want you to  
18           leave and have to come back, but if somebody does  
19           have something to do that you can do in this period  
20           of time, well, go ahead and leave the courthouse or  
21           something and come back by 11:00 by that clock right  
22           there. If you need to use telephones, we have got  
23           them, of course, and whatever else you might need  
24           to do.

25

1 (Whereupon the jury retired from  
2 (the courtroom and the following  
3 (proceedings took place out of  
4 (their presence and hearing:

5 (Brief recess.)

6 THE COURT: All right. Now,  
7 gentlemen, before we bring the jury back in, is there  
8 anything that needs to be stated?

9 MR. VANCE: Judge, we intend to  
10 rest at this time, but Mr. Spence has got a statement  
11 he wants to make to the Court.

12 THE COURT: All right.

13 THE DEFENDANT: Your Honor, I  
14 really don't understand what is going on here. I  
15 mean, you have given us 20 minutes to contact some  
16 witnesses and approximately a couple of hours to  
17 get them down here against stuff we didn't even  
18 know we was going to have to rebut against.

19 It seems to me like we are here  
20 on the issue of time to keep in compliance with the  
21 Court's docket instead of to issue that I get a  
22 fair trial.

23 I mean, my lawyers don't even  
24 want to call no more witnesses. I don't want the  
25 jury to have to guess that these people are lying.  
I know they are, and I want to prove it.

1 I don't want to leave them to  
2 guess on something on my life, and they are not  
3 wanting to call the witnesses that I want.

4 I mean, I can't see no fair  
5 trial here. It is supposed to be in my best  
6 interest -- not in the interest of the time of the  
7 Court or who they want to call, but who I want to  
8 call. I don't understand it.

9 I mean, how can it be said that  
10 I am getting a fair trial when all of this is  
11 happening? I can't even get my lawyers to comply  
12 with what I want.

13 I am supposed to be the client --  
14 not them. I mean, if I was paying them, wouldn't  
15 they go get the witnesses I wanted?

16 Just because they are appointed  
17 by the Court, I can't get certain witnesses brought  
18 in to prove that these people are lying.

19 So I have to -- I have to rest  
20 on leaving it up to the jury to guess to these  
21 people's statements and things. That is just like  
22 with the bracelet that they are saying that was found  
23 out at the scene of the crime.

24 That bracelet was found after  
25 my lawyers brought up the issue of Ronnie Lee Breiton,

1 and they bench warranted him back to the county jail.

2 It was during that time that  
3 they come across that bracelet. I don't think Tony  
4 and Gilbert took them out there. I think it was  
5 Ronnie Lee Breiton because I know that we didn't do  
6 this, and I know that you know it too, Vic.

7 THE COURT: All right, Mr. Spence,  
8 if you want to testify, you can. Otherwise, you  
9 have had an opportunity to speak, and I have heard  
10 enough, and you are now out of order, and you sit  
11 down, and we will proceed with the trial.

12 THE DEFENDANT: Your Honor, if I  
13 was to take the stand to testify, they would be able  
14 to bring up criminal prior -- a criminal prior  
15 record.

16 THE COURT: What you are doing  
17 now is wasting time giving unsworn testimony.

18 THE DEFENDANT: Everything is  
19 on time, time, time.

20 MR. VANCE: Your Honor, in light  
21 of that motion, we would ask to withdraw, again.

22 THE COURT: All right, that is  
23 denied. I might even give you a raise. You are  
24 doing a fine job.

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(Whereupon the jury returned  
(into the courtroom and the  
(following proceedings took place:

THE COURT: All right,  
announcements, gentlemen, for both sides?

MR. VANCE: At this time, the  
Defense rests and closes.

MR. FEAZELL: State closes,  
Your Honor.

THE COURT: All right, ladies  
and gentlemen of the jury, you have heard both  
sides announce that they have rested and closed which  
means, as I have explained to you before, that all  
the evidence that either side intends to present  
has been presented.

We had a very productive session  
yesterday afternoon preparing the Charge, and we have  
our first draft ready to be reviewed.

There will probably be a few  
cosmetic changes, and then it will be finalized, but  
rather than have you wait around, which you have been  
very patient about, I have tried to avoid as many  
waits as possible, and rather than have you wait  
around this afternoon, we are going to recess until  
8:00 o'clock in the morning.

At that time, the Charge will be

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read, the final argument will be presented, and then you will retire to commence deliberation.

Arrangements have been made at a local motel to house you all, to feed you and transportation has been arranged.

So as I pointed out to each of you when you were selected as members and as alternates, you will need to make plans. This will give you some time this afternoon, and come with an overnight preparation when you come tomorrow.

You can just come in and put it all, whatever you bring, in the jury room in the morning, and you will deliberate here at the courthouse in the jury room.

In the event it becomes necessary tomorrow night to be sequestered, those arrangements have been made.

There will be no telephone facilities available except in the event of an emergency. So do all the planning that you need to, and explain to your family and friends or whoever that you will not be able to communicate with them.

Now, does anybody have any questions about the sequestering part of it? There will be a whole floor of a local motel available,

1 and there will be security there.

2 You all might want to consider --  
3 we can have individual rooms, or you can room  
4 together. It is up to you all. There will be plenty  
5 of facilities either way, but you can think about  
6 that and decide tomorrow evening late.

7 As to the deliberation, you  
8 can deliberate any time you want to. You all can  
9 stay here at night or start when you want to. That  
10 is going to be entirely up to you all, but think  
11 about it, and if there are any questions you have  
12 that you think of between now and in the morning,  
13 make a notation of it, and we will discuss them  
14 when you get here in the morning.

15 Now, as I tell you every  
16 afternoon or every day when we recess, remember the  
17 instructions of the Court so far as the news media  
18 coverage and any other contacts directly or indirectly  
19 by anyone regarding the case.

20 Gentlemen, is there anything  
21 that any of you all can think of that you would like  
22 for me to point out to the members of the jury? Is  
23 8:00 -- will you all be ready to proceed at 8:00 in  
24 the morning, or would you rather say 8:30, Mr. Vance?

25 MR. VANCE: Why don't we make it

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around 8:30.

THE COURT: All right, that will give us this afternoon to finish the Charge and give you all a night to review your notes and so on.

MR. VANCE: I want to make sure the jury will be sequestered from now on -- after arguments to the full conclusion.

THE COURT: Yes, I have said this before but I will reiterate. You will be sequestered continuously until deliberations are concluded. So that will be whatever -- no one can answer that question, even yourselves, at this point in time, but I want to let you know that, and you will remain -- you will be brought in a van back and forth as a group, all 13 of you, or all 12 of you.

That brings to mind, the alternate will not -- if all 12 jurors are still on the case at the time the deliberation commences, then the alternate will not be necessary. So anything else?

MR. VANCE: No, sir.

THE COURT: All right, everyone remain seated in the courtroom until all the jurors have exited, please.

(Whereupon the jury retired from the courtroom and the following proceedings took place out of

1 (their presence and hearing:

2 MR. FEAZELL: Your Honor, are  
3 you going to want to commence with the punishment  
4 evidence immediately after the verdict or start  
5 Friday morning?

6 THE COURT: Well, it would  
7 depend, of course, what time the verdict is in, but  
8 if it is a reasonable hour, yes. Let us go ahead  
9 and go directly into punishment.

10 MR. FEAZELL: So get our  
11 punishment witnesses here tomorrow afternoon?

12 THE COURT: Yes, sir, I don't  
13 like to have people just aimlessly waiting, but as  
14 long as this has been and as many people that are  
15 involved, I would certainly appreciate it, or have  
16 them where they could get here, say, in an hour and  
17 a-half. What is the -- is that adequate time for  
18 most of them?

19 MR. FEAZELL: Two hours is better.

20 THE COURT: That is just too hard  
21 a question to answer because there is no telling what  
22 time there may be a verdict, if there is.

23 MR. FEAZELL: I think, we might  
24 can arrange to have one witness who may take awhile  
25 here tomorrow afternoon.

1 THE COURT: Well, try to do that,  
2 and meanwhile, if we get to that point, and that  
3 witness has testified, you can have the others start.

4 Now, let me ask you, gentlemen,  
5 some questions here. We have a whole floor of a  
6 motel. There will be no television or telephones  
7 in the rooms, and we will have a bailiff and a matron  
8 on the same floor and at all times. Are there any  
9 other questions or suggestions that you all have or  
10 Mr. Spence?

11 MR. VANCE: Again, the deliberation  
12 you use the word plural, I hope. In the event that he  
13 is found guilty, they are not going to break at any  
14 time from the time they leave tomorrow?

15 THE COURT: They will be  
16 sequestered continuously until the conclusion of  
17 the case. When I said deliberation, I was speaking  
18 strictly to the first phase, and I will not address  
19 the second phase until that time. I don't in any  
20 way want to predict or presume or even indicate that  
21 there would be. I will take one phase at a time is  
22 the reason I was very guarded about the singular  
23 instead of the plural because I don't want in any  
24 way to have a comment on the weight of the evidence  
25 from the Court.

1 Mr. Spence, you understand now  
2 what I just explained about sequestering the jury?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you have any  
5 questions?

6 THE DEFENDANT: No, sir.  
7 Your Honor, I would just like to reurge to dismiss  
8 my counsel and also, a mistrial.

9 THE COURT: All right, you have  
10 done so and denied. All right, anything else?

11 MR. FEAZELL: Judge, since I  
12 can comment on the weight of the evidence, you do  
13 want me to try to get a punishment witness here  
14 tomorrow?

15 THE COURT: It would be a good  
16 idea to have one on standby so we won't prolong  
17 it any longer than necessary.

18 I understand you don't want to  
19 have somebody inconvenienced any more than is  
20 necessary, but we have gone this far. I certainly  
21 would appreciate it.

22 Now, gentlemen, let us reconvene  
23 here at 1:30. The draft of the Charge is already  
24 out. Here it is. You can look at it over the  
25 lunch hour, and we will see where we go from here.

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All right, gentlemen, see you all  
at 1:30. Is that enough time to look at the Charge  
and so on?

MR. VANCE: I think so.

(Recess - lunch.)

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THURSDAY, OCTOBER 17, 1985

MORNING SESSION: 8:00 a.m.

- - - - -

(Whereupon the Defendant was present.)

(Whereupon the following proceedings took place outside the presence and hearing of the jury:

THE COURT: All right, gentlemen, let us go on the record now for any requests or objections to the Charge.

MR. VANCE: Your Honor, at first, I want to make sure the Court has made a ruling on all of our special instructions we have requested in this case, and the Court originally had a copy of those special instructions which the Court marked up and after deliberations regarding what the contents of the Charge were, we reoffer the same and would have the Court rule on them and that it be filed and made part of the record.

THE COURT: Yes, sir, I have ruled on this. Now, the second copy to be clear for the record is --

MR. VANCE: Can we write second copy on it?

THE COURT: Yes, and I think

1 we ought to and I am going to leave this other one  
2 in here because we ended up using it as a work copy  
3 at the work session, and there are some notations on  
4 it, and then you supplied a second clean copy.

5 So why don't you write "second"  
6 or it is really a duplicate original of the first  
7 except it doesn't have all these little notations  
8 that we made during the work session.

9 MR. BUTLER: Judge, while we are  
10 talking about second copies and duplicates, I talked  
11 to Mr. Vance about this, and we would like to  
12 substitute a copy for the original title on the  
13 truck that was introduced.

14 MR. VANCE: We have no objections.

15 MR. BUTLER: If we could get  
16 that done this morning before that stuff goes back  
17 to the jury.

18 THE COURT: All right, let us  
19 get it, and we will get copies made right now while  
20 final arguments are going on.

21 MR. VANCE: All right, Your Honor,  
22 may I proceed?

23 THE COURT: All right. Now, let  
24 us reflect in the record, gentlemen, that this is  
25 Thursday the 17th, and on the afternoon of Tuesday,

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the 15th, and the afternoon of Wednesday the 16th, the attorneys and the Court conducted a work session regarding the Charge, and there was a final draft as of 5:00 yesterday, and the attorneys received copies of the final draft and the Court scheduled a session to commence at 8:00 o'clock this morning to discuss any final changes and/or objections or requests. Are you ready to proceed, gentlemen?

MR. VANCE: At this time, the Defendant will make the objections to the Court's Charge. Now comes David Wayne Spence, Defendant in the above entitled and numbered cause by and through his attorney of record, after the State and the Defense have closed and after the Court has furnished a proposed final copy of the Court's Charge and before the Charge has been read to the jury and pursuant to Article 36.14 of the Texas Code of Criminal Procedure with the consent of the Court and in the Court's presence dictates into the record the following objections to said Charge.

Page 1, last three lines, the Defendant objects to the inclusion of the definition concerning criminal responsibility. That includes the last three lines of Page 1 of the Charge because it is not raised by the evidence that the State has --

1 or the Court has allowed the theory of parties to  
2 be included in the Charge and the evidence does  
3 not support it.

4 THE COURT: All right, how do  
5 you want to handle this -- one at a time?

6 MR. VANCE: Yes, one at a time.

7 THE COURT: All right, objection  
8 is overruled.

9 MR. VANCE: All right, Defendant  
10 further objects on Page 2 to the definition of  
11 criminal responsibility beginning with "The person  
12 is criminally responsible" ending with "the other  
13 person to commit the offense."

14 Again, the evidence does not  
15 raise the issue of parties in this case, and for  
16 that reason, we would object.

17 THE COURT: All right, objection  
18 overruled.

19 MR. VANCE: The Defendant  
20 further objects to Page 2 of the Charge. Looking at  
21 paragraph under Roman Numeral II, Line 4, beginning  
22 with the words "acting alone or together with  
23 Anthony Melendez and/or Gilbert Melendez as a  
24 party," again, it is the Defendant's contention that  
25 the evidence does not support a party's theory in

1 this case, and we would so object.

2 THE COURT: All right, objection  
3 overruled.

4 MR. VANCE: The Defendant  
5 further objects, again, in Roman Numeral II  
6 paragraph, Line 8, the words "acting alone" --  
7 Judge, we have "acting along." It should be "acting  
8 alone."

9 We have got "alone" for one  
10 and "along" with the other.

11 THE COURT: I have "alone" in  
12 this one.

13 MR. VANCE: All right, "acting  
14 alone or together with Anthony Melendez and/or  
15 Gilbert Melendez as a party," again, the evidence  
16 does not raise the issue of theories, and for those  
17 reasons, we would object to that language being  
18 included.

19 THE COURT: All right, objection  
20 overruled.

21 MR. VANCE: Turn your attention  
22 now to Roman Numeral III, Line 4, again, the  
23 Defendant would object to the inclusion of the  
24 words "acting alone or together with Anthony  
25 Melendez and/or Gilbert Melendez as a party."

1                   Again, the evidence does not  
2 support the issue of parties in this case.

3                   THE COURT: All right,  
4 objection overruled.

5                   MR. BUTLER: I just noticed  
6 something on that one. The second time it mentions  
7 "acting alone or together with Anthony Melendez  
8 and/or Gilbert Melendez," the word -- the phrase  
9 "as a party" was omitted or was not included, and  
10 I think, it should have been.

11                   THE COURT: All right, tell me  
12 which line you are on.

13                   MR. VANCE: Line 8.

14                   MR. BUTLER: In the middle of  
15 the sentence on Paragraph 3.

16                   MR. VANCE: Line 9.

17                   MR. BUTLER: 8 or 9.

18                   THE COURT: All right, "David  
19 Spence acting alone or together with Anthony Melendez  
20 and/or Gilbert Melendez as a party"?

21                   MR. BUTLER: Yes, sir, it is  
22 included in every other place.

23                   THE COURT: Are you saying right  
24 after "Gilbert Melendez" you don't have "a party" on  
25 yours?

1 MR. BUTLER: That is correct.

2 THE COURT: I do.

3 MR. BUTLER: Wait a minute.

4 Are you on Line 5? It is still Line 5 but on Line 8,  
5 it is not.

6 THE COURT: No, come here. Let  
7 us look. Somehow or another -- did you not get a  
8 copy this morning?

9 MR. FEAZELL: This is the new  
10 one.

11 THE COURT: Just a minute then.  
12 Let me look and see.

13 (Off-the-record discussion  
14 ensued.)

15 THE COURT: All right, go ahead.  
16 Now, again, reiterate what you were saying to be  
17 sure everybody is clear.

18 MR. VANCE: All right, I will  
19 start back over. We are objecting specifically to  
20 Page 3 of the Charge under Roman Numeral III, Line 4,  
21 beginning with "acting alone or together with Anthony  
22 Melendez and/or Gilbert Melendez as a party," again,  
23 it is our contention that the evidence does not  
24 support the party's theory in this case, and we  
25 would object to the inclusion of that language.

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THE COURT: All right,  
objection overruled.

MR. VANCE: Then we drop down  
to Line 8 under Roman Numeral III, again, we would  
object to the words "acting alone or together with  
Anthony Melendez and/or Gilbert Melendez," and now,  
you are going to add in the words "as a party"?

THE COURT: Right after Gilbert  
Melendez in that Line 8. "As a party" needs to be  
in there, yes.

MR. VANCE: We would object to  
the total inclusion of the language that we are  
going to add on to it for the same reasons that the  
evidence does not support the party's theory in  
this case.

THE COURT: All right, objection  
overruled. Note that change.

MR. VANCE: Turn your attention  
to Roman Numeral IV, Line 3, again, the Defendant  
would object to the inclusion of the words "acting  
alone or together with Anthony Melendez and/or  
Gilbert Melendez as a party," for the same reasons  
stated above. The evidence does not support the  
party's theory in this case.

THE COURT: All right, objection

1 overruled.

2 MR. VANCE: Dropping down to  
3 Line 7 under Roman Numeral IV, again, "acting alone  
4 or together with Anthony Melendez and/or Gilbert  
5 Melendez as a party" for the same reasons stated  
6 above.

7 THE COURT: All right, same  
8 ruling. Overruled.

9 MR. VANCE: Turning your  
10 attention to Page 4 of the Charge under Roman  
11 Numeral VII, we would object to the inclusion in  
12 the definition of accomplice on Line 2, the words  
13 as follows: "As a party thereto and includes all  
14 persons who are connected with the crime as parties  
15 by unlawful act or emission on their part transpiring  
16 either before or after the commission of the  
17 offense." Again, the evidence does not support a  
18 party's theory, and we would object to that language  
19 being included.

20 THE COURT: All right,  
21 objection overruled.

22 MR. VANCE: All right, and we  
23 object to the entire inclusion of Roman Numeral VIII  
24 and would request that our special instruction that  
25 we specifically requested the Court be put verbatim

1 in its place.

2 THE COURT: All right, that  
3 request is denied. This instruction will stand.

4 MR. VANCE: Furthermore just  
5 to clarify for the record, you have denied our  
6 special request concerning the accomplice theory  
7 that normally would have gone into Paragraph VIII?

8 THE COURT: I haven't denied  
9 the accomplice theory.

10 MR. VANCE: You have denied  
11 our special --

12 THE COURT: I have denied your  
13 requested wording.

14 MR. VANCE: That is all I need  
15 on the record.

16 THE COURT: You definitely have  
17 the corroboration and accomplice theory in here.

18 MR. VANCE: All right. Now,  
19 since the Court has allowed the evidence or allowed  
20 Paragraph VIII to stand as it is, we specifically  
21 object to the language, I think, it is Line -- it  
22 will be Line Number 18 under Paragraph VIII beginning  
23 with the words "tending to show the commission of  
24 the alleged stabbing and cutting that caused the  
25 death of Kenneth Franks, if it did, and that the

1           alleged cutting and stabbing, if any, was committed  
2           in the course of committing or attempting to commit  
3           aggravated kidnapping upon the said Kenneth Franks."

4                                 Again, we would request that  
5           the language that we included in our special  
6           instructions would favor the evidence more than the  
7           one that the Court has included.

8                                 THE COURT: I didn't follow  
9           your Line 18 because I don't have but 15 lines on  
10          the second -- on Page 5.

11                                MR. VANCE: All right, on page --  
12          I am sorry. It is Page 5, Line 9 beginning with  
13          "tending to show the commission" all the way down  
14          through the words "commit aggravated kidnapping  
15          upon the said Kenneth Franks." We would object to  
16          that as the evidence doesn't support that and  
17          specifically, that we have requested a special  
18          instruction include what we feel is necessary  
19          language to include the necessity of intent to  
20          kill which we set out in our special request which  
21          the Court has denied.

22                                So we would object to the  
23          inclusion of the language here in this Roman  
24          Numeral VIII.

25                                THE COURT: The only difference

1 has been that in your request starting after the  
2 word "show" there has been a deletion from "first  
3 the commission of the alleged stabbing and cutting  
4 of Kenneth Franks by the Defendant, David Wayne  
5 Spence; secondly, that the Defendant cut and stabbed  
6 Kenneth Franks with the intent of killing him;  
7 thirdly, that at the time of the alleged cutting  
8 and stabbing, if any, the Defendant was in the  
9 course of committing and attempting to commit  
10 aggravated kidnapping upon Kenneth Franks." All  
11 right, in lieu of that is this language, "the  
12 commission of the alleged stabbing and cutting that  
13 caused the death of Kenneth Franks, if it did, and  
14 that the alleged cutting and stabbing" -- I am  
15 leaving out these commas -- "if any, was committed  
16 in the course of committing or attempting to  
17 commit aggravated kidnapping upon the said Kenneth  
18 Franks."

19 Now, that is what replaced the  
20 original request language.

21 MR. VANCE: Is our objection  
22 overruled?

23 THE COURT: Yes, sir.

24 MR. VANCE: More specifically  
25 on that, in that Paragraph VIII, it doesn't follow

1 the law of accomplices because it allows the  
2 State, merely tends to show the commission, whereas,  
3 if you read above it, "Unless you further believe  
4 there is other evidence in this case outside the  
5 testimony of Anthony Melendez and Gilbert Melendez  
6 tending to show the commission," our contention is  
7 there has to be a connection tending to connect  
8 him with the alleged --

9 THE COURT: That is your request,  
10 "tending to show."

11 MR. VANCE: You have eliminated  
12 our request.

13 THE COURT: No, I haven't. We  
14 did not. The elimination starts after the word  
15 "show." If you look over here, it is in both  
16 places. It is in your request, and it is in the  
17 present Charge.

18 MR. VANCE: Judge, this was  
19 a hybrid that -- Mr. Butler rewrote this.

20 THE COURT: No, no. He did  
21 not touch that part. I have got your request  
22 right here that says "tending to show." If you  
23 want to change your request to "connect" then you  
24 can certainly change the words, if it means that  
25 much.

1 MR. BUTLER: May it please  
2 the Court, the requirement of "tending to connect"  
3 is in the standard accomplice which is on the  
4 preceding page in the preceding paragraph.

5 THE COURT: That is what I was  
6 thinking.

7 MR. BUTLER: "Corroborated by  
8 other evidence tending to connect the Defendant  
9 with the offense charged." They are already charged  
10 on that. What we are talking about -- what he is  
11 talking about here is the requirement that you have  
12 got to show not only that the offense occurred as  
13 alleged, but you have also got to have corroboration.  
14 In addition to the required accomplice corroboration  
15 in the regular case, in a capital murder case, it  
16 has also got to go to the aggravating circumstance.

17 MR. VANCE: Well, it goes back  
18 to our original argument that there must be some  
19 corroboration to the intent because then I think  
20 we get into the problems of the particular defendant  
21 that does not actually maybe shoot or kill, a  
22 defendant, yet, is susceptible to a death penalty  
23 under the party's theory.

24 THE COURT: It says "as charged  
25 in the indictment" up here in this paragraph, and

1 that has intent as a constituent element of the  
2 Charge.

3 All right, next paragraph.

4 MR. VANCE: Is the objection  
5 overruled?

6 THE COURT: Yes, sir, as to  
7 Paragraph VIII.

8 MR. VANCE: I believe, that is  
9 all we have regarding the objections to the Court's  
10 Charge.

11 THE COURT: All right, anything  
12 else? Do you all want to set up your exhibits?

13 MR. BUTLER: Yes, sir.

14 (Whereupon the jury returned into  
15 (the courtroom and the following  
16 (proceedings took place:

17 THE COURT: All right, ladies  
18 and gentlemen of the jury, I will now read you the  
19 Court's Charge.

20 (Whereupon the Court read the  
21 (Court's Charge to the jury.

22 THE COURT: All right, ladies  
23 and gentlemen, we will now proceed with final  
24 arguments. Each side has an equal amount of time.  
25 The State having the burden of proof is entitled  
to open and close.

1 In between the two parts of  
2 the State's argument will be the Defendant's  
3 argument, and after each side has concluded the  
4 final argument, you will retire with the original  
5 and 11 copies of the Charge and commence deliberating.

6 The 11 copies of the Charge are  
7 for your use. You may make notes, mark on them,  
8 underline, circle, whatever you would like to do.

9 The original which is in the  
10 manuscript cover is the only one to be signed by  
11 the presiding juror.

12 As mentioned before, you will  
13 have an ample opportunity to review all the evidence  
14 at your leisure. Take as much time as you deem  
15 necessary.

16 The argument -- the final  
17 argument of the attorneys is just what it is called.  
18 It is argument. It is not evidence.

19 The attorneys will draw  
20 reasonable deductions from the evidence as they  
21 best heard it and remember it, and being an adversary  
22 proceeding, the attorneys obviously will have a  
23 difference of opinion of most, if not all, the  
24 evidence and the testimony, of course, being  
25 evidence also.

1                   If for some reason one of the  
2 attorneys or all of them, two of them or more, seem  
3 to have a different recollection of evidence than  
4 you do, I assure you that they are not intentionally  
5 trying to mislead you or in any way be deceptive.

6                   During the heat of trial and as  
7 advocates, they are going to see things from  
8 different perspectives. It is their job to interpret  
9 their side of the case from their point of view.

10                   It is your job to be fair,  
11 impartial and objective. So if for some reason or  
12 another there is a variance in your mind as to what  
13 the attorneys are trying to recall, you remember it  
14 as you best heard it.

15                   If all of you all don't remember  
16 it the same, that is part of the deliberative process  
17 for you to discuss and rediscuss and try to  
18 recollect and recall and put the evidence in the  
19 proper perspective.

20                   So at this time, I will proceed  
21 with the final argument, gentlemen. Now, I think,  
22 you all agreed during the work session yesterday  
23 that you would like to have about an hour and a-half  
24 to each side, and you may give some time back. Is  
25 that correct? All right, I have a little time device

1 here that, if you would like, I can give you a  
2 certain warning after so many minutes, whatever  
3 you would like, or you can go ahead and time  
4 yourself, whatever you would like to do.

5 MR. BUTLER: Judge, I don't  
6 believe I will need any time warning on it.

7 THE COURT: All right.

8 MR. BUTLER: May we proceed?

9 THE COURT: Yes, sir, let us  
10 proceed.

11 STATE'S CLOSING ARGUMENT

12 MR. BUTLER: May it please the  
13 Court, Counsel, members of the jury, it has been  
14 some six weeks now since the first juror was chosen  
15 in this case, and approximately, three weeks since  
16 the last one was chosen.

17 We went through a long jury  
18 selection process. We talked about a lot of things  
19 that, I believe, most of you have admitted you were  
20 having to consider for the very first time.

21 We talked about things and  
22 told you that we didn't know for sure what was going  
23 to be in this Charge because the evidence was not  
24 before you and was not before the Judge, and he  
25 couldn't tell what it was until the evidence was in,